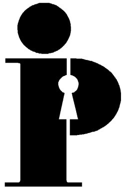

ORDER PO-2426

Appeal PA-030362-1

Ontario Civilian Commission on Police Services

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NATURE OF THE APPEAL:

The requester is an individual who made a complaint under Part V of the *Police Services Act* (the *PSA*) to the Waterloo Regional Police Service (the Police) about the conduct of two police officers. The Police dismissed his complaint on the basis that it was made in bad faith. The requester applied to the Ontario Civilian Commission on Police Services (OCCPS) for a review of the Police's decision. OCCPS reviewed the decision of the Police and decided that the requester's complaint, although not made in bad faith, was unfounded.

After the OCCPS review was completed, the requester made a request to OCCPS under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to "a copy of the complaint file that the [Police] gave [OCCPS] to use in my OCCPS case."

OCCPS identified 87 pages of responsive records. OCCPS issued a decision to the requester, granting access to 20 pages (pages 5-7, 12-15, 20-32). OCCPS denied access in part to three pages (pages 1-4) on the basis of the exemption in section 49(b) (invasion of privacy). OCCPS also took the position that the remaining 63 pages are excluded from the scope of the *Act* pursuant to section 65(6)1 and 3, the exclusion for certain labour relations and employment records.

The requester (now the appellant) appealed OCCPS's decision.

During mediation, the appellant indicated that he is not pursuing access to the information withheld from pages 1-4. As a result, these pages and the section 49(b) exemption are no longer at issue in this appeal. However, the appellant still wishes to appeal OCCPS's decision that the records are outside the scope of the *Act* under sections 65(6)1 and 3.

Mediation did not resolve this appeal, and this office commenced an inquiry. This office sent a Notice of Inquiry to OCCPS setting out the facts and issues in this appeal. OCCPS made representations, a copy of which was shared, in its entirety, with the appellant, along with a copy of the Notice of Inquiry. The appellant provided representations in response. The appellant's representations do not directly address the only issue in this appeal, whether the records at issue are excluded from the scope of the *Act* under section 65(6)1 or 3.

RECORDS:

The records that have been withheld under section 65(6) are all of pages 8-11, 16-19 and 33-87 (63 pages in total).

Pages 8-10 are a letter from the Police addressed to the appellant setting out their disposition of his complaint about the two police officers. Page 11 is a notice of the determination by the Chief of Police or Designate of the appellant's complaint, addressed to the appellant. Both records are part of the file forwarded to OCCPS by the Police.

Pages 16 to 19 are two letters and two fax cover sheets sent by OCCPS to the Police in the course of processing the appellant's application to OCCPS for a review of the Police's disposition of his complaint.

Pages 33 to 87 are the contents of the Police investigative file relating to the investigation of the appellant's complaint, sent to OCCPS at its request, as well as OCCPS's request to the Police to forward their file. The investigation file includes seven memos from police officers to other police officers dealing with procedural matters; the complaint form signed by the appellant; a witness statement signed by the appellant; other witness statements; a copy of the Police Chief's determination on the appellant's complaint; excerpts from police officers' notebooks; and occurrence reports.

DISCUSSION:

LABOUR RELATIONS AND EMPLOYMENT-RELATED RECORDS

Introduction

OCCPS has claimed the application of sections 65(6)1 and 3 of the *Act* for the 63 pages of records listed above.

Section 65(6) of the *Act* provides, in part:

> 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.
>
> 3. Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

Section 65(7) provides exceptions to the section 65(6) exclusions, none of which apply to the records at issue here.

If either paragraph 1 or 3 of section 65(6) applies to the records, then the records are excluded from the scope of the *Act*. I will first consider the application of section 65(6)3.

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

General

In order to fall within the scope of paragraph 3 of section 65(6), OCCPS must establish that:

1. the records were collected, prepared, maintained or used by an 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.

Because of OCCPS's role in reviewing the Police's decision in relation to the appellant's complaint against the police officers, it is clear that it could not itself have "an interest" in that matter. As stated by Adjudicator Donald Hale in Order P-1345 and adopted by Adjudicator Big Canoe in Order P-1560:

> [A]n institution . . . acting as an impartial adjudicator would not "have an interest" in a labour relations or employment-related matter before it, in the sense intended by section 65(6)3. Such an interest would be inconsistent with impartial adjudication.

