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

ORDER PO-2639

Appeal PA-060038-1

Ministry of Health and Long-Term Care

Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

BACKGROUND:

The Ministry of Health and Long-Term Care (the Ministry) operates a provincial psychiatric hospital in Penetanguishene, Ontario. The Penetanguishene Mental Health Centre (PMHC) is part of the Ministry, and the Centre's staff are Ministry employees.

NATURE OF THE APPEAL:

The Ministry received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to strike contingency planning for the PMHC. The requester's areas of interest were outlined in the request as follows:

- any and all site/occupation specific memoranda of agreement between the Ontario Public Service Employees Union (OPSEU) and the Crown in Right of Ontario represented by Management Board of Cabinet (Crown) related to the [PMHC], 2005;
- any guidelines developed for the completion of eligibility lists and random draws in the event of a labour disruption related to the [PMHC], 2005;
- eligibility lists for essential and emergency workers, OPSEU locals 329 and 307, related to the [PMHC];
- any documentation or specific agreements describing essential and emergency services at the [PMHC] in the event of a labour disruption, 2005; and
- any contingency plans developed to respond to a work disruption at the [PMHC], 2005.

The Ministry initially identified 112 records as responsive to the request, but informed the requester that the records are excluded from the *Act* as they fall within the ambit of section 65(6)3, the exclusion for labour relations and employment records.

The requester, now the appellant, appealed that decision.

This office appointed a mediator to try to resolve the issues between the parties. During mediation, the Ministry prepared an index of records, and sent a copy to this office. The Ministry declined to provide the appellant with a copy and took the position that sharing the index would reveal the content of the records at issue. However, the Ministry also reconsidered its decision and issued a revised decision letter to the appellant, granting full access to 21 records. One additional record was located at this time, bringing the total number of records to 113. The Ministry maintained its assertion that the remaining 92 records are excluded from the operation of the *Act* pursuant to section 65(6)3.

No further mediation was possible and the appeal was transferred to adjudication where it was assigned to me to conduct an inquiry. Initially, I sent a Notice of Inquiry to the Ministry, outlining the facts and issues and seeking representations on the possible application of the exclusionary provision in section 65(6) of the *Act* to the records.

During the preparation of its representations, the Ministry decided to disclose four additional records to the appellant and issued a second revised decision letter accordingly. Following

review of these records, the appellant confirmed that it still wished to pursue access to the 89 records remaining at issue.

I then sent a modified Notice of Inquiry along with a complete copy of the Ministry's representations to the appellant seeking submissions, which I received. Having reviewed the appellant's representations, I determined that these representations raised issues to which the Ministry should be given an opportunity to reply. Notably, the appellant narrowed the appeal by abandoning pursuit of access to draft versions of the agreements requested, but expressed concern about the difficulty encountered in making submissions as a consequence of the Ministry declining to provide a detailed index of records. The appellant also raised a related concern with the adequacy of the Ministry's search for responsive records.

The appellant's complete representations were sent to the Ministry, along with a Reply Notice of Inquiry. With its reply representations, the Ministry provided a revised index of records for this office and for the appellant, as well as offering submissions on the search for responsive records.

I provided the Ministry's representations and index of records to the appellant inviting sur-reply representations, which I received. As a consequence of the description of the records provided in the index and based on the Ministry's explanation of the search undertaken, the appellant withdrew the appeal of all issues except the Ministry's decision regarding the exclusion of eight records pursuant to the operation of section 65(6).

Accordingly, the Ministry's claim of section 65(6) of the *Act* is the sole issue to be addressed in this order.

RECORDS:

The 106 pages of records remaining at issue are those identified in the Ministry's October 2006 Index of Records as:

- Record 10: Document re: 2002 Strike Client Outcomes, undated (2 pages);
- Record 17: OLRB Application materials, undated (16 pages);
- Record 18: OLRB Application materials, undated (16 pages);
- Record 23: OLRB Application materials, undated (5 pages);
- Record 45 (duplicated at Record 52): Letter from Dorothy Mahoney, December 22, 2004 (2 pages);
- Record 47: Email to PMHC Managers, April 21, 2005 (1 page);
- Record 56: Email from Deborah Duncan and teleconference notes, July 6, 2004 (8 pages); and
- Record 111: Application under CECBA, April 13, 2005 (56 pages).

DISCUSSION:

LABOUR RELATIONS AND EMPLOYMENT RECORDS

The Ministry takes the position that the *Act* does not apply to the records because they fall within the exclusion in section 65(6).

