Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

Reconsideration Order PO-2096-R

Appeal PA-000026-1

Order PO-1814

Ministry of Correctional Services

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NATURE OF THE APPEAL:

This order sets out my decision on the reconsideration of Order PO-1814 issued August 17, 2000.

The appellant submitted a request to the Ministry of Correctional Services (the Ministry) (now the Ministry of Public Safety and Security) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for "full disclosure of all materials that are currently on my personnel file with the Ministry of the Solicitor General and Correctional Services", and all materials, notes and documentation relating to the investigations pertaining to her conducted under section 22 of the *Public Service Act*.

The Ministry denied access to the appellant's personnel file and the investigation file in their entirety, relying on section 65(6) of the *Act*, and taking the position that by operation of this section, the records are not covered by the *Act*.

The appellant appealed the Ministry's decision.

The Ministry was invited, initially, to provide representations on the application of section 65(6) to the records. In its representations, it indicated that it relied specifically on section 65(6)3.

Subsequently, I issued Order PO-1814 (the order), in which I found that section 65(6) did not apply, and thus the records are subject to the access provisions of the *Act*. I ordered the Ministry to provide the appellant with a decision letter under the *Act* with respect to the records.

The Ministry sought judicial review of Order PO-1814, in *Ministry of Correctional Services v. Sherry Liang, Adjudicator et al.*, Divisional Court File No. 55/2000, a matter which is still outstanding. Since the initiation of that application, the Ontario Court of Appeal has issued a decision which affects the issues raised in this appeal and in the application for judicial review, in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355. In that decision, the court found that the Commissioner's interpretation of section 65(6) was incorrect. This office brought a motion for leave to appeal the Court of Appeal's decision to the Supreme Court of Canada and on June 13, 2002, the Supreme Court denied the motion. As a result, the judgment of the Court of Appeal stands.

On November 7, 2002, I wrote to the Ministry and the appellant and advised that I had formed the preliminary view that I should reconsider the order in light of the Court of Appeal decision in *Ontario (Solicitor General)*. I sought representations from both parties on (1) whether there are grounds for reconsideration; and (2) if so, what the appropriate remedy should be. Only the Ministry submitted representations, in which it agrees with my preliminary view.

DISCUSSION:

The procedures for reconsideration of an order are set out in section 18 of the *Code of Procedure*. In particular, section 18.01 of the *Code* states:

> The IPC may reconsider an order or other decision where it is established that there is:
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> (a) a fundamental defect in the adjudication process;
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> (b) some other jurisdictional defect in the decision; or
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> (c) a clerical error, accidental error or omission or other similar error in the decision.

Section 18.03 of the *Code* states:

> The IPC may reconsider a decision at the request of a person who has an interest in the appeal or on the IPC's own initiative.

The application of section 65(6)3 in Order PO-1814

In Order PO-1814, I set out the three-part test which has been applied by this office in applying section 65(6)3:

> In Order P-1242, Assistant Commissioner Tom Mitchinson found that in order to fall within the scope of section 65(6)3, it must be established that:
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> 1. the records were collected, prepared, maintained or used by the institution or on its behalf; **and**
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> 2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; **and**
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> 3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

I found that the Ministry had established the first two parts of the three-part test:

> With respect to the first requirement, on a review of the records, I am satisfied that they were "collected, prepared, maintained or used by the institution or on its behalf". They are documents which were either compiled or created by the Ministry, for its own use.
>
> I am also satisfied that the second requirement is met, in that the collection or preparation of the records was in relation to "meetings, consultations, discussions or communications" about the appellant's employment.

