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

ORDER PO-2678

Appeal PA06-239

Ministry of Community Safety and Correctional Services

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

NATURE OF THE APPEAL:

The Ministry of Community Safety and Correctional Services (the Ministry) received a multi-part request under the *Freedom of Information and Protection of Privacy Act* (the *Act*), for access to all records, of any nature, relating to the arrest of the requester. The charge that led to his arrest was ultimately withdrawn and the requester then commenced a complaint under the *Police Services Act* (*PSA*). A review of the materials filed by the requester indicates his belief that there was no foundation for the charges to be laid. The request was for access to "all documentation" in the possession of the Ontario Provincial Police (OPP) or an identified detachment of the OPP "that substantiated this act" and "… pertaining to this incident prior to, during and after." The broadly worded request also listed a number of specific items which were sought. They included:

- copies of all police reports "where the case was reviewed" which I am treating as a request for the contents of any file where the conduct of a police officer was reviewed,

- copies of the notebooks of the arresting officer and the case officer;

- copies of all court documents and Crown Attorney reports;

- all documents, emails and correspondence of any sort made to, or received from, any other law enforcement agencies, including the Royal Canadian Mounted Police and the Canadian Security Intelligence Service as well as sources outside Ontario and Canada;

- copies of videotapes of statements made by a complainant in the investigation of the criminal charges against the requester;

- any information sent to the Canadian Police Information Centre;

- records of all documentation including fingerprints and photographs, that "were destroyed in accordance with a court order";

- copies of letters from the requester to the OPP, including letters to the Chief of Police, as well as any replies.

In its initial decision letter, the Ministry did not distinguish between the original records that related to the criminal charges and arrest of the appellant, on the one hand, and any copies of those records that were collected, maintained or used in relation to a review of a police officer's conduct, on the other. Instead, relying on the exclusionary provision in section 65(6) of the *Act*, the Ministry simply denied access to any responsive record. The Ministry also took the position that the documents filed in the course of civil or criminal proceedings should be requested from the appropriate court office, directly.

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

During the course of mediation, the Ministry conducted a further search for records and subsequently issued a supplementary decision letter advising that:

- the Ministry did not have possession of the requested Crown Attorney records and that the appellant should make a request for those records to the Ministry of the Attorney General,

- copies of videotapes of statements made by a complainant in the investigation of the criminal charges against the appellant do not exist, and

- access would be granted to the responsive portion of a record which confirms that the appellant's fingerprints and photographs have been destroyed.

The appellant advised the mediator that he was satisfied with the Ministry's response regarding the Crown Attorney records and the records confirming the destruction of his fingerprints and photographs. As a result, access to those records is no longer at issue in this appeal. The appellant took issue with the Ministry's statement that the requested videotapes did not exist and challenged the adequacy of its search for these records. As a result, the reasonableness of the Ministry's search for the requested videotapes is an issue to be considered in this appeal.

Mediation did not fully resolve the appeal and it was referred to the adjudication stage of the process.

I sent a Notice of Inquiry setting out the facts and issues to the Ministry, initially. The Ministry filed representations in response to the Notice. A Notice of Inquiry, along with the complete representations of the Ministry, was then sent to the appellant. The appellant provided representations in response.

RECORDS:

The Ministry ultimately identified the contents of an OPP Professional Standards Bureau file in relation to a complaint the appellant made under the *PSA*, as being responsive to the request. The 524 pages of records in the file include police officers' notes, correspondence, notices, statements, synopses, court documents, occurrence summaries, arrest reports, tables of contents, forms, charts, memoranda, emails, transcripts of examination for discovery and bail proceedings, affidavits and interview notes. The Ministry explains in its representations that pages 1 to 62 are documents that have been maintained and used by the Professional Standards Bureau (PSB) in relation to the *PSA* complaint and pages 63 to 524 consist of a four volume OPP PSB brief containing information that was collected, prepared, maintained and/or used in relation to the complaint.

