



**Information and Privacy  
Commissioner/Ontario**

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

# **Reconsideration Order PO-2078-R**

**Appeal PA-000070-1, Order PO-1797**

**Ministry of Public Safety and Security**

**(Formerly Ministry of the Solicitor 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/Télééc: 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-1797, dated July 5, 2002.

The appellant submitted a request to the Ministry of the Solicitor General, now the Ministry of Public Safety and Security (the Ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a copy of documentation regarding an internal review of an Ontario Provincial Police (OPP) investigation into the death of his son.

The Ministry identified a number of responsive records, and denied access to them in their entirety, claiming that they fall outside the scope of the *Act* pursuant to section 65(6). The appellant appealed the Ministry's decision.

After conducting an inquiry, I rejected the Ministry's position and found that all of the records were subject to the *Act*. I issued Order PO-1797, wherein I ordered the Ministry to issue an access decision to the appellant concerning the records.

The Ministry later applied to the Divisional Court for judicial review of Order PO-1797.

The Ministry then issued a decision letter to the appellant in compliance with the provisions of Order PO-1797, denying access to some records based on a number of exemptions in the *Act*. The Ministry stated that its decision was without prejudice to its position that the records were excluded from the *Act* under section 65(6).

The appellant appealed the Ministry's denial of access. After conducting an inquiry, I issued Order PO-1955 on October 4, 2001, wherein I ordered the Ministry to disclose certain records for which no exemptions were claimed, and upheld the Ministry's decision to deny access to the remaining records. I also stayed the disclosure provision in this order pending the disposition by the Divisional Court of the judicial review of Order PO-1797. I later declined a request by the appellant that I reconsider Order PO-1955, as I was unable to find any fundamental defects in the adjudication process or jurisdictional defects in my decision.

The application for judicial review of Order PO-1797 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 18, 2002, I wrote to the Ministry and the appellant and advised that I had formed the preliminary view that I should reconsider Order PO-1797 in light of the Court of Appeal's decision. I sought representations from both parties on (1) whether there are grounds for reconsideration; and (2) if so, what the appropriate remedy should be for Orders PO-1797 and PO-1955. Only the Ministry submitted representations.

## 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.

My interpretation and application of section 65(6) in Order PO-1797

Sections 65(6)1 reads as follows:

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:

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.

In order for records to fall within the scope of paragraph 1 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 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 Ministry.

In Order PO-1797, I found that the Ministry had established the first requirement of section 65(6)1.

With respect to the second part of the test, I described a number of reviews undertaken by the OPP and the Ontario Civilian Commission on Police Services (OCCPS) in response to complaints made by the appellant. I then reviewed Order P-1618 and proceeded to apply a “time-sensitive” approach in the circumstances of the appeal. I then found that the second part of the test was not met for the following reasons:

In the circumstances of this appeal, both the OPP and OCCPS reviews were completed by May 7, 1999, more than a year ago. Both bodies determined that there had been no misconduct on the part of OPP officials in relation to the investigation of the appellant’s son’s death or the handling of the appellant’s complaints. All proceedings flowing from the appellant’s complaints were completed 14 months ago and the appellant has taken no further action involving the OPP since that time. To that point, the appellant had established a pattern of prompt action when dissatisfied with any decision made by the OPP. For these reasons, I find that disclosure of records associated with the OPP and/or OCCPS proceedings could not have an impact on any labour relations issues directly related to these records. Therefore, I find that the second requirement of section 65(6)1 has not been established. The fact that the appellant continues to complain to other sources (i.e. his MPP) is not sufficient to bring these records within the scope of section 65(6)1.

### **The Court of Appeal’s 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.

### **Is there a jurisdictional defect in Order PO-1797 in light of the Court of Appeal’s decision?**

The Ministry submits that my reliance on the “time-sensitive” approach in interpreting section 65(6)1 was specifically rejected by the Court of Appeal, and that this represents a jurisdictional defect in Order PO-1797.

