

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-2106

Appeal PA-010222-1

Archives of Ontario

NATURE OF THE APPEAL:

This appeal concerns a decision of the Archives of Ontario (Archives) 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 information relating to several named retired Ontario Provincial Police (OPP) officers.

In a series of decision letters, Archives granted partial access to the records, but denied access to other records on the basis that they were excluded from the scope of the *Act*, by virtue of section 65(6)3.

The appellant appealed Archives' decisions to deny access. As a result of mediation, the issues were narrowed to the application of section 65(6)3 to information relating to one retired OPP officer, and to whether or not certain records relating to the officer are in fact responsive to the request.

I, initially, sought representations from Archives and it made submissions. Archives agreed to share its representations with the appellant in their entirety. I then sought representations from the appellant, who provided representations in response. The appellant's representations do not address the application of section 65(6)3 to the records at issue.

RECORDS:

The information at issue is contained in 11 one-page excerpts from 11 different records. The 11 portions at issue relate to one named police officer. These records are comprised

of OPP Orders that refer to Orders-in-Council made between April 18, 1942 and April 8, 1967. Archives claims that seven portions are responsive to the request, while the remaining four portions are not.

By way of additional background, the records at issue originate from the Ministry of Public Safety and Security (the Ministry), more specifically the OPP, and were transferred to Archives in accordance with the Ministry's records retention schedule as it applies to these types of records and section 3 of the *Archives Act*. Section 3 of the *Archives Act* requires ministries to deliver all original documents, papers, records and other matters to Archives for safekeeping and custody "within twenty years from the date on which such matters cease to be in current use."

CONCLUSION

The *Act* does not apply to any of the information at issue, including the information that Archives believes is not responsive, by virtue of section 65(6)3. Therefore, the responsiveness issue is moot.

DISCUSSION:

APPLICATION OF THE *ACT*

Introduction

If section 65(6)3 applies to the records, and none of the exceptions found in section 65(7) applies, section 65(6)3 has the effect of excluding the records from the scope of the *Act*.

For the purposes of my section 65(6)3 analysis, I will consider the application of this exclusion to all 11 portions at issue.

Section 65(6)3 of the Act states:

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:

Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

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

Requirement 1

Archives submits that the records were originally prepared, maintained and used by the Ministry:

[...T]he 11 records at issue, OPP Routine Orders, were collected and maintained by [...] Archives [...] pursuant to its statutory mandate to receive all original documents, papers and records "within twenty years from the date on which such matters cease to be in current use". In this case, the records were collected by Archives from the [Ministry] in accordance with the latter's records retention schedule as it relates to these types of records. Therefore Archives has met the first part of the test.

Furthermore, in this case the records were also prepared, maintained and used by [the Ministry]. Past IPC orders support the argument that [the Ministry's] original collection, maintenance and use of the records is relevant to determining the application of the exclusion. The IPC has accepted this proposition in situations where employment-related records are originally collected by one institution, but are in the custody of a different institution when an access request is made for them, and the request is not transferred to the originating institution. In these orders, the IPC relies on the precise wording of the preamble: "the wording of the preamble of section 65(6)3 is important; it refers to records collected, prepared, maintained or used by or on behalf of **an** institution, rather than making specific reference to an institution which received the request". (emphasis in the text) [P-1560].

I accept Archives' analysis and interpretation of past IPC orders. To meet the first requirement under section 65(6)3, it is only necessary that *an* institution has collected, prepared, maintained or used the record. The fact that one institution originally "prepared" and "collected" the record and another institution later "maintained" it does not alone defeat the operation of section 65(6)3 (see Order P-1560).

On my review of the records and the surrounding circumstances, I find that all of the records were prepared, maintained and used by the OPP, a part of the Ministry, which is an institution under the *Act*. Therefore, I find that the first requirement of section 65(6)3 has been satisfied.

Requirement 2

Archives submits:

Archives [...] collected and maintained the records at issue in relation to communications. OPP Routine Orders are a category of OPP communications that Archives is required to preserve and maintain in its custody for research and other purposes under the *Archives Act*.