The review that OCCPS carries out under section 72 of the *PSA* is analogous to the processes of the Ontario Labour Relations Board referred to in Orders P-1345 and P-1560. Both the Board and OCCPS are independent and impartial agencies that make binding decisions on disputes between parties (in OCCPS's case, the police and members of the public). As such, OCCPS's function is inconsistent with having an "interest" in the appellant's complaint in the sense intended by section 65(6)3.

Accordingly, the question here is not whether the records were "collected, prepared, maintained or used by or on behalf of OCCPS in relation to "employment-related matters" in which it "has an interest", but rather, whether this could be said of the Police.

OCCPS submits that:

> The records remaining at issue were either sent to OCCPS by the [Police] or were sent from OCCPS to the [Police]. The [Police are] an institution subject to the *Municipal Freedom of Information and Protection of Privacy Act* [the municipal *Act*] . . . [T]he records remaining at issue would fall within the scope of section 52(3)1, the [municipal *Act*] equivalent of section 65(6)1 of [the *Act*], should the appellant's request have been directed to the [Police].

In my view, it is not possible simply to apply the provisions of the municipal *Act* to a request made to OCCPS, which is an institution under the *Act* rather than the municipal *Act*. Rather, the question is whether the word, "institution" in section 65(6) can encompass an institution under the municipal *Act*.

In Order P-1560, Adjudicator Holly Big Canoe faced the same question. She 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*. She considered it necessary to go beyond the plain words of the *Act* which do not include municipal institutions in order to avoid an "absurd result". In reaching this conclusion, Adjudicator Big Canoe stated 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-André Coté, 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*. The remaining records, however, do not qualify for exclusion under section 65(6), and the OLRB must make a decision respecting the appellant's access to them under the *Act*.

Applying Adjudicator Big Canoe's analysis to this case results in the conclusion that the Police are an institution for the purposes of section 65(6) of the *Act*.

I will therefore consider whether records at issue meet the requirements of section 65(6)3 as a result of the Police supplying or receiving them.

Part 1: collected, prepared, maintained or used

As noted earlier, the records OCCPS seeks to exclude under section 65(6) were either provided to OCCPS by the Police, or sent to the Police by OCCPS. On this basis, I am satisfied that they were either prepared or collected by the Police. I find that this requirement is met.

Part 2: meetings, consultations, discussions or communications

OCCPS's representations do not identify or describe any particular meetings, consultations, discussions or communications relating to the information in the records. However, based on the contents of the records and the statutory scheme governing OCCPS proceedings, and the fact that the records were either sent to or by the Police, I am satisfied that the collection and/or preparation, maintenance and use of the records by the Police was in relation to communications between OCCPS and the Police.

Accordingly, I find that requirement 2 has been met.

Part 3: labour relations or employment-related matters in which the institution has an interest

To meet part 3 of the test, OCCPS must show that the meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

In its representations, OCCPS states:

> . . . [I]nformation supplied by or sent to the [Police] in its capacity as employer of the involved police officers is excluded.

The question of whether police officers are engaged in "employment" within the meaning of this section was canvassed in considerable detail by Adjudicator Laurel Cropley in Order M-899. Based on a number of provisions of the *Police Services Act*, she concluded that, whether or not police officers are "employees" at common law, they are clearly engaged in "employment" in the eyes of the Ontario legislature.

I agree, and accordingly, I have concluded that disciplinary matters involving police officers are "employment-related" matters for the purposes of section 65(6)3 of the *Act*. Therefore, I find that the communications referred to under requirement 2 were "about" employment-related matters.

The remaining question is whether the proceedings before the OCCPS were a matter in which the Police have "an interest".

It is also clear from the factual context of this appeal that the officers in question were officers with the Police. As noted 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, an interest "must relate to more than a mere curiosity or concern", and restricts the application of section 65(6)3 to records relating to an institution's "own workforce". I am satisfied that these requirements are met in this case, and I find that the Police have the requisite "interest". Requirement 3 is therefore met.

As all three requirements are met, I find that the records are excluded from the scope of the *Act* under section 65(6)3.

Accordingly, it is not necessary to consider whether section 65(6)1 applies.

ORDER:

I uphold the decision of OCCPS that the *Act* does not apply to the records at issue and I dismiss the appeal.

Original Signed By: November 4, 2005
John Swaigen
Adjudicator