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

ORDER PO-2132

Appeal PA-020079-1

Ministry of Public Safety and Security

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NATURE OF THE APPEAL:

The appellant made a request under *the Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry of Public Safety and Security [then the Ministry of the Solicitor General] (the Ministry) for:

> copies of any and all reports, notes, photographs, memoranda, correspondence, computer print-outs, etc., prepared by and for the Ontario Provincial Police (OPP) in the course of its initial investigation, follow-up investigations, contacts with the appellant and disciplinary proceedings against its members resulting from the distribution by e-mail of photographs of the appellant taken in the course of criminal proceedings.

In particular, the appellant specified that he sought access to the following:

1. the e-mailed photograph(s) of the appellant referred to in a named OPP official's letter;
2. all notes and records of when the existence of said e-mailed photograph(s) came to the attention of the OPP supervisors, to whose attention the photograph(s) was first brought and when the photograph(s) was identified as being of the appellant;
3. the investigation report of a named OPP official, completed on or about 9 August 2001; and
4. copies of the notes of three named OPP officials from their meeting with the appellant on 10 July 2001.

The Ministry advised the appellant that it did not have any responsive records in relation to one of the named OPP officials in Part 4 of the request.

The Ministry also denied access to the responsive records in their entirety on the basis that the records fell outside of the scope of the *Act* by virtue of section 65(6) of the *Act*.

At the mediation stage, the Ministry indicated that it had also removed portions of the records it had determined to be non-responsive to the request. In particular, the Ministry removed the following portions of the report commencing at page 34 of the records at issue: all of Tab 1, pages 1 to 3 of Tab 2, and all of Tab 3.

Mediation on both the issue of non-responsiveness and the section 65(6) issue was unsuccessful. Non-responsiveness of records was then added as an issue in dispute and the matters moved to the inquiry stage.

The Ministry provided representations on the relevant issues, the non-confidential portions of which I shared with the appellant. The responding representations from the appellant were shared with the Ministry in their entirety. Then the Ministry provided a brief reply.

RECORDS:

There are 46 pages of records at issue in this appeal consisting of hand written notes, photographs, e-mail messages, a media release and a report.

CONCLUSION:

The records at issue are excluded from the application of the *Act* by virtue of section 65(6).

DISCUSSION:

APPLICATION OF THE *ACT*

Introduction

Section 65(6) of the *Act* provides:

> 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.
>
> 2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.
>
> 3. Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

Section 65(6) is record-specific and fact-specific. If this section applies to a record, and none of the exceptions listed in section 65(7) applies, section 65(6) excludes that record from the scope of the *Act* (see, for example, Orders P-1654 and PO-1772).

The Ministry relies on paragraphs 1 and 3 of section 65(6). If I find that one of these paragraphs applies to exclude the records at issue, I need not go further to examine the applicability of the other paragraph. I begin with a consideration of section 65(6)1.

Section 65(6)1

Introduction

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.

Requirements 1 and 2

While it is for the Ministry to show that the records at issue meet both of Requirements 1 and 2 for each of sections 65(6)1 and 3, it should be noted at the outset that the appellant concedes that these requirements apply in the circumstances of the appeal.

The Ministry submits:

> On April 19, 2001, the OPP received a complaint relating to the inappropriate use of e-mail. The Commissioner ordered the Professional Standards Bureau (PSB) to fully investigate the matter. The records at issue are the results of the investigation into the matter.
>
> The records at issue in the appeal were, collected, prepared, maintained or used by the OPP, [Professional Standards Branch (PSB)] for the purposes of investigating complains relating to the Force. It is this office, which has been established to investigate internal as well as public complaints against members. During the course of investigation these complaints, information and records are created and gathered or compiled in order to thoroughly investigate allegations and arrive at proper conclusions . . . The Commissioner is bound by 60(4) and 64(1) [of the *Police Services Act* (*PSA*)] to investigate every complaint against a police officer. This is imposed by way of 41(1)(b) and 41(1)(d) [of the *PSA*].

After careful examination of the records before me and a consideration of the representations of the parties, I am satisfied that the records meet Requirements 1 and 2 of section 65(6)1 in that the records were collected, prepared, maintained or used by or on behalf of the Ministry in relation to proceedings or anticipated proceedings before a court tribunal or other entity. As submitted

by the Ministry, this office has ruled in other appeals that these matters, undertaken under section 60 of the *PSA*, are:

> a dispute or complaint resolution process conducted by a court, tribunal or other entity, which has, by law, the power to decide disciplinary matters. As such, these hearings are properly characterized as proceedings for the purpose of section 52(3)1 (the municipal equivalent of section 65(6)1). [Order M-835]

See also Orders M-1347, MO-1280, M-1186.