In addition, Archives submits that the records were also prepared, maintained and used by [the Ministry] in relation to communications. [The Ministry] confirmed that these types of orders were used as a means of communicating employment-related information to members of the OPP across the province.

Consequently, the records meet part two of the test since their collection, maintenance, preparation and use by both ministries was in relation to communications.

Assistant Commissioner Tom Mitchinson in Order P-1223 addressed the meaning of the phrase "in relation to". He states:

I am of the view 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 "in relation to" that activity. (emphasis added)

I agree with this approach. In my view, the OPP prepared, maintained and used the records for the purpose of communicating information relating to OPP police officers to other members of the OPP across Ontario. Accordingly, I find that the second requirement of section 65(6)3 has been satisfied.

Requirement 3

Introduction

To meet the third requirement Archives must establish that the "communications" were "about labour relations or employment related matters" and that the Ministry "has an interest" in these matters.

Archives provided detailed submissions on both parts of the third requirement.

About labour relations or employment related matters

Archives states:

Archives consulted with [Ministry] staff about the nature and purpose of these records. [Ministry] staff confirmed that these Routine orders concern employment-related matters and are used specifically as a vehicle for notifying OPP personnel about status changes affecting members of the force. They are mailed to specific OPP detachment regions, and are posted for the information of OPP members, to advise them of employment-related events which may affect them directly or indirectly.

Archives respectfully submits that the particular records at issue in this appeal are inherently about employment-related matters. They convey information about [a named OPP officer's] appointment, re-appointment, postings, promotions and transfers as an OPP employee. These are "employment-related matters" because they all relate to his status, position and career development as an OPP employee. As such, Archives respectfully submits that the records are, on their face, clearly and unequivocally employment-related because they are similar to human resources records. As such, they meet the first part of the third [requirement].

In my view, appointments, promotions, transfers and resignations are all clearly employment-related matters. Each of these events would engage both the OPP and the named police officer in transactions that are significant to their employment relationship. I find that the first part of the third requirement has been satisfied.

Has an interest

In *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 509, the court stated that "interest" must be more than a "mere curiosity or concern", though not necessarily a "legal" interest. In addition, the court stated that the "matter" must relate to an institution's own workforce and that once records are excluded from the operation of the *Act*, they remain excluded.

Archives states:

[...T]hese were employment-related records when they were in the custody of [the Ministry], and [the Ministry] had an interest in these records as [the named OPP officer's] employer. When Archives collected the records from [the Ministry] they were "employment related" records and, as such, continued to be excluded from the Act despite the fact that physical custody was transferred to Archives. Otherwise, it would mean the records are now subject to the Act simply because they are being stored at the Archives of Ontario. Archives respectfully submits that this would be an absurd result, and that it contradicts the [Ontario Court of Appeal] decision.

Based on the [IPC's] past orders, Archives respectfully submits that [the Ministry's] interest in the records is also relevant to determining the

application of the exclusion. [The Ministry] confirmed that the OPP has an interest in these records as the former employer of the individual whose employment information is at issue. The records relate to the OPP's management of its own workforce. As such, the records meet the "interest" test as articulated by the Ontario Court of Appeal.

In my view, the Ministry and, by extension, the OPP, clearly have more than a mere curiosity or concern about appointments, transfers, resignations and promotions involving members of the OPP force. These are notable events impacting the OPP and its members. In addition, it is clear to me that the records relate to the OPP's management of its "own workforce". In the circumstances, I find that the OPP has an "interest" in all of the information at issue, and that the second part of the third requirement has been met.

CONCLUSION

I find that Archives has established all of the requirements of section 65(6)3. Also, it is clear that none of the exceptions in section 65(7) applies. I conclude that all of the records at issue, including those portions that Archives believes are not responsive, are excluded from the scope of the *Act*.

ORDER:

I dismiss the appeal.

Original Signed by: _____
Bernard Morrow
Adjudicator

January 31, 2003