DISCUSSION:

ADEQUACY OF THE SEARCH FOR RECORDS

Although the adequacy of the search for records was characterized as relating to the videotapes sought by the appellant, it has another more fundamental component. In addition to the records that confirmed the destruction of the appellant's fingerprints, the Ministry only identified the contents of the PSB file as the records in its custody or control that were responsive to the request. Previous orders of this office, including Order M-927, discussed in more detail below, have emphasized the distinction between a request for the contents of an original police investigative file, on the one hand, and a request for information relating to allegations of misconduct against the officers who conducted that original investigation, on the other. For this reason, I asked for submissions on Order M-927 in the Notice of Inquiry. Although the manner in which an institution identifies records responsive to a request is typically addressed as a preliminary issue in an appeal, I will instead be addressing the manner in which the Ministry dealt with the responsiveness of the original police investigative file in my analysis of the application of section 65(6) 1 and 3, below. At this point in my order I will only be addressing the specific request for copies of videotapes of statements made by a complainant in the investigation of the criminal charges against the requester.

Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and
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> …
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

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]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

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 [Order P-624].

A reasonable search would be one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request [Order M-909].

Although a requester 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 Ministry's Search for the Videotapes

The appellant alleges that the Ministry should have custody or control of a copy of two videotaped statements made by a complainant against him.

The Ministry provided an affidavit setting out in detail that nature and extent of its search for the videotapes and deposing that the responsive videotapes were destroyed after criminal charges against the appellant had concluded. In response the appellant expresses surprise that the tapes no longer exist. He suggests that they were destroyed for improper purposes.

In my view, the Ministry has provided a satisfactory explanation of the efforts made to identify and locate the videotapes and why they no longer exist. Accordingly, I find that the Ministry has conducted a reasonable search for the videotapes.

LABOUR RELATIONS AND EMPLOYMENT RECORDS

The Ministry takes the position that sections 65(6)1 and 65(6)3 of the *Act* operate to remove the contents of the PSB file in relation to a complaint the appellant made under the *PSA* from the scope of the *Act*. In the discussion that follows I will be:

- confining my discussion of the application of the exclusionary provisions to the contents of the PSB file, and

- addressing how the way the Ministry identified the responsive records impacts upon the application of sections 65(6)1 and 65(6)3 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.

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

Section 65(6) is record-specific and fact-specific. If this section applies to the records at issue in this appeal, these records are excluded from the scope of the *Act*.

I will first consider section 65(6)1.

Section 65(6)1: court or tribunal proceedings

Introduction

For section 65(6)1 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 proceedings or anticipated proceedings before a court, tribunal or other entity; and

3. these proceedings or anticipated proceedings relate to labour relations or to the employment of a person by the institution.

The Ministry relies on the decision of the Court of Appeal in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (*Solicitor General*) and Orders M-1130, MO-1240 and PO-2512 in support of its position that the records are excluded from the *Act*.

Part 1: collected, prepared, maintained or used

To satisfy Part 1 of the section 65(6)1 test, the Ministry must establish that the records were collected, prepared, maintained or used by an institution or on its behalf.

The Ministry submits that the OPP collected, prepared, maintained and/or used the records at issue in the investigation of the *PSA* complaint about an OPP officer and the subsequent review by the Ontario Civilian Commission on Police Services (OCCPS).

I find that the records contained in the complaint file that the Ministry identified as responsive to the request were collected, prepared, maintained or used by the PSB in order to investigate the police officer's conduct. These records were subsequently forwarded to OCCPS after the appellant triggered a review of the PSB Bureau Commander's decision. I find that these records were collected and maintained by the OPP.

In short, I am satisfied that the records contained in the complaint file were collected, prepared, maintained or used by an institution. Consequently, the Ministry has met Part 1 of the section 65(6)1 test.