However, I found that the third part of the test was not met, for the following reasons:

> The third requirement merits more discussion. The Ministry has accurately described the appellant's personnel file as documenting all stages of her employment with the Ministry, including her initial hiring, training, working conditions, suspensions from employment, grievances and compensation claim. With respect to the investigation reports, the Ministry states that the first investigation was conducted at the request of the Superintendent of the facility at which the appellant worked, and the second investigation was conducted pursuant to section 22 of the *Ministry of Correctional Services Act*, which states:
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> > The Minister may designate any person as an inspector to make such inspection or investigation as the Minister may require in connection with the administration of this Act, and the Minister may and has just cause to dismiss any employee of the Ministry who obstructs an inspection or investigation or withholds, destroys, conceals or refuses to furnish any information or thing required by an inspector for the purposes of the inspection or investigation.
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> The Ministry states that the two investigations involving the appellant were authorized in order to investigate allegations that the appellant was associating with offenders or ex-offenders in contravention of policies regarding such matters, and that these investigations are in the reasonably proximate past.
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> In general, the Ministry submits that the collection, preparation, maintenance and use of the appellant's personnel file and the investigation file documents were in relation to meetings, consultations, discussions and communications about labour relations and employment-related matters in which the Ministry has an interest. The Ministry identifies its interest in the records at issue as arising from statute, including the *Ministry of Correctional Services Act*, the *Public Service Act* and the *Workplace Safety and Insurance Act*, from the collective agreement between OPSEU and the government of Ontario and from general common law principles regarding employer/employee relations, including the right of the employer to manage and direct its workforce.
>
> I am satisfied that the "meetings, consultations, discussions or communications" for which the records were compiled or created were in relation to labour relations and/or employment matters. In order to meet the third requirement, however, it is not enough that the records simply relate to such matters. It must be clear that the Ministry "has an interest" in these labour relations or employment matters. Prior decisions have stated that an "interest" is more than a 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: see, for instance, Orders P-1242 and P-1658. Further, there must be a *reasonable prospect* that this interest will be engaged. The passage of time, inactivity by the parties, loss of forum or conclusion of a matter have all

been considered in arriving at a determination of whether an institution has a legal interest in the records. Orders P-1618, P-1627 and PO-1658, all of which applied this reasoning, were the subject of judicial review by the Divisional Court and were upheld in *Ontario (Solicitor General and Minister of Correctional Services) v. Ontario (Information and Privacy Commissioner*) (March 21, 2000), Toronto Docs. 681/98, 698/98, 209/99 (Ont. Div. Ct.), leave to appeal granted (June 29, 2000), Docs. M25698, M25699, M25700 (Ont. C.A.).

The statutes, collective agreement and other legal obligations cited by the Ministry are all important in establishing the framework within which to assess the existence of a legal interest in the records. I am satisfied that at the time these records were compiled and prepared, the Ministry had a legal interest in at least some of them, pursuant to its obligations under these statutes, collective agreement and the common law. It is not necessary for me to review whether a legal interest existed in each and every record at issue, for I am also satisfied that whatever legal interest existed at one time, it is no longer in existence.

As I have stated, the appellant is no longer employed by the Ministry. More important than this, however, is the existence of the Memorandum of Settlement dated November 9, 1999. This Memorandum states, in part:

> 6. In consideration of the above, the grievor hereby releases and forever discharges the crown, its employees, agents, Ministers, Deputy Ministers and servants of and from all actions, causes of action, claims and demands of every nature and kind arising out of or as a result of the above-noted grievances or her employment with the Government of Ontario, as well as any outstanding OHRC, OLRB and WDHP complaints.
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> 7. The grievor agrees that she is fully informed of and understands the consequences of this settlement, and further agrees that the Union has fairly and properly represented her.
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> 8. The union and the grievor agree that the above-noted grievances as well as any all [sic] outstanding grievances and WDHP complaints, are withdrawn.

In light of this settlement, it cannot be said, in my view, that the Ministry maintains a legal interest in the records. The appellant's employment with the Ministry has been terminated. Any employment-related disputes have been finally resolved, and the settlement reflects not only a complete severance of that employment relationship, but a barrier to any future attempt by the appellant to re-kindle any of the issues arising under that relationship. Further, although it is *possible* to imagine a situation where a settlement agreement may give rise to issues which engage the parties' legal interests (for instance, where there are

> allegations of non-compliance), the evidence before me does not establish the existence of any such potential issues, and none are alleged.
>
> In short, having regard to the settlement between the Ministry, the appellant and her union, and the absence of any evidence indicating either current or potential disputes which have the capacity to affect the Ministry's legal rights or obligations, I conclude that there is no reasonable prospect that the Ministry's legal interests in the employment matters reflected in the records will be engaged.

