



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

ORDER PO-2374

Appeal PA-020394-3

Ministry of Community Safety and Correctional Services



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NATURE OF THE APPEAL:

The Ministry of Community Safety and Correctional Services (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following records pertaining to the former Parry Sound Police Department:

Correspondence - Municipal Police Force. Series consists of correspondence between the Ontario Police Commission (OPC) and municipal police forces of Ontario concerning the operation of these police forces. The files contain advisor's reports, agreements and newspaper clippings relevant to this correspondence.

Correspondence - Ontario Provincial Police Contract. Series consists of correspondence between the Ontario Police Commission and the Ontario Provincial Police (OPP) the Attorney General and various municipalities concerning the takeover of the policing responsibilities of these municipalities by the OPP or the formulation of a contract between the OPP and the municipalities.

The Ministry did not respond to the request and the requester filed an appeal with the Commissioner's office. The Ministry's failure to respond placed it in a "deemed refusal" situation and this office opened Appeal Number PA-020394-1. When the Ministry issued its decision respecting access on January 6, 2003, that appeal file was closed.

In its decision letter, the Ministry stated that it had located paper records relating to the first part of the request (the OPC records) and granted partial access to them. Access was denied to 44 pages of records or parts of records pursuant to sections 13(1) (advice or recommendations), 19 (solicitor-client privilege) and 21(1) (invasion of privacy), with reference to the factors in section 21(2)(f) (highly sensitive information) and (h) (information supplied in confidence) and the presumption in section 21(3)(d) (information relating to employment history) of the *Act*. The requester, now the appellant, appealed this decision and the Commissioner's office opened Appeal Number PA-020394-2. Issues relating to access to the undisclosed records were resolved by mediation.

During the mediation stage of that appeal, the appellant advised the Commissioner's office that the office of the Deputy Minister of the Solicitor General had advised him that further records related to his request reside on microfiche with the OPP Contract Policing Bureau. The Ministry conducted a further search for responsive records and located these microfiche records. It issued an interim decision and fee estimate of \$3,771.25, advised that a final decision respecting access to the records had not yet been made and that some records may be exempt pursuant to sections 12, 19 and 21(1) of the *Act*. The appellant appealed the amount of the fee estimate and the appeal file was forwarded to the Adjudication stage of the appeals process.

During the Adjudication stage of Appeal Number PA-020394-2, the Ministry advised the requester that it had converted the microfiche records to machine-readable records and it was therefore able to provide the appellant with a detailed Index of Records. As a result, the appellant narrowed the scope of his request to include only 371 pages of records. The Ministry

made a final decision respecting access to these records and quoted a fee of \$34.00. Since the fee issues were resolved and the amount of the fee was no longer at issue, Appeal Number PA-020394-2 was closed. In its decision letter, the Ministry granted partial access to the records, denying access to the remainder, in whole or in part, pursuant to sections 21(1) and 65(6) of the *Act*.

The requester appealed the Ministry's decision to deny access and Appeal file PA-020394-3 was opened. In his letter of appeal, the appellant asked for an explanation as to why the original documents maintained by the OPC were destroyed. The appellant referred to an August 6, 1969 Retention Schedule between the Solicitor General and the Archivist of Ontario regarding correspondence between the OPC and municipal police forces which states that such records should be transferred to the record centre after 10 years and destroyed after 20 years. The appellant therefore claims that some records responsive to this request must exist in paper form.

During mediation, one additional record was disclosed to the appellant following the notification of a third party. A complete settlement of this appeal by mediation was not possible and the appeal proceeded to the Adjudication stage of the appeals process. Prior to the issuance of a Notice of Inquiry to the Ministry, further correspondence was received by this office from both the appellant and the Ministry. The Ministry provided the appellant with a detailed explanation as to why a 1969 records retention schedule relating to the OPC does not apply to records held by the Ontario Provincial Police and why the Archives of Ontario does not maintain copies of the requested information. The appellant responded by indicating that he was not satisfied with the explanation provided to him. The appellant maintains that records relating to the OPC hearings that took place in March, April and May of 1988 should still exist. Accordingly, the reasonableness of the Ministry's search for these records continues to be an issue in this appeal.

I sought and received the representations of the Ministry, the relevant portions of which were then shared with the appellant, along with a Notice of Inquiry. The attachments to the Ministry's representations were not enclosed as it appeared that all of these documents had already been shared with the appellant during the processing of the appeal. The appellant provided submissions relating to his views on the continued existence of OPC records relating to the Parry Sound Police disbandment in 1988-89.

RECORDS:

The records at issue in this appeal are described in the detailed Index of Records provided to the appellant by the Ministry with its final decision dated April 22, 2004. The remaining records include correspondence, memoranda and an assortment of reports. Handwritten notes on the Index of Records indicate whether the records were released or the exemptions cited to withhold the records or parts of records.