Applying a “correctness” standard of review to my interpretation of section 65(6)1, the Court of Appeal determined that my interpretation of the “time-sensitive” element of this provision was incorrect. The finding in Order PO-1797 that section 65(6)1 does not apply to the records is based solely on the application of this “time sensitive” approach. Because the Court of Appeal explicitly rejected this approach, I conclude that this finding constitutes a jurisdictional defect in the order, and that Order PO-1797 should be reconsidered for this reason.

Accordingly, I will reconsider my decision.

### **Do the records fall within the scope of section 65(6)1?**

In Order PO-1797, I found that the records were collected, prepared, maintained and used by the OPP in discharging its responsibilities to investigate two complaints made by the appellant under the *Police Services Act* (the *PSA*). I confirm that finding here, thereby establishing the first requirement of section 65(6)1.

As far as the second requirement is concerned, in Order PO-1797 I accepted the Ministry’s position that proceedings stemming from complaints made under the *PSA* are properly considered proceedings for the purposes of section 65(6)1 of the *Act* (Order M-835), but went on to find that the availability of these proceedings was not sufficient to satisfy the second requirement of section 65(6)1 on the basis of the “time sensitivity” approach discussed above.

Applying the direction of the Court of Appeal, I find that proceedings under the *PSA* were available to the appellant at the time the records at issue in this appeal were collected, prepared, maintained and used by the OPP in discharging its investigative responsibilities, and that this is sufficient to establish the second requirement of section 65(6)1.

In order to satisfy the third requirement of section 65(6)1, the proceedings must relate to labour relations or to the employment of a person by the Ministry. In this regard, the Ministry submits:

With respect to the third requirement to be established under section 65(6)1, the Ministry submits that the records at issue relate to the employment of the lead OPP investigator and the Detective Inspector by the Ministry whose alleged misconduct was the basis for the appellant’s public complaints and subsequent appeals to the Ontario Civilian Commission on Police Services.

In Order M-899, Adjudicator Laurel Copley 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* relate to the “employment of a person by the institution” for the purposes of section 52(3)1 of the *Municipal Freedom of Information and Protection of Privacy Act*, which is virtually identical to section 65(6)1 of the provincial *Act*. In that order, I 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.

Applying this reasoning to the records at issue in this appeal, I find that the proceedings under the *PSA* relate to the employment of OPP officers by the Ministry, thereby satisfying the third requirement of section 65(6)1.

Therefore, I find that all three requirements of section 65(6)1 have been established, and the records are excluded from the *Act*.

It is not necessary for me to address section 65(6)3.

### **WHAT IS THE APPROPRIATE REMEDY?**

The operational provisions of Order PO-1797 read:

1. I order the Ministry to issue an access decision to the appellant concerning the records, in accordance with the provisions of sections 26, 28 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 by sending it to my attention c/o Information and Privacy Commissioner/ Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario M5S 2V1.

The Ministry has complied with both of these provisions. In the circumstances, despite my finding that Order PO-1797 contains a jurisdictional defect, my staying or rescinding that order would have no practical effect, and I therefore will not make any further order with respect to Order PO-1797.

In compliance with Order PO-1797, the Ministry issued a decision, which ultimately led to Order PO-1955. The operative provisions that order read:

1. I order the Ministry to disclose records 1-5, 7, 9, 42-45, 71, 72, 74, 75, 78, 79, 85, 93-95, 97-108 and 110-112, for which no exemptions were claimed, to the appellant.
2. I uphold the Ministry's decision to deny access to the remaining records.
3. My order for disclosure of records under Provision 1 of this order is stayed pending the disposition by the Superior Court of Justice (Divisional Court) of the current judicial review of Order PO-1797.
4. In order to verify compliance with the provisions of this order, I reserve the right to require the Ministry to provide me with a copy of the record that is disclosed to the appellant pursuant to Provision 1.

In light of my findings that Order PO-1797 contains a jurisdictional defect and that the Act does not apply to the records, Order PO-1955 can be of no force or effect. The appropriate remedy in the circumstances is to permanently stay provisions 1, 3 and 4 of Order PO-1955.

## **ORDER**

I hereby permanently stay provisions 1, 3 and 4 of Order PO-1955.

Original signed by: \_\_\_\_\_  
Tom Mitchinson  
Assistant Commissioner

\_\_\_\_\_ November 28, 2002