



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER PO-2658

Appeal PA06-362

Ministry of Community Safety and Correctional Services



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NATURE OF THE APPEAL:

An individual and his spouse filed two complaints with the Ontario Provincial Police's (OPP) Professional Standards Bureau (PSB) against two officers, pursuant to section 56(1) of the *Police Services Act* (the *PSA*). Under this provision, any member of the public may make a complaint about specified matters, including the conduct of a police officer.

After investigating the first complaint, the PSB Bureau Commander concluded that the evidence did not support several of the allegations. However, he concluded that the evidence substantiated one allegation relating to an officer using inappropriate language. The PSB Bureau Commander also investigated a supplementary complaint filed by the individual and his spouse but concluded that there was insufficient evidence to substantiate this complaint.

Section 64(6) of the *PSA* provides that a complainant may ask the Ontario Civilian Commission on Police Services (OCCPS) to review the decision of a chief of police with respect to a particular complaint. Consequently, the complainants asked OCCPS to review the PSB Bureau Commander's first decision. OCCPS subsequently notified them it was upholding this decision.

The complainants also asked OCCPS to review the PSB Bureau Commander's second decision. OCCPS subsequently notified them that it did not have the jurisdiction to review this decision because the complainants did not file their request within the 30-day timeframe prescribed by the *PSA*.

The complainants then filed a request with the Ministry of Community Safety and Correctional Services (the Ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

[C]opies of documentation provided to [OCCPS] by the [OPP]. Our [OCCPS] file no. was 06-CON-0026 and the noted [OPP] file no. was 2531004-0198. Our [OCCPS] case manager was [named individual].

The Ministry located 189 pages of records responsive to the request and then issued a decision letter to the requesters, granting them partial access to these records. It denied them access to some of the records, either in whole or in part, pursuant to the exclusionary provision in section 65(6) of the *Act*. Section 65(6) excludes certain labour relations and employment-related records from the scope of the *Act*.

In addition, the Ministry denied them access to portions of one of the records pursuant to the discretionary exemption in section 49(a) (refuse to disclose requester's own information) in conjunction with section 13(1) (advice to government); as well as the discretionary exemption in section 49(b) (personal privacy), in conjunction with the presumption in section 21(3)(b) (investigation into possible violation of law) and the factor in section 21(2)(f) (highly sensitive) of the *Act*.

One of the requesters (now the appellant) appealed the Ministry's decision to this office, which appointed a mediator to assist the parties in resolving the issues in this appeal. However, this appeal was not settled in mediation and was moved to the adjudication stage of the appeal

process. I started my adjudication of this appeal by issuing a Notice of Inquiry, setting out the facts and issues, to the Ministry. The Ministry submitted representations in response.

In its representations, the Ministry stated that it had decided to disclose page 9 of the records at issue to the appellant and would therefore be withdrawing its reliance on the discretionary exemption in section 49(a), in conjunction with section 13(1) of the *Act*. It attached a revised decision letter that it had issued to the appellant, along with a copy of page 9.

I then issued a Notice of Inquiry to the appellant, along with the complete representations of the Ministry. The appellant submitted brief representations in response.

RECORDS:

I have summarized the records that remain at issue in this appeal in the following chart:

Description of record	Page number(s)	Ministry's decision	Exclusion/exemption claimed
Letter from OCCPS Case Manager to Bureau Commander, OPP Professional Standards Bureau (March 28, 2006)	3	Withheld in full	Section 65(6)
Email from OCCPS Case Manager to Acting Staff Sergeant, OPP Professional Standards Bureau (March 28, 2006)	4	Withheld in full	Section 65(6)

Description of record	Page number(s)	Ministry's decision	Exclusion/exemption claimed
Case Summary – OCCPS Public Complaints Review Panel (March 27, 2006)	7-8	Withheld in part	The withheld portion on page 7 – section 49(b) in conjunction with sections 21(3)(b) and 21(2)(f) The withheld portion on page 8 – section 65(6); section 49(b) in conjunction with sections 21(3)(b) and 21(2)(f)
Fax from appellant to OPP (Smith Falls) (May 3, 2004)	11-18	Withheld in full	Section 65(6)
Letter from Bureau Commander, OPP Professional Standards Unit to appellant (October 4, 2004)	19-20	Withheld in full	Section 65(6)
Professional Standards Bureau – Investigation Report (OPP file # 2531004-0198)	21-30	Withheld in full	Section 65(6)

Description of record	Page number(s)	Ministry's decision	Exclusion/exemption claimed
Letter from Bureau Commander, OPP Professional Standards Unit to appellant (December 13, 2005)	31	Withheld in full	Section 65(6)
Professional Standards Bureau – Investigation Report (OPP file # 2531004-0198 - supplementary)	32-41	Withheld in full	Section 65(6)
Handwritten notes regarding appellant's OCCPS complaint (March 22, 2006)	94	Withheld in full	Section 65(6)
Emails between OCCPS Case Manager and OPP (Email #1 – January 30, 2006; Email #2 – January 17, 2006)	146	Withheld in full	Section 65(6)
Letter from Sergeant Major, OPP Professional Standards Bureau (Eastern Region Unit) to appellant (December 8, 2005)	147-148	Withheld in full	Section 65(6)