DISCUSSION:

PERSONAL INFORMATION/INVASION OF PRIVACY

Do Records 24-25, 771-779 and 1022-1027 contain “personal information” within the meaning of section 2(1)?

Records 24-25, 771-779 and 1022-1027 are letters written to the Ontario Police Commission, the Commissioner of the Ontario Provincial Police and the Council of the Town of Parry Sound respectively by private residents of that community. They refer to various issues surrounding the debate over the provision of policing services that took place in 1987 and 1988. The Ministry submits that these records contain personal information within the meaning of section 2(1) of the *Act* and are exempt from disclosure under the mandatory exemption in section 21(1).

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains “personal information” and, if so, to whom it relates. That term is defined in section 2(1) as follows:

“personal information” means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except where they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

The Ministry submits that the records contain the personal information of the individuals who wrote the letters, specifically their addresses and telephone numbers (section 2(1)(d)), their personal opinions and views (section 2(1)(e)) and their names along with other personal information relating to them (section 2(1)(h)).

The appellant does not address this issue in his representations.

I have reviewed the contents of Records 24-25, 771-779 and 1022-1027 and find that they contain the personal information of the individuals who wrote them within the meaning of sections 2(1)(d), (e) and (h). In addition, I find that Records 24-25, 771-779 and 1022-1027 also contain the personal information of the former Chief of the Parry Sound Police as it represents the personal views or opinions of the authors of the letters about the Chief himself, as contemplated by section 2(1)(g).

Are Records 24-25, 771-779 and 1022-1027 exempt from disclosure under the mandatory exemption in section 21(1)?

The Ministry argues that the records qualify for exemption under section 21(1) of the *Act*. Where a requester seeks personal information of another individual, section 21(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 21(1) applies. If the information fits within any of paragraphs (a) to (f) of section 21(1), it is not exempt from disclosure under section 21. In the circumstances, it appears that the only exception that could apply is paragraph (f).

Section 21(1)(f) states:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

if the disclosure does not constitute an unjustified invasion of personal privacy.

In order to establish that section 21(1)(f) applies, it must be shown that the disclosure of personal information would *not* constitute an unjustified invasion of personal privacy (Order MO-1212). Sections 21(2) and (3) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates.

Section 21(3) lists the types of information the disclosure of which is *presumed* to constitute an unjustified invasion of personal privacy. The Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 21(2) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767] though it can be overcome if the personal information at issue falls under section 21(4) of the *Act* or if a finding is made under section 23 of the *Act* that a compelling public interest exists in the disclosure of the record in which the personal information is contained which clearly outweighs the purpose of the section 21 exemption. [Order PO-1764]

If none of the presumptions in section 21(3) applies, as is the case in the present appeal, section 21(2) requires me to consider all relevant circumstances, including the factors listed therein and any unlisted factors, in order to determine whether disclosure would constitute an unjustified invasion of personal privacy.

The Ministry argues that the information contained in the records is highly sensitive (section 21(2)(f) and was supplied by the writer in confidence (section 21(2)(h)). To be considered highly sensitive, it must be found that disclosure of the information could reasonably be expected to cause excessive personal distress to the subject individual [Orders M-1053, P-1681 and PO-1736]. The Ministry submits that:

[T]hese individuals [the authors of the letters] would have had a reasonable expectation of confidentiality in respect to correspondence they authored approximately 21 years ago at a time when sensitive matters relating to the provision of policing services in the Town of Parry Sound were being considered by the former Ontario Police Commission. The Ministry believes that the correspondence was likely to have been implicitly submitted in confidence by the authors.

The appellant has not referred to any factors, listed or otherwise, in section 21(2) that favour the disclosure of the information contained in these records.

I have reviewed the contents of the correspondence that comprises Records 24-25, 771-779 and 1022-1027 and find that the considerations listed in sections 21(2)(f) and (h) are applicable. Owing to the subject matter of the records and the candid comments contained in each of the letters outlining the personal opinions of the writers of the letters, I am satisfied that their disclosure could reasonably be expected to cause excessive personal distress to these individuals within the meaning of section 21(2)(f). Despite the fact that a significant amount of time has passed, I find that the nature of the opinions expressed in the letters remain highly sensitive to this day.

I further find that because the letters express certain strongly held personal beliefs held by their authors, it can reasonably be said that the information was provided with an expectation that it would be maintained confidentially, as contemplated by section 21(2)(h).

I find that these are significant considerations weighing in favour of privacy protection. I found above that the personal information in these records relates only to individuals other than the appellant. I have not, however, been provided with any considerations favouring disclosure that would enable me to make a finding that the disclosure of the personal information would not constitute an unjustified invasion of personal privacy under the exception in section 21(1)(f). Accordingly, I conclude that Records 24-25, 771-779 and 1022-1027 are exempt under the mandatory exemption in section 21(1).

