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

ORDER PO-2396

Appeal PA-040086-1

Ministry of Community Safety and Correctional Services

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NATURE OF THE APPEAL:

This appeal concerns a decision of the Ministry of Community Safety and Correctional Services (the Ministry) made pursuant to the provisions of the *Freedom of Information and Protection of Privacy Act* (the *Act*). The requester (now the appellant) made a request under the *Act* for the following information:

> All related documents regarding appointments/reappointments of [Toronto Transit Commission (TTC)] special constables: for example: the procedures for appointment/reappointment, the sign off steps of approval for special constables from the manager, Assistant Minister, and the Minister himself; the list of names of those appointed/reappointed from Jan.1, 2002 to Dec. 22, 2003 and as well all other related documents regarding TTC special constables.

The Ministry issued a decision letter, denying access to the responsive information pursuant to 65(6) (labour relations and employment records) of the *Act*. In addition, the Ministry states in its decision letter that the appellant previously requested and obtained a copy of the *Special Constables Practitioner's Handbook* (the *Practitioner's Handbook*) which details best practices for the appointment/reappointment of special constables.

The appellant appealed the Ministry's decision to deny access to the responsive information.

During the mediation stage the Ministry confirmed that it is relying on 65(6)3 of the *Act* to deny access to the information at issue.

Also during mediation, the appellant advised that he was not interested in the lists of special constables employed by the TTC between January 1, 2002 and December 22, 2003. These lists are, therefore, no longer at issue.

Regarding the *Practitioner's Handbook*, the appellant indicated that he had misplaced his copy. The Ministry advised the appellant that he could request another copy from the Ministry.

Further mediation was not possible and the file was transferred to inquiry.

I commenced my inquiry by sending a Notice of Inquiry to the Ministry and seeking its representations on the application of section 65(6). The Ministry submitted representations and agreed to share them in their entirety with the appellant. I then sent a Notice of Inquiry to the appellant along with a copy of the Ministry's representations. The appellant submitted representations.

RECORDS:

There are eight pages of records at issue, comprised of documentation relating to the appointment of one TTC special constable pursuant to the *Police Services Act* (*PSA*). The Ministry indicates that these records form a representative sample of the requested records, being documentation associated with the appointment of special constables under the *PSA*.

DISCUSSION:

LABOUR RELATIONS AND EMPLOYMENT RECORDS

General principles

Section 65(6) is record-specific and fact-specific [Order M-927]. If section 65(6) applies to a specific record, in the circumstances of a particular appeal, and none of the exceptions listed in section 65(6)7 are present, then the record is excluded from the scope of the *Act*.

As stated above, the Ministry has taken the position that section 65(6)3 applies to the information at issue in this appeal.

Section 65(6)3 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:
>
> 3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

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].

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].

Section 65(6) may apply where the institution that received the request is not the same institution that originally "collected, prepared, maintained or used" the records, even where the original institution is an institution under the *Municipal Freedom of Information and Protection of Privacy Act* (the municipal *Act*) [Orders P-1560, PO-2106].

Section 65(6)3: matters in which the institution has an interest

The test

For section 65(6)3 to apply, the institution 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

The Ministry submits that its staff collected, prepared, maintained and/or used the information in the records in relation to meetings, consultations, discussions and/or communications in respect of the appointments and/or reappointments of TTC special constables pursuant to section 53 of the *PSA*.

The Ministry reproduces section 53 of the *PSA* in its representations. It reads:

> 53. (1) With the Solicitor General's approval, a board may appoint a special constable to act for the period, area and purpose that the board considers expedient.
>
> (2) With the Solicitor General's approval, the Commissioner may appoint a special constable to act for the period, area and purpose that the Commissioner considers expedient.
>
> (3) The appointment of a special constable may confer on him or her the powers of a police officer, to the extent and for the specific purpose set out in the appointment.
>
> (4) A special constable shall not be employed by a police force to perform on a permanent basis, whether part-time or full-time, all the usual duties of a police officer.
>
> (5) Subsection (4) does not prohibit police forces from authorizing special constables to escort and convey persons in custody and to perform duties related to the responsibilities of boards under Part X.
>
> (6) The power to appoint a special constable includes the power to suspend or terminate the appointment, but if a board or the Commissioner suspends or terminates an appointment, written notice shall promptly be given to the Solicitor General.
>
> (7) The Solicitor General also has power to suspend or terminate the appointment of a special constable.

The Ministry states that for the purposes of the *PSA* the term "board" refers to a municipal police services board and that the duties and powers of the "Solicitor General" are now exercised by the Ministry. The Ministry states that the "employer" in this case is the TTC.