Part 2: in relation to proceedings before a court, tribunal or other entity

The word "proceedings" means a dispute or complaint resolution process conducted by a court, tribunal or other entity which has the power, by law, binding agreement or mutual consent, to decide the matters at issue [Orders P-1223, PO-2105-F].

For proceedings to be "anticipated", they must be more than a vague or theoretical possibility. There must be a reasonable prospect of such proceedings at the time the record was collected, prepared, maintained or used [Orders P-1223, PO-2105-F].

The word "court" means a judicial body presided over by a judge [Order M-815].

A "tribunal" is a body that has a statutory mandate to adjudicate and resolve conflicts between parties and render a decision that affects the parties' legal rights or obligations [Order M-815].

"Other entity" means a body or person that presides over proceedings distinct from, but in the same class as, those before a court or tribunal. To qualify as an "other entity", the body or person must have the authority to conduct proceedings and the power, by law, binding agreement or mutual consent, to decide the matters at issue [Order M-815].

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].

As noted above, in addition to the records confirming the destruction of the appellant's fingerprints, the Ministry only identified the contents of the PSB file as the records in its custody or control that were responsive to the request. The Ministry states that the 524 pages of records it identified as responsive to the request had been collected, maintained and used by the PSB in relation to the requester's *PSA* complaint. It submits that "the scope of the requester's *PSA* complaint necessitated a detailed review of records in relation to his arrest on [a specified date]." There is also an indication in the copy of the PSB investigation report the Ministry provided with its representations, that certain records were obtained from identified police officer's in the context of the PSB investigation.

By choosing to identify the contents of the PSB file as records in its custody or control that were responsive to the request, however, the Police did not adequately address the appellant's broadly worded request for information relating to his arrest and detention.

In Order M-927 Senior Adjudicator John Higgins drew a distinction between a request for the contents of an original police investigative file on the one hand and a request for information relating to allegations of misconduct against the officers who conducted that original investigation, on the other. That order dealt with section 52(3) of the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA*), the municipal equivalent of section 65(6) of the *Act*. Senior Adjudicator Higgins found that the main investigation file housing the original incident reports and related officers' notebook entries, would remain subject to the *Act*, even if copies of these same records made their way into the file relating to a review of a police officer's conduct.

After reviewing the records at issue in that appeal, which consisted of pages from a police officer's notebook, five witness statements, a typed Motor Vehicle Collision Report with two supplementary reports, and photographs of the damaged vehicles, Senior Adjudicator Higgins wrote:

> In my view, in assessing the possible application of section 52(3) in this case, it is important to note that the request was essentially directed at the contents of the police investigation file concerning the accident, and any related entries in officers' notebooks. It was not a request for information relating to the allegations against the investigating officers.
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> It is difficult to imagine any category of records which would be more integral to the basic mandate of a police force than the files kept in connection with day-to-day police investigations of incidents occurring within the force's jurisdictional boundaries, and related entries in officers' notebooks. Moreover, although some of them are prepared by employees of the Police, such records are not, in essence, related to employment or labour relations. Rather, they record the activities and conclusions of the investigating officers and, at times, others who conduct forensic analyses, etc. Generally speaking, such records are subject to the *Act*.
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> It is an established principle of statutory interpretation that an absurd result, or one which contradicts the purpose of the enactment, is not a proper implementation of the Legislature's intention. In *Driedger on the Construction of Statutes* (3rd ed., Butterworths), by Ruth Sullivan, the author states (at page 89):
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> > Legislative schemes are supposed to be elegant and coherent and operate in an efficient manner. Interpretations that produce confusion or inconsistency or undermine the efficient operation of a scheme are likely to be labelled absurd.

