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

ORDER PO-2615

Appeal PA-050222-1

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*) from an individual requesting access to all correspondence between a named case manager employed by the Ontario Civilian Commission on Police Services (OCCPS) and an internal affairs investigator on or about August 2002 relating to why criminal charges for breaking and entering were not laid by the Brantford Police Service (the Police) against the requester's mother. The OCCPS review arose as a result of a complaint about the conduct of three Police officers under the *Police Services Act* (the *PSA*).

The Ministry identified records responsive to the request and granted partial access to them. In its initial decision letter, the Ministry relied on the discretionary exemptions in sections 49(a) (refusal to disclose requester's own personal information), in conjunction with sections 13(1) (advice and recommendations) and 15(b) (relations with other governments), and 49(b) (personal privacy) with particular reference to the factor in section 21(2)(f) (highly sensitive) and the presumption in 21(3)(b) (information compiled as part of an investigation) to deny access to some of the information it withheld. The Ministry also relied on the exclusionary provision in section 65(6) of the *Act* to withhold access to a number of the responsive records.

The requester (now the appellant) appealed the decision.

At mediation, the appellant took the position that other responsive records ought to exist. As a result, the reasonableness of the Ministry's search for responsive records became an issue in the appeal. Also during mediation, the Ministry issued a supplementary decision letter. The letter advised the appellant that it had decided to provide access to the information on page 15 that it had withheld under the discretionary exemption in section 49(a). As a result, the information on page 15, and the application of section 49(a) is no longer at issue in the appeal.

Mediation did not resolve the matter and it was moved to the adjudication stage.

This office sent a Notice of Inquiry to the Ministry, initially, seeking representations on the issues in the appeal. The Ministry provided representations in response in which it advised that, after a review of the issues in this appeal, it had decided to provide access to the information on pages 8, 13 and 14 that were withheld under the discretionary exemption in section 49(b). The Ministry sent the appellant a further supplementary decision letter along with copies of the records it was now releasing. As a result, those pages and the application of section 49(b), is no longer at issue in the appeal. A Notice of Inquiry, along with the complete representations of the Ministry, was then sent to the appellant who provided representations in response.

RECORDS

The records the Ministry identified as responsive to the request are associated with an identified OCCPS review file. Remaining at issue in the appeal are OCCPS correspondence to the Police (pages 10, 23 and 53), OCCPS facsimile transmission cover pages for facsimiles to the Police (pages 24, 27, 46, 54 and 55) and a seven page letter sent from the Police to OCCPS (pages 16 to 22). Remaining to be determined in this appeal is whether the Ministry conducted a reasonable search for responsive records and whether section 65(6) excludes the above listed records from

the operation of the *Act*. All other issues were resolved at mediation or as a result of the Ministry's supplementary decisions.

DISCUSSION:

SEARCH FOR RESPONSIVE RECORDS

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24 of the *Act* [Orders P-85, P-221, PO-1954-I]. Although an appellant will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records within its custody or control [Order P-624].

A reasonable search is one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request (see Order M-909).

In its representations the Ministry describes the steps it took to clarify the request and search for responsive records. The Ministry submits that:

> With respect to the matter of request clarification, the Ministry sent the appellant a letter on June 21, 2005, requesting clarification of the request that had been submitted. The Ministry ultimately interpreted the appellant's request to be for all OCCPS records associated with OCCPS review [identified file number].
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> It should be noted that during a review, the responsible case manager makes a presentation to the members of the review panel. A verbal discussion is then held regarding the complaint issues. The parties in attendance do not take notes. After completion of the review, a decision is made pursuant to section 72(8) of the *PSA*. The case manager documents the decision on the Case Summary.
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> The review procedures are reflected in pages 8 to 15 of the responsive records. These pages have been released to the appellant in their entirety. These records document the process as it specifically relates to the review of the requester's public complaint. It should be noted that the panel members and the observer present at the review of the requester's complaint are no longer with OCCPS.
>
> With respect to the records management practices of OCCPS, the Ministry has been informed that OCCPS follows a one file system. All records relating to a particular review or investigation are retained in a single hard copy file.

