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

Reconsideration Order PO-2073-R

Appeal PA-990017-1

Order PO-1696

Ministry of the Attorney General

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

This order sets out my decision on the reconsideration of Order PO-1696 issued July 14, 1999.

The appellant submitted a request to the Ministry of the Attorney General (the Ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to the following audits:

1. Criminal Injuries Compensation Board
2. Ontario Court at Brantford
3. Ontario Court (General Division) at Toronto
4. Review of P-Card Transactions (Court Services Division)
5. Ontario Court (Provincial Division) at London

The Ministry denied access to the records responsive to parts 1, 3, 4 and 5 of the request on the basis that they are excluded from the scope of the *Act* under section 65(6)3 of the *Act*. Access was granted in part to the record responsive to part 2 of the request, with severances made pursuant to section 13 of the *Act*.

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

Adjudicator Holly Big Canoe resolved the appeal respecting parts 2-5 of the request by Order PO-1696 (the order). (The appeal respecting part 1 of the request was resolved by separate order). In the order, Adjudicator Big Canoe found that the section 13 exemption did not apply to the withheld portions of the record responsive to part 2 of the request. She also found that the three records responsive to parts 3, 4 and 5 of the request (Records 2, 3 and 4) did not fall within the scope of the section 65(6)3 exclusion. As a result, the adjudicator ordered the Ministry to disclose the part 2 record to the appellant, and to issue a decision letter with respect to the records responsive to parts 3-5 of the request.

The Ministry then applied to the Divisional Court for judicial review of the order, as it pertains to the adjudicator's finding that section 65(6) does not apply to Records 2, 3 and 4. This application for judicial review was placed on hold pending the outcome of the judicial review of three other orders of the Information and Privacy Commissioner (IPC) that raised similar issues.

On August 8, 2001, the Court of Appeal for Ontario issued a ruling quashing the three orders that were under review on the basis that the IPC's interpretation of section 65(6) was incorrect [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355]. The IPC brought a motion for leave to appeal the Court of Appeal's decision to the Supreme Court of Canada. On June 13, 2002, the Supreme Court denied this motion ([2001] S.C.C.A. No. 509). As a result, the judgment of the Court of Appeal now stands.

On October 17, 2002, I wrote to the Ministry and the appellant and advised that I had formed the preliminary view that I should reconsider the order relating to Records 2, 3 and 4, 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:

SHOULD THE ORDER BE RECONSIDERED?

Introduction

The IPC's reconsideration procedures are set out in section 18 of the *Code of Procedure*. In particular, sections 18.01 and 18.03 of the *Code* state:

> 18.01 The IPC may reconsider an order or other decision where it is established that there is:
>
> (a) a fundamental defect in the adjudication process;
>
> (b) some other jurisdictional defect in the decision; or
>
> (c) a clerical error, accidental error or omission or other similar error in the decision.
>
> 18.03 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 Adjudicator's interpretation and application of section 65(6)3 in the order

Section 65(6)3 of the *Act* reads:

> 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.

For a record to qualify under section 65(6)3, an institution must establish that:

1. it 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 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.

In the order, Adjudicator Big Canoe found that the Ministry had established the first two parts of the three-part test for section 65(6)3 for all three records. I agree with these findings. However, she found that the third part of the test was not met for these records, for the following reasons:

> The purpose for initiating the audit which resulted in Record 3 was to determine whether an employee had complied with established policies and procedures with respect to purchases incurred on behalf of government. The purpose for initiating the audit which resulted in Record 4 was to investigate the performance of an employee. As such, I am satisfied that the meetings, consultations, discussions or communications in relation to which these records were prepared or used were about employment-related matters.
>
> Record 2, however, was prepared to investigate two unrelated matters: the circumstances surrounding the issuance of a divorce certificate prior to a divorce having been granted; and to appraise the effectiveness of the financial management and operational controls in the family law section of the court. Although the first matter reviewed in this record is not specifically focussed on the employment of any specific person or persons, given the particular circumstances (which are only apparent on reviewing the record) I consider it reasonable to conclude that it is an "employment-related matter" as the term is used in section 65(6).
>
> However, the second aspect of the audit, the appraisal of the effectiveness of the financial management and operational controls in the family law section of the court, is not what I would consider an "employment-related matter". I do not agree with the Ministry's submission that this term should include a general audit which does not relate to the employment of an individual or individuals specifically, but generally relates to the Ministry's "right to control the method of carrying out work".
>
> However, even if I were to find that each of the records involves an employment-related matter, the Ministry would still have to establish that it was a matter in which the Ministry "has an interest".
>
> Previous orders have held that an interest is more than mere curiosity or concern. An "interest" for the purposes of section 65(6)3 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 legal rights or obligations of the Ministry (Orders P-1242 and M-1147).
>
> Several recent orders of this Office have considered the application of section 65(6)3 (and its municipal equivalent in section 52(3)3) in circumstances where there is no reasonable prospect of the institution's "legal interest" in the matter being engaged (Orders P-1575, P-1586, M-1128, P-1618 and M-1161). The conclusion of this line of orders has essentially been that an institution must establish an interest that has the capacity to affect its legal rights or obligations,

and that 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.

A review of the records reveals that the audits resulted in an employee being counselled in one case, an employee's dismissal in the second, and no action against any individual employee in the third. The employee who was dismissed filed a grievance, which has since been settled.

The Ministry submits that it has a legal interest in the records at issue because the disclosure of the records could result in complaints being made under the *Human Rights Code* by the employees who were the subject of the investigations.