> Applying section 52(3) to the information at issue in this appeal would have the effect of permanently removing certain information maintained by the Police with respect to their basic mandate (i.e. protection of the peace and investigation of possible criminal behaviour which comes to their attention) from the scope of the *Act*, while most information of this nature would remain subject to the *Act*. As noted above, this information is not, in essence, related to employment or labour relations, and in my view, broadly speaking, it is to these latter categories of information that section 52(3) is intended to apply. Moreover, applying this section in the context of this appeal would result in the inconsistency that some files kept in connection with day-to-day police investigations of incidents occurring within the force's jurisdictional boundaries and related entries in officers' notebooks would be subject to the *Act*, while others would not be.
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> In my view, therefore, it would be a manifestly absurd result, and one not intended by the Legislature, if the records at issue were removed from the scope of the *Act* because they happen to have been reviewed in connection with an investigation of an employee's conduct.
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> On the other hand, in the context of a request for the file relating to an investigation of a police officer's conduct, where copies of incident reports, etc. from the original investigation formed part of that file, section 52(3) could apply to that entire file including those particular copies. However, in my view, the main investigation file housing the original incident reports, etc., and related officers' notebook entries, would remain subject to the *Act*.

In Order MO-2131, adjudicator Frank DeVries applied the reasoning in Order M-927 and held that an original accident report, although duplicated in a police complaints file, was not excluded from the purview of *MFIPPA*. In that appeal, the Toronto Police Services did not assert that the accident report was excluded from the *Act*, but rather claimed that it was subject to exemption. In making his finding that the accident report was subject to the *Act*, Adjudicator DeVries wrote that:

> … Senior Adjudicator Higgins clearly identified the important distinction between records or copies of records which relate to day-to-day police investigations of incidents occurring within the force's jurisdictional boundaries, and copies of those same records which may reside in a file relating to an investigation of a police officer's conduct. I accept this distinction for the purpose of my review of the records at issue in this appeal, and the possible application of section 52(3).

The Ministry takes the position that Order M-927 was wrongly decided. It submits:

> … Senior Adjudicator Higgin's analysis in that 1997 decision is incorrect as it is not consistent with the express language of s. 65(6) nor with the Court of

> Appeal's 2001 ruling in the *Solicitor General* case [cited above] on the correct interpretation of the section 65(6) exclusions.
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> In Order M-927, Senior Adjudicator Higgins expresses the view that the records at issue, an investigation file into a car accident that subsequently became part of an investigation into a public complaint against the police officers, were not "in essence" related to employment or labour relations. Senior Adjudicator Higgins stated that it would be an absurd result if the records at issue were removed from the scope of the [*MFIPPA*] because they happen to have been reviewed in connection with an investigation of an employee's conduct. This view is not consistent with the express language of section 65(6) as the provision does not call for a determination of what the records are "in essence" and does not prescribe that the records must necessarily have been created or prepared for a particular purpose. If the records are collected or prepared or maintained or used in relation to the matters set out in subclause 1 to 3 of 65(6), they are then excluded from the *Act* and cannot at some later date be brought within the scope of the *Act*.
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> Senior Adjudicator Higgins' analysis is also inconsistent with the Court of Appeal's direction on the correct interpretation of the statutory provision, when dealing with the issue of records in a police complaint file. The Court of Appeal's ruling means that, no matter what the original purpose for the creation of the record, once that record is collected, prepared, maintained or used in relation to the criteria set out in subclauses 1 to 3 of s. 65(6), that is, "once effectively excluded" as the Court put it, the records are from that point on excluded from the *Act* and remain excluded.

The Ministry further submits that the Senior Adjudicator's analysis is inconsistent with the determinations in Orders M-1130, MO-1240, P-1618 (ultimately quashed by the Court of Appeal) and Order PO-2512.

I have considered the Ministry's submissions on this issue and do not find them to be persuasive. Order P-1618, one of the decisions reviewed by the Court of Appeal in *Solicitor General*, dealt with a two-part request. The first part was for four specific police occurrence reports and all records about the requester and her husband located at two identified OPP detachments. The second part of the request was for a copy of the 124 pages of the public complaint file relating to a complaint made by the requester and her husband about the conduct of the police. In the appeal that gave rise to Order P-1618 the Ministry distinguished between the contents of original police investigation files and a request for information relating to allegations of misconduct against the investigating officers. It granted access in full, or in part, to 53 of the 78 pages of records responsive to the first part of the request. The Ministry did not rely on the exclusionary provisions at sections 65(6)1 or 65(6)3 to deny access to the portions of the records responsive to the first part of the request that it withheld, although copies of some of those records would also have made their way into the complaint file. This is entirely consistent with Order M-927.