LABOUR RELATIONS AND EMPLOYMENT RECORDS

Section 65(6)3 Generally

The Ministry claims that the remaining records at issue fall within the ambit of the exclusionary provision in section 65(6)3 of the *Act*, which 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.

If section 65(6) applies to the records, and none of the exceptions found in section 65(7) applies, the records are excluded from the scope of the *Act*.

The term “in relation to” in section 65(6) means “for the purpose of, as a result of, or substantially connected to” [Order P-1223]. The term “labour relations” refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships [Order PO-2157, *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.)]. The term “employment of a person” refers to the relationship between an employer and an employee. The term “employment-related matters” refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship [Order PO-2157].

If section 65(6) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date [*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. 507].

For section 65(6)3 to apply, the Ministry must establish that:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;

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.

Representations of the Ministry

In support of its contention that the records are excluded from the operation of the *Act* by virtue of section 65(6)3, the Ministry submits that:

Ministry staff have collected, prepared, maintained and/or used [the] excluded information at issue. The records at issue are in the possession of the OPP's Contract Policing Bureau. The OPP is part of the Ministry.

The Ministry submits that Ministry staff collected, prepared, maintained and/or used the information in the excluded records at issue (or parts thereof) in relation to meetings, consultations, discussions and/or communications with respect to the disbandment of [the] former Parry Sound Police Force and related labour relations and employment-related issues.

In 1988, the former Ontario Police Commission held an Inquiry pursuant to section 58(1) of the former *Police Act* into the Administration and Operation of the Parry Sound Police Force. In 1989, the OPP took over responsibility for the provision of policing services in the Town of Parry Sound. The Parry Sound Police Force was disbanded. The police officers employed by the Parry Sound Police Force were considered for employment with the OPP and a number were ultimately appointed to the OPP. The excluded records (or parts thereof) at issue in this appeal involve labour relations and employment-related matters in relation to the provision of policing services in the Town of Parry Sound both prior to and subsequent to the OPP assuming responsibility for the provision of policing services in the community.

...

The excluded records (or parts thereof) concern a myriad of labour relations and employment-related matters such as staffing, recruitment, classification issues, salaries, benefits, grievances, scheduling and attendance, hours of work, employee morale, staff performance, training, complaints, internal investigations, health and safety issues, seniority and relocation issues.

The excluded records (or parts thereof) on their face are about inherently labour relations and/or employment-related matters.

The Ministry submits that the records concern labour relations and/or employment-related matters primarily relating to individuals employed by the former Parry Sound Police Force who ultimately were employed by the Ministry and appointed to the OPP, as well as individuals who were considered for employment with the Ministry but who ultimately were not appointed to the OPP. The Ministry submits that the exclusion would apply notwithstanding whether the Ministry has a current employment relationship with individuals formerly employed by the Parry Sound Police Force.

A number of earlier IPC orders have concluded that the complete hiring process is considered to be an employment-related matter for the purposes of section 65(6)3 of *FIPPA*. As such, records concerning recruitment, screening and interviewing of candidates satisfy the requirements of the term “employment-related matter”, notwithstanding the outcome of the competition and whether the requester of such information is a successful candidate (Orders P-1627, P-1685-F, PO-1760 and MO-1291).

The Ministry also relies on the reasoning of former Assistant Commissioner Tom Mitchinson in Order PO-2212 in which he held that:

The records at issue in this appeal relate to the provision of benefits to former employees who have retired from the OPS. In my view, the fact that the records relate to individuals who are no longer employed by the OPS and do not have a current employment relationship with the Ontario government does not mean that the records are not “employment-related” for the purposes of section 65(6)3. The only reason the records exist is because the pension beneficiaries had an employment relationship with the OPS. Applying similar reasoning from past orders where records created prior to the establishment of an employment relationship such as job competition records concerned “employment-related matters”, I find that records stemming directly from a previously existing employment agreement also concern “employment-related matters”, regardless of the fact that the employment relationship has terminated.

The Ministry concludes its representations on the application of section 65(6)3 to the records as follows:

In Order PO-2106, Adjudicator Bernard Morrow considered whether the Archives of Ontario, in its capacity as the holder of archived OPP records, has an interest in certain records containing employment-related information relating to a retired OPP officer. Adjudicator Morrow commented as follows:

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.

Analysis

Part one of the test under section 65(6)3

I have reviewed the contents of all of the remaining records at issue. These documents were originally prepared by the Ontario Police Commission and the Ontario Provincial Police (the OPP) in the course of its investigation into the activities of the former Parry Sound Police Force and the Parry Sound Police Services Board. All of the records have been collected, maintained or used by the OPP, which forms part of the Ministry. The records have been maintained by the OPP since their creation in 1988 and 1989 and are included as part of its record-holdings. Accordingly, I am satisfied that part one of the test under section 65(6)3 has been satisfied.