Requirement 3

Requirement 3 stipulates that the relevant proceedings, i.e., those referred to in Requirement 2, must relate to labour relations or to the employment of a person by the institution. The Ministry takes the position that disciplinary hearings under Part V of the *PSA* "relate to . . . the employment of a person by the institution":

> It is incumbent upon the institution's management to ensure that all members adhere to the rules, regulations, and procedures of the OPP, which includes the PSA as well as the *Criminal Code of Canada*. When an officer is deemed not to have fulfilled his employment duties/responsibilities by failing to comply with the above-noted regulations, it therefore follows that any ensuring (sic) public complaints investigation clearly relates to the employment by the institution of the police officer that is the subject of the investigation. As such, these records no longer fall within the auspices of the 'Act'.
>
> In support of our position that disciplinary proceedings under the Part V of the PSA are characterized as "*employment relations actions*", Acting Commissioner Tom Mitchinson found at Order M-835 that:
>
> > 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.

The appellant makes detailed representations on Requirement 3 with respect to the notes of the OPP officials and the e-mailed photographs of the appellant. The appellant is adamant that these records are not caught by Part 3 of section 65(6)1. No specific representations are made about the investigation report.

First, in respect of the copies of the notes of named OPP officials from their meeting with the appellant on 10 July 2001, the appellant argues as follows:

> Nothing that occurred at [a specified location], and specifically involving the attendance there of three senior officers of the [OPP] on 10 July 2001, could possibly relate, directly or indirectly, to "labour relations or to the employment of a person by the institution" or about "employment–related matters in which the institution has an interest".
>
> … As the appellant was unconscious at the time the photographs were originally taken, did not have access to the criminal investigation file, and had no contact with those involved in altering, adding captions, or distributing the photographs by email, there is no reasonable basis for claiming that the meeting with the appellant was in any way related to the concurrent investigation of misuse of criminal investigation files and the government computer network…

The appellant also makes numerous allegations about the actual purpose of the July 2001 meeting the veracity of which I cannot verify and which, ultimately, are irrelevant to my disposition of this issue.

Second, with respect to the e-mailed photographs, the appellant states:

> The photographs of the appellant themselves, in their original form and in their e-mail format, and the captions attached thereto, pre-date any disciplinary proceedings, even though they may have formed the basis for such proceedings, and as such, they are simply evidence which form the foundation for the internal OPP investigation and of part of the appellant's suit for damages…
>
> While the Ministry and the OPP may, accordingly, "have an interest" in these documents in terms of potential liability for the Ministry, the OPP and their employees, it cannot possibly be the intent of this legislation, and particularly sub-section 65(6) to allow the Ministry to hide behind it in order to evade such liability. In Order PO-1905, Senior Adjudicator Goodis stated:
>
> If I accepted the Ministry's position, then whenever government is or may be sued for actions taken or decision made by employees, through whom government must invariably act, all related records documenting the actions taken or decisions made would be excluded from the Act regardless of government's 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)…Where, as in this case, there is no demonstrable connection between the exclusion of the records and any interest …the Ministry may have in labour relations or employment-related matters, I am unable to accept that the exclusions should apply solely on the basis of various liability implications attendant on a possible law-suit.

Finally, and more generally, the appellant submits that:

> The original criminal proceedings, in which the appellant was the victim, and which gave rise to the creation of the photographs, have long since been concluded, as have the disciplinary proceedings under the *Police Services Act* against specific officers arising from the offensive emails, and the results of all of these proceedings are a matter of public record.

I do not accept the appellant's first argument.

First, the appellant makes no clear argument about whether the proceedings in question, i.e., the investigation/complaint proceedings, relate to labour relations or the employment of a person. Instead, the appellant appears to be arguing that the meeting itself, to which some of the records pertain, must relate to labour relations or the employment of a person. Requirement 3 of section 65(6)1, however, stipulates that the *current or anticipated proceedings* referred to in Requirement 2 be related to "labour relations or to the employment of a person". It does not state that the records at issue have been created for a labour relations or employment purpose. In Order PO-1905, Senior Adjudicator David Goodis dealt with a similar argument made instead in respect of Requirement 2 of the section but applicable here nonetheless. The appellant in that case contended that:

> . . . [T]his section requires that records be collected, prepared, maintained or used *in relation to* proceedings or anticipated proceedings before a court, tribunal or other entity relation to labour relations or to the employment of a person by the institution. Based on the plain wording of this section, … unless these records were collected, prepared, maintained or used with a view to or in reaction to such proceedings, they do not fall within this exemption. If the were created independently from proceedings and without a view to them, they should not fall within this exemption.