However, the Ministry did claim that the 124 pages of the public complaint file fell within the scope of sections 65(6)1 and 65(6)3. With respect to section 65(6)3, Former Assistant Commissioner Mitchinson found in Order P-1618 that as six years had passed and he had not been provided with any evidence pertaining to the copies of the records in the public complaint file to suggest that "there is an outstanding interest in the investigation that has the capacity to affect the O.P.P.'s legal rights or obligations … there is no matter pending or reasonably foreseeable which has the capacity to affect the Ministry's legal rights or obligations." He also found that the copies of the records were not excluded under section 65(6)1 as there were no existing proceedings or anticipated proceedings before a court, tribunal or other entity. These were the findings that were overturned by the Court of Appeal in *Solicitor General*. Accordingly, the Court of Appeal made a finding with respect to copies of records found in the public complaint file, only. The Court held that these copies would fall within the scope of section 65(6). The existence of a distinction between a request for the contents of an original police investigative file, on the one hand, and a request for information relating to allegations of misconduct against the officers who conducted that original investigation, on the other, was never an issue before the Court in *Solicitor General*. Accordingly, that case does not stand for the proposition that M-927 was wrongly decided, nor does it support a view that the Ministry's approach in responding to the request in Order P-1618 was inappropriate.

The request before me is not solely for the contents of the PSB complaint file. It is a broadly worded request that also seeks copies of the records in connection with day-to-day police investigations of incidents occurring within the force's jurisdictional boundaries and related entries in officers' notebooks. As described in Order M-927, this would encompass copies of records in the main investigation file housing the original incident reports, copies of related officers' notebooks, etc.

In my opinion, the result in Orders M-927 and MO-2131 accords with the "modern" rule of statutory interpretation accepted as the preferred approach by the Supreme Court of Canada in *Re Rizzo and Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at 41. In *Ontario (Attorney General) v. Big Canoe* (2002), 62 O.R. (3rd) 167 (leave to appeal refused May 15, 2003 S.C.C.) the Court of Appeal discussed the rule at pages 172 -173:

> Finally, the "modern" interpretation method was reformulated in Canada by Professor R. Sullivan: Driedger on the Construction of Statutes (3rd ed. 1994) at p. 131:
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> There is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of legislation in its total context, having regard to the purpose of the legislation, the consequences of proposed interpretations, the presumptions and special rules of interpretation, as well as admissible external aids. In other words, the courts must consider and take into account all relevant and admissible indicators of legislative meaning. After taking these into account, the court must then adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy in its promotion of the

> legislative purpose; and (c) its acceptability, that is, the outcome is reasonable and just.

In *Ontario (Ministry of Correctional Services) v. Goodis* [2008] O.J. No. 289 (*Goodis*), a recent decision of the Divisional Court, Madam Justice Swinton, writing for the Court, did not agree with a broad interpretation of the exclusion in sections 65(6)1 and 3. She wrote:

> In my view, the interpretation suggested by the Ministry is not in accordance with the language of s. 65(6) when the provision is read in context and in light of its legislative history and the purpose of the Act. The exclusion in s. 65(6) does not exclude all records concerning the actions or inactions of an employee simply because this conduct may give rise to a civil action in which the Crown may be held vicariously liable for torts caused by its employees.
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> …
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> Moreover, the words of subclause 3 of s. 65(6) make it clear that the records collected, prepared, maintained or used by the Ministry in relation to meetings, consultations or communications are excluded only if those meetings, consultations, discussions or communications are about labour relations or "employment-related" matters in which the institution has an interest. Employment-related matters are separate and distinct from matters related to employees' actions.
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> …
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> The fact that the Act applies to the documents in subclauses 1 through 3 of s. 65(7) suggests that the type of records excluded from the Act by s. 65(6) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue.