Part two of the test under section 65(6)3

In Order P-1223, former Assistant Commissioner Mitchinson considered the meaning of the phrase "in relation to". He found that:

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 find that the collection, maintenance and use of the records by the OPP was for the purpose of, as a result of or was substantially connected to meetings, consultations, discussions and communications that occurred at that time concerning the whole provision of policing services issue. I am, therefore, satisfied that the second part of the test under section 65(6)3 has also been met.

Part three of the test under section 65(6)3

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

In Order PO-2106, Adjudicator Bernard Morrow found that appointments, promotions, transfers and resignations were all employment-related matters because each of those events would engage the employer and the employee in transactions that are significant to their employment relationship. In addition, this office has consistently held that job competitions are

“employment-related” matters for the purposes of section 65(6)3 or the municipal equivalent (Orders M-830, PO-1950, PO-2123 and PO-2212).

I have reviewed the records that the Ministry claims to be excluded from the ambit of the *Act* owing to the operation of section 65(6)3 and find that they pertain to employment-related matters. Many of the records relate directly to the staffing problems faced by the former Parry Sound Police Force. The documents at issue also address certain classification issues surrounding the employment of the former Chief of Police by the OPP. Other records relate directly to the evaluation of the other former members of the Force by the OPP and the decision to hire or not hire each of these individuals. In my view, the subject of all of these records relates directly to employment-related matters involving the members of the former Parry Sound Police Force and their possible employment by the OPP.

A number of previous orders have addressed the issue of whether or not an institution “has an interest” in a matter for the purposes of section 65(6)3. In *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355, leave to appeal refused [2001] S.C.C.A. No. 509), the Ontario Court of Appeal specifically addressed the meaning of the phrase “in which the institution has an interest”. 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 once records are excluded from the operation of the *Act*, they remain excluded.

I agree with the reasoning and approach taken by Adjudicator Morrow in Order PO-2106, referred to in the Ministry’s representations. Applying that reasoning to the circumstances present in this appeal, I agree that the Ministry, through the OPP, has more than a mere curiosity or concern “about appointments, transfers, resignations and promotions involving members of the OPP force” and that “[T]hese are notable events impacting the OPP and its members.” I also conclude that the records relate to the OPP’s management of its “own workforce”. In the circumstances, I find that the OPP, and therefore the Ministry, has an “interest” in all of the information at issue, and that the second part of the third requirement has been met.

In summary, I am satisfied that the Ministry has provided me with sufficient evidence to establish all three components of the test under section 65(6)3. None of the exceptions in section 65(7) are present, and I find that all of the remaining records at issue in this appeal are excluded from the scope of the *Act* due to the operation of section 65(6)3.

SCOPE OF THE REQUEST

There exists some confusion between the Ministry and the appellant as to the scope of the request and the whereabouts of all of the possible responsive records. The appellant is of the view that records relating to the disbandment of the Parry Sound Police Force in 1988-89 ought to exist in the record-holdings of both the OPP and the Ontario Civilian Commission on Policing Services (OCCPS), as the successor organization to the Ontario Police Commission. However, I find that the correspondence received from the appellant is not helpful in clarifying either his

reasons for this belief or providing a clear idea of what records he might still be seeking. I note also that the appellant declined the opportunity to participate in the mediation stage of the processing of this appeal and provided only the most rudimentary of representations to me at the inquiry stage.

This appeal involved a request for access to a large number of records maintained in several locations with respect to events that took place 17 or 18 years ago. The Ontario Police Commission no longer exists, further complicating the difficulty of identifying where records which it maintained respecting the Parry Sound Police Force in 1988-89 might be. I note that the Ministry has expended a great deal of time and expense in attempting to respond to the appellant. It has provided him with a great many records and arranged for records on microfiche to be made available to the appellant at no cost. As far as I am able to determine, the appellant has not assisted in this process in any meaningful way.

In the circumstances of this appeal, I find that the Ministry has complied with its obligations under section 24(2) of the *Act* in attempting to assist the appellant to provide the Ministry with sufficient detail in his request to enable it to respond. I am satisfied, based on my review of the records and the representations submitted by the Ministry, that it has met its obligations under section 24(2) and has adequately responded to the appellant's request, as framed.

ORDER:

1. I uphold the Ministry's decision to deny access to the records.
2. I find that the Ministry has satisfied the requirements of section 24(2) in the manner in which it has responded to the request, as framed.

Original Signed by: _____
Donald Hale
Adjudicator

_____ March 3, 2005