



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2136

Appeal PA-020082-1

Ministry of Correctional Services



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NATURE OF THE APPEAL:

This appeal concerns a decision of the Ministry of Correctional Services (now the Ministry of Public Safety and Security) (the Ministry) made pursuant to the provisions of the *Freedom of Information and Protection of Privacy Act* (the *Act*). The requester (now the appellant) sought access to the following:

... copies of all documents leading to the disclosure of my criminal record, the disclosure itself, and all subsequent related documents including but not excluding the following:

- Any document that has my name on it,
- Has a case number associated with my name,
- All communication around this incident with my employer both sent and received,
- Memos, internal or external communications,
- Memorandum of agreement pertaining to the release of such records,
- Any related correspondence with [a named organization], [a named police service], [a named detention centre] or the [Royal Canadian Mounted Police].

By way of background, this matter arises out of a request made by the appellant's former employer to the detention centre for a Canadian Police Information Centre (CPIC) information search on the appellant. The detention centre then asked the police service to conduct the CPIC search, and the police service, in turn, conducted the search and provided the results to the detention centre. The detention centre then forwarded the search results to the appellant's employer. The appellant alleges that, as a result, his employment was terminated and his reputation damaged. Later, the appellant initiated a privacy complaint with this office, which settled after an investigation. The appellant then commenced a civil action against the Ministry and the police service, which I understand also has been settled.

The Ministry denied the appellant's request, taking the position that the *Act* does not apply to the records by virtue of section 65(6).

The appellant appealed the Ministry's decision to this office.

The file proceeded to the mediation stage of the appeal process. Mediation was unsuccessful at resolving the issues in dispute.

Initially, I sought representations from the Ministry on the application of section 65(6). The Ministry indicated in its representations that it was relying on sections 65(6)1 and 65(6)3 of the *Act*. The Ministry agreed to share its representations in their entirety with the appellant. I then sought representations from the appellant. The appellant elected not to submit representations.

RECORDS:

Twelve records are at issue, comprised of twenty-four pages, and consisting of e-mail messages, internal reports, correspondence, notes and a computer generated CPIC report.

DISCUSSION:

APPLICATION OF THE ACT

Introduction

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

Section 65(6)1 and 3 state:

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.

In order for a record to fall within the scope of section 65(6)1, the Ministry 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 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 institution.

In order for a record to fall within the scope of section 65(6)3, the Ministry must establish that:

1. the records were collected, prepared, maintained or used by an 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.

Requirements 1 and 2 under sections 65(6)1 and 65(6)3

The Ministry's representations do not assist me in my analysis of these requirements. Therefore, I have referred to the records themselves and the surrounding circumstances to conduct my analysis.

As stated above, the records include reports, internal e-mails, letters, memoranda and a CPIC report. The contents of these records relate to the processing of a CPIC search request, a discussion of issues related to the procedure for undertaking such requests and the processing of the privacy complaint. On my review of the circumstances of this case and the records themselves, I find that the records were collected, prepared, maintained or used by the Ministry. Therefore, I find that requirement 1 for both sections 65(6)1 and 3 has been satisfied.

With respect to requirement 2 under section 65(6)1, I am satisfied that the collection, preparation and usage of these records was in relation to proceedings before a court, tribunal or other entity, namely this office in respect of a privacy complaint and the Superior Court of Justice regarding the civil action mentioned above.

With respect to requirement 2 under section 65(6)3, I am satisfied that the records were collected, prepared and used in relation to meetings, consultations, discussions or communications. Therefore, I find that requirement 2 under both sections 65(6)1 and 3 has been satisfied.

Requirement 3 under sections 65(6)1 and 65(6)3

Section 65(6)1 requires that the current or anticipated proceedings be related to "labour relations or to the employment of a person". Section 65(6)3 requires that the activities listed in the section be "about labour relations or employment-related matters".

The Ministry submits with respect to section 65(6)1:

[...]he Ministry did conduct an internal investigation into the matter in addition to responding to a Privacy Complaint.