General Principles

Section 65(6) of the *Act* 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:
>
> 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.

The interpretation of sections 65(6) and (7) is a preliminary issue which goes to the jurisdiction of the Commissioner, or her delegate, to continue an inquiry into whether or not a record is subject to any of the exemptions found in the *Act*. If section 65(6) applies to a record, it is excluded from the scope of the *Act*, unless it fits within one of the exceptions in section 65(7).

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]. In order to satisfy the definition, more than a superficial connection between the creation, preparation, maintenance and/or use of the records and the labour relations or employment-related matter is required [Order MO-2024-I].

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 phrase "in which the institution has an interest" means more than a mere curiosity or concern, and refers to matters involving the institution's own workforce [*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, ("*Solicitor General*")].

Furthermore, 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 [*Solicitor General*].

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

Although other paragraphs of section 65(6) are cited in relation to some of the eight records, the Ministry makes a common claim of the third paragraph for all of them.

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

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

Representations

The Ministry describes the genesis of the records at issue in this appeal in the following manner:

> All the records … were created by or for the Ministry and [PMHC] for labour relations purposes. More specifically, these records were collected, prepared, maintained and/or used by [PMHC] for strike contingency planning, in accordance with Part IV of the *Crown Employees Collective Bargaining Act, 1993*, S.O. 1993, c. 38 ("CECBA"), which requires that the Crown employer and its employees negotiate an essential services agreement ("ESA") prior to the expiry of their collective agreement. The ESA must be in place by the time the employees are entitled to strike.

The Ministry continues by outlining the requirements of an ESA pursuant to section 34 of the CECBA, as well as the process of applying to the Ontario Labour Relations Board (OLRB) under section 36 of the CECBA for determination of unresolved issues between the parties.

The Ministry states that the records address essential services and related matters governed by the CECBA, including draft ESAs, documents reflecting the Ministry's negotiating position, and materials prepared in relation to the OLRB proceedings, all of which, in the Ministry submission,

this office has held are excluded from the *Act*. The Ministry cites Orders P-1540, P-1464, P-1560, and MO-1592-R in support of this position, but also submits that reference must be made to the plain wording of the section and the Ontario Court of Appeal's decision in *Solicitor General* (citation above).

Submitting that the records were prepared in anticipation of "imminent or potential labour disruptions", the Ministry adds that the records reflect communications, discussions and consultations between Ministry and PMHC management and staff regarding ESA content and negotiations, as well as OLRB applications under the CECBA. The Ministry argues that by their very nature, all of these records are inherently about labour relations matters in which the Ministry has an interest because they deal with labour disruption issues.

On the final requirement of section 65(6)3, the Ministry submits:

> … [T]he meetings, consultations, discussions and/or communications were clearly and obviously about labour relations in which the Ministry has a very strong interest. Potential labour disruptions and the statutory and administrative processes that are necessary to prepare for and cope with such disruptions are inherently labour relations matters in which the Ministry, as employer, has a direct and significant interest.

Regarding the possible relevance of the exceptions in section 65(7) of the *Act*, the Ministry states that it has disclosed all final agreements, and explains that no final 2005 ESA for PMHC was ever signed because a strike was averted by the resolution of issues between the parties. Furthermore, the Ministry argues, section 65(7) does not apply to the remaining records since draft or annotated versions of ESAs do not fit under any of the exceptions.

The Ministry also notes that the various draft versions of the proposed 2005 ESA and related appendices previously disclosed to the appellant were released through the Ministry's discretion since such records are not subject to the *Act*.

Having reviewed the Ministry's reply representations and the index, the appellant offered submissions based on the description of the records in the latter document. With respect to Record 10 ("2002 Strike Client Outcomes"), the appellant argues that since it appears to describe the impact of the 2002 OPSEU strike on patients, its content does not fit within the exclusion in section 65(6)3. Further, the appellant argues that this record does not satisfy the requirements of the exclusion since "an assessment of the impact of a strike on patients at the PMHC is not 'about labour relations or employment-related matters'."

The appellant also submits that the content of Records 45, 47 and 56 suggested by the description in the index similarly would not fall under the exclusion in section 65(6)3.