The Ministry states that the "process for the initial appointment of a special constable begins when an employer identifies a need for the candidate of a particular position to have special constable status." The Ministry indicates that in this case, the TTC, as the employer, "initiated the appointment process by requesting that specific employees be appointed as special constables." The Ministry submits that the collection, preparation, maintenance and/or use of the information at issue by the Ministry was "on behalf of the TTC in its capacity as an employer of special constables." The Ministry acknowledges that the TTC is a municipal institution under the *Municipal Freedom of Information and Protection of Privacy Act* but believes it should be "considered an 'institution' for the purposes of section 65(6) of the [*Act*]" in accordance with the reasoning in Order P-1560.

The Ministry submits that the records at issue were collected, prepared and/or used on behalf of an institution (the TTC) in relation to meetings, consultations, discussions or communications about employment-related matters in which the TTC, as the employer, has an interest. The Ministry, therefore, concludes that pursuant to section 65(6) the *Act* does not apply to the records.

In response, the appellant's representations focus on the Ministry's status and role in the appointment of special constables. The appellant states that he has made telephone inquiries of the Ministry regarding its role in the appointment of special constables and the responses he has received from Ministry staff support his view that the Ministry "has no labour relations [or employment] interest regarding the [appointment of] special constables" and that the main responsibility for appointments lies with the Police Services Board and the TTC.

The appellant also relies on a letter from an Assistant Deputy Minister with the Ministry to a third party who had inquired into the procedure for filing a complaint against a special constable. In this letter the writer suggests that this third party send a letter of complaint to the TTC, the special constable's employer in that case, and copy the Chair of the Toronto Police Services Board with the letter "as the Board is responsible for appointing special constables".

The appellant has chosen not to address the Ministry's assertion that the TTC should be treated as an institution under section 65(6) of the *Act*, following the reasoning in Order P-1560. The appellant simply states that the TTC is "not part of the Ministry" and the Ministry "has no authority to fire, discipline, [or] promote TTC special constables. This is solely the responsibility of the TTC."

Analysis and findings

For the purposes of my analysis and, in particular, the interpretation of section 53(1) of the *PSA*, I accept that the term "board" means police services board, as the case may be, and that the

duties and powers of the "Solicitor General" are now exercised by the Ministry. I now turn to an examination of the three part test under section 65(6)3.

Part 1

In Order P-1560, Adjudicator Holly Big Canoe found that the meaning of the word "institution" in section 65(6) of the *Act* should be extended to include a municipal institution under the municipal *Act*. Adjudicator Big Canoe concluded that the Legislature intended that the *Act* and municipal *Act* operate as a "single, coherent, logical legislative scheme, with certain express distinctions" to avoid an "absurd result", where it is clear that the municipal *Act* equivalent of section 65(6) [section 52(3)] would otherwise apply had the file been transferred to the municipal *Act* institution. In reaching this conclusion Adjudicator Big Canoe states, in part:

> In the present case, if the [Ontario Labour Relations Board (OLRB)] had exercised its discretion to transfer the request to the Hamilton-Wentworth District School Board (HWDSB)], it is clear that the section 52(3) exclusion in the municipal Act would be available, as found by Inquiry Officer Higgins in Order M-962. The only difference between the facts in Order M-962 and the present case is that the institution receiving the request exercised its discretion not to transfer the request.
>
> These different outcomes may be regarded as an "absurd" result, as that term is understood in law. Driedger in Driedger on the Construction of Statutes (3rd edition, 1994 (Butterworths) at page 79) says "consequences judged to be unjust or unreasonable are regarded as absurd." There are different categories of absurdity, including:
>
> > **Irrational distinctions.** A proposed interpretation is likely to be labelled absurd it if would result in persons or things receiving a different treatment for inadequate reasons, or for no reason at all. This is one of the most frequently recognized forms of absurdity.
>
> In my view, the Act and the municipal Act are intended to function as a single, coherent, logical legislative scheme, with certain express distinctions based on variations in how local and provincial government operate. For example, there is an exemption for "closed meetings" in the municipal Act and a "Cabinet records" exemption in the Act. As well, Part I of the Act, which sets out the administration of the office of the IPC is not repeated in the municipal Act, because they are meant to be read together.
>
> If the Act and the municipal Act are to be read together as a coherent scheme, would the Legislature intend that the section 65(6) exclusion would be available to the OLRB when the employer is a provincial institution, but not available when the employer is a municipal institution? In my view, the question arises whether a

municipal institution can be considered as an institution for the purposes of section 65(6) of this Act.

The word "institution" is defined in section 2(1) of the Act as follows:

> "institution" means,
>
> (a) a ministry of the Government of Ontario, and
>
> (b) any agency, board, commission, corporation or other body designated as an institution in the regulations.