The allegations, which form the basis for the request, relate to the employment responsibilities and actions of Ministry employees. As a result of the incident the Ministry was subject to the above litigation ...

Regarding section 65(6)3, the Ministry submits:

. . . Ministry staff collected, prepared, maintained and/or used the records at issue in relation to meetings, consultations, discussions and communications about anticipated and past employment-related civil actions in which the Ministry has an interest.

On page 8 of Order P-1242, Assistant Commissioner Mitchinson stated the following regarding the meaning of the term “has an interest”:

Taken together, these [previously discussed] authorities support the position that 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.

. . . [I]n Order P-1395, Inquiry Officer John Higgins concluded that the Ministry had a legal interest in the matter of whether or not Ministry staff at a correctional facility carried out their responsibilities in an appropriate manner. On page 6 of the Order, Inquiry Officer Higgins commented as follows:

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.

The Security clearance process for volunteers from private agencies seeking admittance to correctional institutions is referenced in section ADI 06 06 01 of the Ministry’s Adult Institutions Policy and Procedures Manual. This manual establishes policies and procedures that must be adhered to by staff working in correctional institutions.

The responsive records were either collected, prepared, maintained and/or used for meetings, consultations, discussions and communications relating to employment-related matters, including the anticipated and past civil actions, in which the Ministry has an interest . . . [T]he Ministry’s ongoing legal interest in the records at issue arises from statute, including the *Ministry of Correctional Services Act* and from general common law principles regarding employer/employee relations . . . [T]he content of the records supports this position.

The Ministry’s representations are not persuasive. I am not satisfied that the proceedings here “relate to the employment of a person” by the Ministry, or that the matters in question are “employment-related”. In Order PO-1905, Senior Adjudicator David Goodis was faced with

similar circumstances and similar representations from the Ministry. He began his analysis by discussing two previous decisions of this office, Orders P-1395 and PO-1772:

In Order PO-1772, Assistant Commissioner Tom Mitchinson considered similar submissions made by the same Ministry. He distinguished the circumstances in Order P-1395 from those present in Order PO-1772 on the basis that the proceedings or anticipated proceedings in the former included ones that clearly arose in an employment setting, whereas the latter did not.

In Order PO-1772, the appellant sought access to records relating to an incident in which the appellant was alleged to have been assaulted by a correctional officer. The appellant had threatened to commence civil proceedings against the Ministry. The Assistant Commissioner accepted that civil court proceedings were reasonably anticipated, but found that the Ministry had failed to establish the third requirement of both section 65(6)1 and 3, for the following reasons:

In my view, section 65(6) has no application outside the employment or labour relation context (see Orders P-1545, P-1563 and P-1564). Therefore, unless the Ministry establishes that the anticipated proceedings for which the records are being maintained arises in an employment or labour relations context, the records do not relate to “labour relations or to the employment of a person by the Ministry”, and section 65(6)1 does not apply. Similarly, unless the Ministry establishes that the meetings, consultations and/or discussions concerning the anticipated proceedings for which the records are being maintained arises in an employment or labour relations context, the records are not “labour relations or employment-related matters in which the Ministry has an interest”, and section 65(6)3 does not apply.

The facts of this appeal establish that records were prepared by Correctional Officers as a consequence of an altercation that took place with the appellant during a period of incarceration. There is clearly a dispute between the appellant and the various Correctional Officers as to what actually took place, and the appellant has put the Ministry of the Attorney General on notice that he intends to commence proceedings against the Crown in this regard. However, there is no indication that the Ministry disagrees with or disputes the position of its employees as reflected in the various records, or that the employees and the Ministry have different interests at stake.

Inquiry Officer Higgins was faced with a significantly different situation in Order P-1395. In that case serious allegations of wrongdoing had been made against Correctional Officers, and the Ministry took specific action in response. Both internal and external investigations were launched, employees were charged

with criminal offences, disciplinary actions were initiated, and records were produced that did not relate to the day-to-day operation of the correctional facility.