The Court of Appeal decision in Ontario (Solicitor General)

In *Ontario (Solicitor General)*, above, the Court of Appeal stated the following with respect to the "time sensitive" element under section 65(6):

> In my view, the time sensitive element of subsection 6 is contained in its preamble. The Act "does not apply" to particular records if the criteria set out in any of subclauses 1 to 3 are present when the relevant action described in the preamble takes place, *i.e.* when the records are collected, prepared, maintained or used. Once effectively excluded from the operation of the Act, the records remain excluded. The subsection makes no provision for the Act to become applicable at some later point in time in the event the criteria set out in any of subclauses 1 to 3 cease to apply.
>
> . . . . .
>
> In my view, therefore, [Assistant Commissioner Mitchinson] was wrong to limit the scope of the exclusions in the way that he did.

The Court of Appeal thus determined that this office's interpretation of the "time sensitive" element of this provision was incorrect.

Further, in the same decision, the Court of Appeal stated the following with respect to the words "in which the institution has an interest" in section 65(6)3:

> 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.
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> 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 added]. 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 added]. 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". To import the word "legal" into the sub clause when it does not appear, introduces a concept there is no indication the legislature intended. [emphasis in original]

The Court of Appeal thus also determined that this office's interpretation of the words "has an interest" to require a "legal interest" was incorrect.

Is there a jurisdictional defect in the order in light of the Court of Appeal decision?

My finding in Order PO-1814 that section 65(6)3 does not apply is based on the application of the "time sensitive" approach. I would have found that section 65(6)3 applies to any record in which the Ministry has an interest, but for the fact that the matters involving the appellant were concluded and no future proceedings were reasonably anticipated. Because the Court of Appeal explicitly rejected this approach, I conclude that this finding constitutes a jurisdictional defect in the order, and that the order should be reconsidered for this reason.

Because of my conclusion in Order PO-1814 that the Ministry's interest in the records, if any, no longer exists, I found it unnecessary to determine whether each and every one of the records at issue pertained to labour relations or employment-related matters in which the Ministry "has an interest" for the purposes of section 65(6)3. As I have concluded that I was wrong in my application of the "time sensitive" approach to section 65(6)3 in Order PO-1814, it becomes necessary to consider whether the records are ones in which the Ministry "has an interest". Further, it appears that the approach to "has an interest" that I articulated in Order PO-1814 is incorrect. As set out above, the Court of Appeal has rejected this office's interpretation of "interest" to mean "legal interest".

The Ministry submits that its interest in the records at issue arises from statute, including the *Ministry of Correctional Services Act*, the *Public Service Act* and the collective agreement between the government of Ontario and the Ontario Public Service Employees Union, and from general common law principles regarding employer rights and responsibilities. The Ministry states that, as an employer, the Ministry has an inherent interest in human resource matters relating to its workforce including work assignments, pay and benefits, training, working conditions, internal investigations, discipline, grievances and related matters. These types of labour relations and employment-related matters, it submits, are reflected in the records at issue.

Having regard to the Court of Appeal decision and the material before me in this appeal, I find that the Ministry's interest in the records is more than "a mere curiosity or concern", and that the matters giving rise to the records relate to the Ministry's own workforce. I am satisfied that the records at issue pertain to labour relations or employment-related matters in which the Ministry "has an interest".

CONCLUSION

In summary, I find that my conclusion in Order PO-1814 that the records are not subject to section 65(6)3 is in error. The *Act* accordingly does not apply to them.

WHAT IS THE APPROPRIATE REMEDY?

The operational provisions of the order read:

1. I order the Ministry to issue a decision letter to the appellant regarding access to the records at issue, in accordance with the provisions of sections 26 and 29 of the *Act*, treating the date of this order as the date of the request.

2. I order the Ministry to provide me with a copy of the decision letter referred to in provision 1 above.

I understand that the Ministry has not complied with the provisions because it seeks an order of the Divisional Court quashing those provisions in its application for judicial review. In the circumstances, the appropriate remedy is to permanently stay the provisions of the order, on the basis that the *Act* does not apply to the records due to the operation of section 65(6)3.

ORDER:

I hereby permanently stay the provisions of Order PO-1814.

Original signed by: January 9, 2003
Sherry Liang
Adjudicator