In the course of her reasons she also addressed in particular the submission of the Ministry that the *Solicitor General* decision supports a broad exclusion, explaining:

> The Ministry submitted that the Court of Appeal approved a broad interpretation of the exclusion, as it quashed the decisions of the IPC and restored the decisions of the heads of the respective Ministries involved in the case (at para. 42). One of the records at issue in the case was a copy of a public complaint file of the Police Complaints Commission. The Ministry of the Solicitor General and Correctional Services had taken the position that the file was excluded under s. 65(6). The IPC agreed that the investigation of a complaint of police misconduct was an employment-related matter. However, it had ordered the file disclosed because there were no existing or anticipated proceedings before a court, tribunal or other

> entity (*Ministry of the Solicitor General and Correctional Services*, Order PO-1618 at pp. 4 and 6).
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> Thus, there was no dispute in that case that the file documenting the investigation of the complaint was employment-related - not surprisingly because of the potential for disciplinary action against a police officer. However, the case does not stand for the proposition that all records pertaining to employee conduct are excluded from the *Act*, even if they are in files pertaining to civil litigation or complaints brought by a third party. Whether or not a particular record is "employment-related" will turn on an examination of the particular document.

In my opinion, the rationale in Order M-927 fits within the analysis of Swinton J. in the *Goodis* case. Together, they support my conclusion that the contents of an original police investigative file, and the contents of a file relating to the review of a police officer's conduct in that investigation, are treated differently for the purpose of the section 65(6) exclusion. As a result, to the extent that Orders M-1130, MO-1240 and PO-2512 may be construed as inconsistent with the position set out in M-927 as recently applied in Order MO-2131, I decline to follow them.

Therefore, when responding to a request of the type before me, (i.e. one that explicitly seeks access to original police investigative records) it is incumbent on the Ministry to identify as responsive to the request the contents of the original police investigative file, or files, as the case may be. It is not sufficient that the Ministry simply identify the contents of the file relating to the review of a police officer's conduct in that investigation as being responsive to the request. I will, accordingly, be ordering the Ministry to conduct a search for the former category of records and provide an access decision to the appellant.

I now turn to the contents of the complaint file that the Ministry identified as responsive to the request.

The Ministry states that the PSB collected and/or used the copies of the records contained in the complaint file in relation to the investigation of the appellant's complaint about the conduct of the police officer. The Ministry submits that this office has consistently held that proceedings arising from complaints filed under the *PSA* constitute proceedings before a "tribunal or other entity" for the purposes of section 65(6)1. I agree with this statement of principle. I find, therefore that the copies of the records in the complaint file were collected, prepared, maintained or used in relation to anticipated proceedings under the *PSA*. As a result, I find that the second part of the test under section 65(6)1 has been met with respect to the copies of the records contained in the complaint file.

Part 3: relating to labour relations or to the employment of a person by the institution

To satisfy Part 3 of the section 65(6)1 test, the Ministry must establish that the proceedings or anticipated proceedings relate to labour relations or to the employment of a person by the institution.

The proceedings that took place involved potential disciplinary action against the OPP officer who was the subject of the appellant's complaint. In my view disciplinary hearings under the *PSA* relate to the employment of a person by the institution for the purposes of section 65(6)1. In this regard, I adopt the findings of Former Assistant Commissioner Tom Mitchinson in Order M-835 where he found that the penalties which follow the discipline of police officers pursuant to the *PSA* "can only reasonably be characterized as employment related actions".