According to Pierre-Andre Cote, in The Interpretation of Legislation in Canada, definitions can be inclusive or exhaustive:

> A first reading is usually sufficient to indicate whether a definition is exhaustive or not: if it is introduced by the word "means" it is deemed to be exhaustive. But a definition introduced by the word "includes" serves only to extend the ordinary meaning or to illustrate certain applications.

Accordingly, it appears that the definition of the word "institution" in the Act was intended to be exhaustive. Additionally, when the municipal Act became law, the Legislature amended sections 25, 39, 41, 50 and 58 specifically to refer to the municipal Act. There is no indication that the Legislature intended that municipal institutions be included in the Act except to the extent that the municipal Act is specifically referenced in the Act. However, at the time the municipal Act became law, section 65(6) was not included in the Act. In my view, it is arguable that had section 65(6) been in the Act at the time the municipal Act became law, additional amendments may have been made.

If the institution receiving the request uses section 25 to transfer the request to another institution with a greater interest in the records, the "different treatment for inadequate reasons" can be avoided. In my view, the situation reviewed by Inquiry Officer Higgins in Orders P-1422 and M-962 is a clear example of how the Act and the municipal Act work in harmony. However, the use of section 25 is discretionary. In my view, the Legislature could not have intended that a question of jurisdiction would be determined by the whim of the institution receiving the request, and I disagree with Inquiry Officer Higgins' finding in Order P-1422 that, where the employer is an institution under the municipal Act, but not an institution for the purposes of section 65(6) of the Act, the fact that the employer may have received (and hence "collected", "used", etc.) some of the records is irrelevant for the purpose of deciding whether section 65(6) applies.

> If the meaning of "institution" in section 65(6) was extended to include institutions as defined in the municipal Act, both provincial and municipal government employers providing records to the OLRB would enjoy the "protection" of that provision. Inconsistent treatment between them is avoided. In my view, this interpretation is more consistent with the Legislature's approach to exclusions in the rest of section 65, which are not location specific but record specific. Accordingly, I find that, in the circumstances of this appeal, the meaning of the word "institution" in section 65(6) should be extended to include the HWDSB, an institution under the municipal Act. As a result, the OLRB records which were sent by or to the HWDSB are excluded from the scope of the Act.

Applying Adjudicator Big Canoe's analysis to this case, I am satisfied that the TTC qualifies as an institution for the purposes of section 65(6)3 of the *Act*. In my view, the information at issue was collected, prepared, maintained or used by the Ministry on the TTC's behalf pursuant to the approval of appointments process set out in section 53(1) of the *PSA*.

The records provided to me, which I have reviewed for the purpose of making this decision, consist of a package of documents submitted by a named board to the Ministry for approval of the appointment of a named individual as a TTC special police constable. I accept that these records comprise a representative sample of the documents that would be collected, prepared, maintained or used by the Ministry on the TTC's behalf in reviewing and approving an appointment application. The records include a completed Ministry "Application for Appointment" form regarding the appointment application of a named individual, inter-Ministerial correspondence regarding the approval process, an approved Ministry "Special Constable Appointment" form for a named individual's appointment application, and a letter from a Ministry employee to the board confirming the approval of twelve special constable appointments.

Some of these documents have been "prepared" by the Ministry while others have been "prepared" by the board. However, it is clear that all of the records have been "collected", "maintained" and "used" by the Ministry on the TTC's behalf in the approval of appointments process. Accordingly, I am satisfied that part 1 of the test under section 65(6)3 has been met.

Part 2

Given the nature of the records and their use in communications between the Ministry, the board and the TTC, I am also satisfied that the collection, preparation, maintenance or usage of the information at issue was "in relation to […] communications" with regard to the approval of special constable appointments. Therefore, I find that part 2 of the test under section 65(6)3 has been met.

Part 3

I must now determine whether these communications were about "employment-related matters" in which the TTC "has an interest".

Regarding the first element of part 3 of the test, the information at issue concerns the appointment or reappointment of special constables and their employment with the TTC. Therefore, I am satisfied that the very nature of the information is "about employment related matters".

With respect to the second element of part 3 of the test, the phrase "in which the institution has an interest" means more than a "mere curiosity or concern" [*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]. In this case, the special constables are employed by the TTC. In its capacity as employer, I concur with the appellant that the TTC has the power to discipline and directly impact the employment status of the special constables. In my view, in light of this employment relationship, the TTC has an interest that is far more than a mere curiosity or concern within the meaning of section 65(6)3. Accordingly, I find that part 3 of the test under section 65(6)3 has been met.

I find that none of the exceptions listed in section 65(7) applies. Accordingly, I find that the records fall outside the scope of the *Act*.

ORDER:

1. I uphold the Ministry's decision that the information at issue in this appeal falls outside the scope of the *Act*.

Original signed by: May 27, 2005
Bernard Morrow
Adjudicator