With regard to Records 17, 18, 23 and 111, which are described in the index as "OLRB Application materials" or "Application under CECBA", the appellant argues that these records

are not excluded from the *Act* pursuant to section 65(6)3 and that the orders relied upon by the Ministry in its submissions can be distinguished. The appellant states:

> The requests at issue in P-1345 and P-1560 comprised requests for access to records related to individual grievances before the OLRB. The interpretation of ss. 65(6) in the context of proceedings before the OLRB respecting the determination of essential services agreements is still to be formulated.
>
> The appellant requests access to submissions and application materials to the OLRB, not institutional records respecting labour relations. Further, OLRB proceedings are public proceedings and all documents filed at such proceedings become documents in the public domain.

With respect to Record 111, the appellant refers to OLRB application materials previously disclosed in full (as Record 112) and submits that "the final versions of documents submitted to the Board are not being used by or on behalf of the institution but [were] created for use by the Board." The appellant's submission is apparently based on the view that Record 111 is a final version of these materials.

The remainder of the appellant's representations on the records referred to in the index as "OLRB Application" documents detail the requirements of an essential services agreement under section 34 of the CECBA. The appellant's submissions conclude with the following statement:

> Essential services, as defined in the CECBA, are the services required to prevent risks to the public, including, in this case, patients at [the PMHC]. It is no accident that the wording of the CECBA coincides closely with the wording of section 11 of [the *Act*]. In the context of a strike, the lives, health and safety of patients under psychiatric detention hinge upon the delivery of services deemed essential and/or may be directly undermined by services left out of the definition of "essential services". Should the Adjudicator find that the records requested are excluded by subsection 65(6) of [the *Act*] …, such an exclusion is overridden by the operation of section 11, which applies despite any other part of [the *Act*].

Analysis and Findings

Before proceeding with my analysis of section 65(6) of the *Act*, a preliminary comment in response to the appellant's reference to the exemption in section 11 is in order. Specifically, it bears emphasis that the exclusions found in section 65(6) – if found to apply – remove records entirely from the purview of this office. Such exclusions cannot be overridden by any provision contained in another part of the *Act*, including exemptions in Part II such as section 11. Moreover, the duties and responsibilities outlined in section 11 of the *Act* belong to the head of the institution alone, and this office has no jurisdiction to order disclosure of a record pursuant to section 11 [Order 187].

In my view, consideration of the underlying purpose of the jurisdictional exclusion in section 65(6) of the *Act* offers useful context for its analysis. As described by the legislators who drafted it, section 65(6) of the *Act* was enacted

> As part of "An Act to restore balance and stability to labour relations and to promote economic prosperity and to make consequential changes to statutes concerning labour relations": Bill 7, 1st Session, 36th Legislature, 1995; "[a]lso, we propose to amend the *Freedom of Information and Protection of Privacy Act* ... to ensure the confidentiality of labour relations information": Hon. David Johnson (Chair of Management Board of Cabinet), Official Report of Debates, October 4, 1995.

Part 1 – collected, prepared, maintained or used

The first requirement is met if the records were collected, prepared, maintained or used by the Ministry or on its behalf. I have considered the representations of the Ministry and the appellant, and I have also reviewed all of the records.

I find that all of the records were collected, prepared, maintained and/or used by the Ministry, thereby meeting the first of the three requirements for the application of section 65(6)3.

Part 2 – in relation to meetings, discussions, communications

For the second requirement to be met, I must be satisfied that the Ministry collected, prepared, maintained or used the records in relation to meetings, discussions, or communications. Once again, I have considered the Ministry's and the appellant's representations on this requirement, as well as the records themselves.

I have also considered previous orders of this office, including Order MO-2024-I. In that appeal, Senior Adjudicator John Higgins elaborated on the nature of the term "in relation to" in circumstances where the institution sought to rely on section 52(3)1 (the municipal equivalent of section 65(6)1) to exclude records relating to amounts it paid to a law firm for legal services. Senior Adjudicator Higgins stated:

> [T]he term "in relation to" in section 52(3) has previously been defined as "for the purpose of, as a result of, or substantially connected to" [Order P-1223]. In my view, meeting this definition requires more than a superficial connection between the creation, preparation, maintenance and/or use of the records and the labour relations or employment-related proceedings or anticipated proceedings. For example, the preparation of the record would have to be more than an incidental result of the proceedings, and would have to have some substantive connection to the actual conduct of the proceedings in order to meet the requirement that preparation (or, for that matter, collection, maintenance and/or use) be "in relation to" proceedings. This interpretation would also apply under sections 52(3)2 and 3, which require that the collection, preparation, maintenance and/or use of the

> records be "in relation to" either negotiations or anticipated negotiations, or to meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

I agree with the reasoning of the Senior Adjudicator, and I adopt it for the purposes of this order.