In Order PO-2658 Adjudicator Colin Bhattacharjee had the opportunity to discuss the impact of *Goodis* on sections 65(6) 1 and 3. He wrote:

> … the Divisional Court found that section 65(6) does not exclude all records concerning the actions or inactions of an employee simply because this conduct may give rise to a civil action in which the Crown may be held vicariously liable for torts caused by its employees [*Goodis*]. In particular, the Court stated the following with respect to the meaning of sections 65(6)1 and 3:
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> > Subclause 1 of s. 65(6) deals with records collected, prepared, maintained or used by the institution in proceedings or anticipated proceedings "relating to labour relations or to the employment of a person by the institution". The proceedings to which the paragraph appears to refer are proceedings related to employment or labour relations *per se* - that is, to litigation relating to terms and conditions of employment, such as disciplinary action against an employee or grievance proceedings. In other words, it excludes records relating to matters in which the institution has an interest as an employer. It does not exclude records where the Ministry is sued by a third party in relation to actions taken by government employees.
> >
> > Moreover, the words of subclause 3 of s. 65(6) make it clear that the records collected, prepared, maintained or used by the Ministry in relation to meetings, consultations or communications are excluded only if those meetings, consultations, discussions or communications are about labour relations or "employment-related" matters in which the institution has an interest. Employment-related matters are separate and distinct from matters related to employees' actions.
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> This raises the question as to whether records concerning disciplinary matters involving police officers are "employment-related matters" for the purposes of section 65(6)3 of the *Act*, because such records have been created as a result of complaints filed by a third party with respect to the actions of those officers. In its decision, the Divisional Court provided some guidance on this issue. In particular, it commented on the Court of Appeal's decision in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001),

> 55 O.R. (3d) 355, in which one of the records at issue was a copy of a public complaint file of the Police Complaints Commission:
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> > *… there was no dispute in that case that the file documenting the investigation of the complaint was employment-related - not surprisingly because of the potential for disciplinary action against a police officer.* However, the case does not stand for the proposition that all records pertaining to employee conduct are excluded from the *Act*, even if they are in files pertaining to civil litigation or complaints brought by a third party. Whether or not a particular record is "employment-related" will turn on an examination of the particular document. (Emphasis added.)
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> I have carefully examined the records at issue in the appeal before me, which document the PSB's investigation of the complaints filed against the two OPP officers and OCCPS's review of the two decisions issued by the PSB Bureau Commander. In my view, these records are "employment-related," because of the potential for disciplinary action against the two officers. I find, therefore, that the meetings, discussions, consultations and communications that took place were about "employment-related matters."

I agree with Adjudicator Bhattacharjee's analysis and adopt it for the purposes of this appeal and find that it is equally applicable to the analysis in the third part of the section 65(6)1 test. I have carefully examined the copies of the records contained in the complaint file and conclude that those copies relate to employment, because of the potential for disciplinary action against the named OPP officer. I find, therefore, that the proceedings that took place were related to employment.

In short, I am satisfied that the Ministry has met Part 3 of the section 65(6)1 test.

Given that the Ministry has met the three-part section 65(6)1 test, I find that the copies of the records contained in the public complaint file are excluded from the scope of the *Act* under that section. It is, therefore, not necessary for me to assess whether they are also excluded under section 65(6)3.

ORDER:

1. I find that the Ministry's search for a copy of the requested videotapes is reasonable.

2. I uphold the decision of the Ministry that the *Act* does not apply to the copies of the records contained in the Ontario Provincial Police Professional Standards Bureau file in relation to a complaint the appellant made under the *Police Services Act*.

3. I order the Ministry to conduct further searches for the contents of the original police investigative file, or files, as the case may, be that are responsive to the request.

4. If, as a result of the further searches, the Ministry identifies any additional records responsive to the request, I order the Ministry to provide a decision letter to the appellant regarding access to these records in accordance with the provisions of the *Act*, considering the date of this order as the date of the request.

5. I remain seized of this appeal to address any outstanding issues arising from this decision.

Original Signed by: May 27, 2008
Steven Faughnan
Adjudicator