Senior Adjudicator Goodis rejected the argument finding that the submission did not "take into account that this part of the test may apply where the records were collected, maintained and/or used in relation to the proceedings, *regardless of the purpose for which they were originally created or prepared* (emphasis added). Furthermore, given that the meeting with the appellant occurred after the e-mail incident in question and after an internal investigation of the matter had begun, I think it unreasonable to find that it was not at least related to the complaint proceedings.

I also do not accept the appellant's second argument. Neither Order M-927 nor Order PO-1905, cited in support, assist the appellant.

In Order M-927, Assistant Commissioner Mitchinson said:

> In my view, in assessing the possible application of section 52(3) in this case, it is important to note that *the request was essentially directed at the contents of the*

> *police investigation file concerning the accident, and any related entries in officers' notebooks. It was not a request for information relating to the allegations against the investigating officers*. (emphasis added)
>
> It is difficult to imagine any category of records which would be more integral to the basic mandate of a police force than the files kept in connection with day-to-day police investigations of incidents occurring within the force's jurisdictional boundaries, and related entries in officers' notebooks. Moreover, although some of them are prepared by employees of the Police, such records are not, in essence, related to employment or labour relations. Rather, they record the activities and conclusions of the investigating officers and, at times, others who conduct forensic analyses, etc. Generally speaking, such records are subject to the *Act*.
>
> *On the other hand, in the context of a request for the file relating to an investigation of a police officer's conduct, where copies of incident reports, etc. from the original investigation formed part of that file, section 52(3) could apply to that entire file including those particular copies*. However, in my view, the main investigation file housing the original incident reports, etc., and related officers' notebook entries, would remain subject to the *Act*. (emphasis added)

In this appeal, none of the records at issue qualifies as a record created in the regular operation of the police force. The appellant requested records related to the investigation resulting from the distribution of e-mailed photographs. The e-mailed photographs are the integral part of the investigation file pertaining to the conduct of members of the police force; they are the reason for which an internal investigation ensued. Furthermore, the appellant has taken out of context a quotation from Order PO-1772, found in Order PO-1905. The paragraph from which the appellant derives his argument begins in this way:

> The Ministry appears to be asking me to accept that routine operation 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.

As stated, the records at issue here are not routine operation records, nor is it the case in this appeal that the institution has failed to show that it has taken steps in an employment-related context.

Therefore, I find that Requirement 3 of section 65(6)1 has been met in the circumstances of this appeal.

Finally, the latter representation made by the appellant has been succinctly dealt with by the Court of Appeal in *Ontario (Solicitor General),* (*supra*), where it stated the following with respect to the "time sensitive" element under the 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 sub clauses 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 sub clauses 1 to 3 cease to apply.

In other words, the fact that the disciplinary and other proceedings have ended has no impact on the continuing applicability of section 65(6)1.

RESPONSIVENESS OF RECORDS

As indicated above, portions of the report commencing at page 34 of the records at issue were removed by the Ministry as the Ministry found the information to be non-responsive to the request.

Previous orders of the Commissioner have established that in order to be responsive, a record must be "reasonably related" to the request.

> In my view, the need for an institution to determine which documents are relevant to a request is a fundamental first step in responding to a request. It is an integral part of any decision by a head. The request itself sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as being responsive to the request. I am of the view that, in the context of freedom of information legislation, "relevancy" must mean "responsiveness". That is, by asking whether information is "relevant" to a request, one is really asking whether it is "responsive" to a request. While it is admittedly difficult to provide a precise definition of "relevancy" or "responsiveness", I believe that the term describes anything that is reasonably related to the request.
>
> [Order P-880, P-1051]

The Ministry explained in its representations that the report from which portions were removed contained information related to three separate investigations conducted by the OPP's PSB, which had been compiled into one report. Not having seen these portions of the records, the appellant was unable to provide detailed representations on this issue.

It is clear from the Ministry's submissions and my own examination of the records before me that the report does contain information relating to other investigations not involving the appellant. I find no error in the Ministry's classification of this information as non-responsive and in its decision to remove that information from the record.

ORDER:

I uphold the decision of the Ministry that the *Act* does not apply to the records.

Original signed by: March 21, 2003
Rosemary Muzzi
Adjudicator