In the present appeal, the only records created were those relating to the regular operation of the detention centre. The Ministry acknowledges in its representations that these records were created at the time of the altercation, and that “[i]t is a normal procedure for involved Ministry staff to prepare reports concerning such serious incidents”. No internal or external investigation has been initiated by the Ministry. The Ministry has simply received a letter giving notice of an intent to commence proceedings against the Crown. Almost a year has passed since the letter was sent, and it is quite possible that nothing further will come of it. If a Statement of Claim is filed by the appellant, the Ministry will no-doubt defend it. If successful in its defence, there is little likelihood that the Ministry would take any subsequent employment-related action and, even if unsuccessful, it does not necessarily follow that the Ministry would take any actions that would put it in a position of conflict with its employees.

The Ministry appears to be asking me to accept that routine operational records such as those at issue in this appeal fall under the scope of section 65(6) whenever someone decides to commence a law suit or provides notice of an anticipated action against the Crown, with attendant implications of vicarious liability, but without any evidence of steps having been taken by the institution or the employee in an employment-related or labour relations context. If I accepted the Ministry’s position, then whenever government is or may be sued for actions taken or decisions made by employees, through whom government must invariably act, all related records documenting the actions taken or decision made would be excluded from the *Act* regardless of governments interest in the records in an employment or labour relations sense. I am not persuaded that this was the legislative intent of section 65(6), which was passed as part of a series of amendments to labour relations legislation, and for the stated purpose of restoring balance and stability to labour relations and promoting economic prosperity. Where, as in this case, there is no demonstrable connection between the exclusion of the records and any interest ... the Ministry may have in a labour relations or employment-related matter, I am unable to accept that the exclusions should apply solely on the basis of vicarious liability implications attendant on a possible law suit.

Senior Adjudicator Goodis then applied these principles to the facts in Order PO-1905:

I agree with the principles and approach articulated by the Assistant Commissioner in Order PO-1772.

In short, the fact that the records may have been collected, maintained, used and/or disclosed in relation to current and anticipated litigation in which the Ministry may be held vicariously liable for actions of its employees is not alone sufficient to qualify the records as arising in an employment or labour relations context. As the Assistant Commissioner indicated in Order PO-1772, if I were to find otherwise, then whenever a third party decides to commence a law suit and hold the Ministry vicariously liable for its employees' actions, all relevant records would automatically be excluded from the scope of the *Act*. I agree with the Assistant Commissioner that this could not have been the intent of the Legislature in enacting section 65(6).

The Ministry submits that I should follow Order P-1395 of this office. In my view, this order is distinguishable on its facts. In discussing the application of section 65(6)3, Inquiry Officer Higgins states that "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." These proceedings included an internal Ministry investigation (which was continuing at the time of the order), an employment-related Divisional Court application by a former Ministry employee and an employee grievance under the *Public Service Act*. Therefore, Inquiry Officer Higgins had ample evidence before him on which to base a finding that the Ministry had a current interest in the records at issue. To the extent that Order P-1395 could be construed as standing for the proposition that the civil suit alone was sufficient to bring the matter within the scope of section 65(6)3, I do not agree with the order and decline to follow it.

In my view, the reasoning in Orders PO-1772 and PO-1995 applies here. The proceedings, meetings, consultations and/or discussions do not arise in an employment or labour relations context, and there is no indication that there is a dispute or disagreement between the Ministry and its employee who requested the CPIC search, or that the employee and the Ministry have different interests at stake. The Ministry states that it "conducted an internal investigation into the matter", but does not elaborate. In the circumstances, there is insufficient evidence about this "investigation" for me to conclude that it had an employment focus, and that it was carried out for any purpose other than to respond to the privacy complaint. Moreover, the records do not shed any light on any such investigation.

For these reasons, I conclude that requirement 3 of sections 65(6)1 and 3 have not been established. Therefore, the *Act* applies to the requested records.

ORDER:

1. I do not uphold the Ministry's decision that the *Act* does not apply to the records at issue.
2. I order the Ministry to provide the appellant with a decision on access to the responsive records under Part II of the *Act*, treating the date of this order as the date of the request.

Original signed by:
Bernard Morrow
Adjudicator

March 31, 2003