> As noted previously, as a result of the requester's second [Freedom of Information] request, the Ministry already possessed a copy of the complete file associated with review [identified file number].
>
> As a result of the requester's third [Freedom of Information] request, the current appeal, the OCCPS senior investigator was contacted and asked to search for any additional responsive records that were created since the appellant's second [Freedom of Information] request. On July 12, 2005, the senior investigator confirmed that no new information had been placed in the review file since the appellant's second [Freedom of Information] request.
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> During appeal mediation, the senior investigator was contacted and asked once again to search once again for any additional responsive records. The senior investigator was also asked to consult directly with the case manager with respect to the possible existence of any additional responsive records.
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> On October 20, 2005, the senior investigator confirmed that no additional responsive records exist. The senior investigator advised that she spoke directly with the case manager. The case manager confirmed that she was not aware of the existence of any additional responsive records. The senior investigator is no longer employed by OCCPS.
>
> On January 31, 2006, the OCCPS senior advisor was contacted to discuss the records search issues. The senior advisor consulted with the case manager in this regard. On February 1, 2006, the senior advisor confirmed that no additional responsive records exist.
>
> It should be noted that the records released to the appellant confirm that the original Brantford Police Service investigation file relating to the requester's *PSA* complaint was returned to the Brantford Police Service on October 4, 2002.

The appellant's representations do not specifically address the adequacy of the Ministry's search for responsive records. Instead, she asserts her belief that a record of a discussion about criminal charges should exist.

Analysis and Findings

I am satisfied that the Ministry's submissions provide a thorough explanation of the efforts it made to identify and locate records that are responsive to the appellant's request and adequately explains why no other responsive records exist. Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the appellant still must provide a reasonable basis for concluding that such records exist. In my view, the appellant has not provided a reasonable basis for concluding that other responsive records exist. Accordingly, I am satisfied that the Ministry's response to the appellant's request as well as its search for responsive records is in compliance with its obligations under the *Act*.

As a result of this finding, it is not necessary to consider the Ministry's alternative argument that because any other responsive records would be excluded by operation of sections 65(6)1 and 65(6)3, no useful purpose would be served in making a determination on the reasonable search issue.

Therefore, I find that the Ministry has conducted a reasonable search for records as required by section 24 of the *Act*.

LABOUR RELATIONS AND EMPLOYMENT RECORDS

Although the appellant made extensive submissions on her concerns about the conduct of the Police and her assertion that injustice occurred, the issue to be decided in this appeal is whether sections 65(6)1 and 65(6)3 of the *Act* operate to remove the responsive records, identified above, from the scope of the *Act*.

Sections 65(6)1 and 3 state:

> 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.

Sections 65(6)1 and 3 are record-specific and fact-specific. If I find that either of those paragraphs applies to a record, it is excluded from the scope of the *Act*. I will first consider the application of section 65(6)3.

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

Section 65(6)3

General

In order for a record to fall within the scope of section 65(6)3, the Ministry must establish that:

1. the record was 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.

In Order PO-2426, Adjudicator John Swaigen addressed a request for records that are similar to the ones at issue in this appeal. In his decision, he extensively considered the roles of OCCPS and a police service in the context of a complaint under the *PSA* and stated:

> 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:
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> > [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.
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> 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.
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> OCCPS submits that:
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> > 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.
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> 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 [if it] 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.
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> 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 agree and find that in the circumstances before me the Police qualify as an "institution" under section 65(6) of the *Act*.

Requirement 1: collected, prepared, maintained or used

The records OCCPS seeks to exclude were either provided to OCCPS by the Police or sent to the Police by OCCPS. On this basis, I am satisfied that those records were either prepared or collected by the Police. Accordingly, I find that requirement 1 has been satisfied.

Requirement 2 - meetings, consultations, discussions or communications

Based on my review of the records, the *PSA*, the submissions of the Ministry, the statutory scheme governing OCCPS proceedings and the fact that the records were sent to or sent 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.

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

In its representations, the Ministry 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.

Therefore, what remains to be determined is whether the proceedings before the OCCPS were a matter in which the Police have the requisite "interest".

It is 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:

1. I find that the Ministry's search for responsive records is reasonable.

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

Original signed by: October 5, 2007
Steven Faughnan
Adjudicator