In the circumstances of this appeal, and with the benefit of having reviewed the records, I am satisfied that they were collected, prepared, maintained or used in relation to meetings, consultations, discussions or communications.

Part 3 – labour relations or employment-related matters in which the Ministry has an interest

Under this final part of the test, records found to have a "substantial connection" to labour relations or employment-related matters in which the Ministry has an interest may be excluded.

Records 10, 17, 18, 23 and 111 are all draft or other versions of documents which were collected or prepared for the OLRB proceeding aimed at determining contentious issues related to the statutorily-required ESA. Records 45, 47 and 56 are internal communications in the form of letters, emails and notes related to some of those same contentious issues.

In Order P-1384, Inquiry Officer Anita Fineberg considered the possible application of section 65(6)3 to records similar to the ones at issue in this appeal. In that case, the institution argued that the records resulting from meetings, discussions or communications about "the OLRB ruling, the essential services agreement and the OPSEU strike…" were about labour relations for the purposes of part 3. Inquiry Officer Fineberg stated the following:

> As I did in my discussion of section 65(6)1, I find that these are labour relations matters. I also accept the submissions of the Ministry that it "has an interest" in these matters under the CECBA and the MIA [*Meat Inspection Act*]. The Ministry also has an interest in complying with the OLRB ruling, the Essential Services Agreement and the court proceedings and claims against the Crown which are continuing.

Notably, in Order P-1384, Inquiry Officer Fineberg had adopted the reasoning of former Assistant Commissioner Mitchinson in Order P-1242 in requiring that the interest engaged by the record be a *legal* one. The Court of Appeal decision in *Solicitor General* (above) overturned the former Assistant Commissioner's finding on that basis and it is now accepted that the nature of the interest need not be legal. However, I am still in agreement with the finding of Inquiry Officer Fineberg in Order P-1384 that the CECBA and proceedings before the OLRB affect the Ministry's rights and obligations. In my view, these considerations carry considerable weight in establishing the existence of an interest in the records on the part of the Ministry.

The appellant sought to distinguish certain orders relied upon by the Ministry (Orders P-1345 and P-1560) and to persuade me that the application of these orders should be limited to their specific context: individual grievances brought before the OLRB. As I understand it, the

appellant is suggesting that this office might yet adopt a different interpretation of section 65(6) in the context of OLRB proceedings involving the determination of issues related to ESAs. In my view, however, the finding on the existence of "an interest" in those orders was not conditional upon the nature of the proceeding before the OLRB, but rather the institution in receipt of the request. In Orders P-1345 and P-1560, the access request was directed to the OLRB itself as an institution under the *Act* and the only involvement of the OLRB was in its role as adjudicator of the grievance before it. In those orders, Inquiry Officers Hale and Big Canoe found that the OLRB's role as an impartial adjudicator would be inconsistent with having "an interest" in the dispute in the sense intended by section 65(6)3. As a consequence, only those records generated by the OLRB as the arbitrator, and not used, collected or maintained by any party to the proceedings were subject to the *Act*.

Instead, a finding under this part of the test for exclusion under section 65(6)3 hinges on there being sufficient evidence to persuade me that the records qualify as labour relations or employment-related matters in which the Ministry – as the institution receiving the request - has an interest.

In the circumstances of this appeal, I find that the Ministry's obligations under the CECBA, its subsequent involvement in the OLRB process, and the planning described in the records demonstrably qualify as labour relations matters in which it has "an interest". Accordingly, I find that the third requirement of section 65(6)3 has been established for Records 10, 17, 18, 23, 45, 47, 56 and 111.

The Ministry has established all of the requirements of section 65(6)3 of the *Act*. Moreover, since none of the exceptions contained in section 65(7) are applicable in the circumstances of this appeal, I find that the records are subject to the exclusion in section 65(6)3.

Although I may be bound by the wording of section 65(6)3 of the *Act* to uphold the Ministry's claim that the records are excluded from the *Act*, it must be noted that section 65 does not prohibit an institution from disclosing records outside the access regime established by the *Act*. Indeed, in this appeal, it should be acknowledged that the Ministry has exercised its discretion to disclose certain records to the appellant even though these may also have been excluded from the *Act* following consideration by me.

ORDER:

I uphold the Ministry's decision that the records are excluded from the scope of the *Act* as a result of the operation of section 65(6)3.

Original Signed By: January 30, 2008
Daphne Loukidelis
Adjudicator