At this point, the only issue is whether the records are subject to the *Act*, and a finding that they are does not mean that the records would be disclosed automatically. Further, having reviewed the record and based on the other material before me, there are no apparent grounds for a complaint under the *Human Rights Code* stemming from any of the audits.

The Ministry also submits that it has a legal interest under the collective agreement made between the government and OPSEU, pointing out that employee disputes or complaints may result in a grievance being filed against the employer. As I pointed out above, only one of the audits resulted in the dismissal of an employee, whose grievance has since been settled. Having reviewed the collective agreement, the time limits for filing grievances relative to the other two audits have expired.

The only relevant evidence before me in this appeal establishes that there is no reasonable prospect that the institution's legal interest will be engaged in two of the cases, and that a settlement has been reached between the Ministry and the former employee in the third. Therefore, there is no reasonable prospect that any legal interests which may have existed will be engaged in future. Accordingly, I find that there is no ongoing dispute or other employment-related matter involving the Ministry that has the capacity to affect the Ministry's legal rights or obligations, and the Ministry has failed to establish a "legal interest" in the employment-related matters reflected in the records (see also Order M-1164).

The Court of Appeal decision in *Ontario (Solicitor-General)*

In *Ontario (Solicitor General)*, 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 65(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.

In addition, in *Ontario (Solicitor General)*, 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.
>
> 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". 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". 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 institution's 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.

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

Applying a "correctness" standard of review to the IPC's interpretation of section 65(6), the Court of Appeal thus determined that this office's interpretation of the time sensitive element of

section 65(6), as well as the words "in which the institution has an interest" to mean a "legal interest", were incorrect.

The finding in the order that section 65(6)3 does not apply to Records 3 and 4 is based on the previous "time sensitive" interpretation, as well as the interpretation of "in which the institution has an interest" described above. Because these interpretations were explicitly rejected by the Court of Appeal, I conclude that the order contains a jurisdictional defect, and that it should be reconsidered for this reason.

The Ministry submits:

> . . . [T]he ministry clearly has an "interest", as an employer, in the remaining records. The matters which form the subject matter of the records concern the employment-related activities of its own employees and, like the second part of record 2, relate to the management of its workforce.
>
> The judgment of the Court of Appeal makes it clear that the exclusion cited by the Ministry previously is applicable to the records at issue in this appeal. The exemption provided by section 65(6)(3) can apply to the record despite the passage of time and the changes of circumstance, including the conclusion of the matter, as long as the requirements of the section of the Act are met at the time when the records were collected or prepared. The Ministry submits that the requirements in paragraph 3 of subsection 65(6) of the *Act* have been satisfied and that the records at issue fall within the scope of the subsection.
>
> Since the records do relate to discussions, communications etc. about employment-related matters in which the ministry has an interest at the point in time when the records were prepared or used, the Act does not apply to them. Once it is established that the criteria of subclause 3 are present when the relevant action in the preamble takes place, the Act "does not apply". As the Court of Appeal explained, "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 the sub clauses 1 to 3 cease to apply."

In my view, based on the material before me in this appeal, it is clear that the Ministry's interest in Records 3 and 4 is more than "a mere curiosity or concern", and that the matter giving rise to the record relates to the Ministry's own workforce where the focus has shifted from "employment of a person" to "employment-related matters". In addition, the fact that the employment-related matters are not longer current does not preclude the operation of section 65(6)3. Therefore, Adjudicator Big Canoe's finding in the order that the Records 3 and 4 are not subject to section 65(6)3 is in error.

Similar to Records 3 and 4, with respect to Record 2, Adjudicator Big Canoe found that section 65(6)3 does not apply. For the same reasons, I conclude that this finding constitutes a jurisdictional defect. However, Adjudicator Big Canoe also found that, in the alternative, section

65(6)3 cannot apply to the portion of Record 2 regarding the appraisal of "the effectiveness of the financial management and operational controls in the family law section of the court", because this was not an "employment-related matter". On this point, the Ministry submits:

> . . .[T]he second part of Record 2 clearly concerns an "employment-related matter". As the Court noted, the focus in subclause 3 has shifted from the "employment of a person", to "employment-related matters" involving the institution's own workforce. An audit which concerns the Ministry's 'right to control the method of carrying out work' relates directly to workforce management issues. Therefore, the ministry submits that record 2, in its entirety, is "employment-related".

In my view, Adjudicator Big Canoe's alternative finding also is in error. The evidence in this appeal indicates that Record 2, as a whole, was prepared and used by the Ministry in relation to an employment-related matter, that being the alleged misconduct of an employee in the family law section of the courts.

Conclusion

Adjudicator Big Canoe's finding in the order that Records 2, 3 and 4 are not subject to section 65(6)3 is in error. Records 2, 3 and 4 are subject to section 65(6)3 and, therefore, the *Act* 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 in accordance with the provisions of sections 26, 27 and 28 of the *Act*, regarding access to the requested records, 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 correspondence referred to in Provision 1 by sending a copy to me when it sends this correspondence to the appellant.
>
> 3. I order the Ministry to disclose Record 1 to the appellant by **August 5, 1999**.

I understand the Ministry has complied with provision 3, but has not complied with provisions 1 and 2 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 provisions 1 and 2 of the order, on the basis that the *Act* does not apply to the relevant records due to the operation of section 65(6)3.

ORDER:

I hereby permanently stay provisions 1 and 2 of Order PO-1696.

Original Signed By: November 27, 2002
David Goodis
Senior Adjudicator