Description of record	Page number(s)	Ministry's decision	Exclusion/exemption claimed
Letter from Bureau Commander, OPP Professional Standards Bureau to appellant's spouse (January 20, 2006)	149	Withheld in full	Section 65(6)
Letter from appellant's spouse to OPP Commissioner (December 30, 2005)	150-152	Withheld in full	Section 65(6)
Letter from appellant's son to OPP Commissioner (November 18, 2005)	153-154	Withheld in full	Section 65(6)
Memorandum from Bureau Commander, OPP Professional Standards Bureau to Regional Commander (Eastern Region) (February 21, 2005)	155	Withheld in full	Section 65(6)
Documents from OPP file # 2531004-0198 (index, involved persons list, general occurrence report, duty reports, will say statements, police officer's notes)	156-186	Withheld in full	Section 65(6)

Description of record	Page number(s)	Ministry's decision	Exclusion/exemption claimed
Letter from OCCPS Case Manager to Acting Staff Sergeant, OPP Professional Standards Bureau (January 17, 2006)	188-189	Withheld in full	Section 65(6)

DISCUSSION:

LABOUR RELATIONS AND EMPLOYMENT RECORDS

General principles

The Ministry claims that the records at issue fall within the exclusionary provisions in sections 65(6)1 and 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 these exceptions apply in the circumstances of this appeal.

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*.

This office has found in previous orders that records similar to the ones at issue in this appeal are excluded from the scope of the *Act* under section 65(6)3. [See, for example, Orders PO-2531,

PO-2499 and PO-2426.] Consequently, although the Ministry claims that both sections 65(6)1 and 3 apply to all of the records remaining at issue, I will start by addressing the possible application of section 65(6)3.

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

Introduction

Section 65(6)3 stipulates that the *Act* does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

For section 65(6)3 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 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 its representations, the Ministry submits that the records at issue were collected, prepared, maintained and/or used for meetings, consultations, discussions and communications relating to labour relations and employment-related matters in which the Ministry, as an employer of OPP officers, has an interest.

In his representations, the appellant does not directly address whether the records are excluded by section 65(6)3, but suggests that the Ministry is not respecting the transparency principles in the *Act* by attempting to “hide” behind this exclusionary provision. He further states that he would be willing to receive a copy of the records at issue with the names of the two OPP officers and other individuals severed from the records.

Part 1: collected, prepared, maintained or used

To satisfy Part 1 of the section 65(6)3 test, the Ministry must establish that the records were collected, prepared, maintained or used by an institution or on its behalf.

The appellant is seeking “copies of documentation provided to [OCCPS] by the [OPP].” The flow of records between OCCPS and the OPP was triggered by the appellant’s request under section 64(6) of the *PSA* that OCCPS review the two decisions issued by the OPP’s PSB Bureau

Commander with respect to the complaints that the appellant and his spouse had filed against two OPP officers.

I find that most of the records at issue were collected, prepared, maintained or used by the OPP's PSB in order to conduct an investigation into the complaints filed by the appellant and his spouse. These records were subsequently forwarded to OCCPS after the appellant asked this oversight body to review the two decisions issued by the PSB Bureau Commander.

The records at issue also include correspondence and related documents sent by OCCPS to the OPP in connection to its review of the PSB Bureau Commander's two decisions. I find that these records were collected and maintained by the OPP.

In short, the records at issue were all collected, prepared, maintained and used by the OPP.

However, to satisfy Part 1 of the section 65(6)3 test, the Ministry must also establish that these records were collected, prepared, maintained or used by an *institution* or on its behalf. This raises the question as to whether the OPP qualifies as an "institution" or whether it acted on behalf of an institution.

The term, "institution," is defined in section 2(1) of the *Act*. Under paragraph (a) of this definition, an "institution" includes a ministry of the Government of Ontario. In its representations, the Ministry states that it employs OPP officers and that the OPP is part of the Ministry. Consequently, I find that although the OPP is not an institution in its own right, it is a part of the Ministry, which is an institution under the *Act*.

In short, I am satisfied that the records at issue were collected, prepared, maintained or used by an institution. Consequently, the Ministry has met Part 1 of the section 65(6)3 test.

Part 2: meetings, consultations, discussions or communications

To satisfy Part 2 of the section 65(6)3 test, the Ministry must establish that the collection, preparation, maintenance or usage of the records by an institution was in relation to meetings, consultations, discussions or communications.

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].

The Ministry's representations do not identify specific meetings, consultations, discussions or communications that took place relating to the records at issue. However, it is evident from my review of the records at issue that meetings, discussions, consultations and communications of various sorts took place involving both the OPP and OCCPS with respect to these records. Consequently, I find that the collection, preparation, maintenance and use of the records at issue by an institution were in relation to meetings, consultations, discussions or communications.

In short, I am satisfied that the Ministry has met Part 2 of the section 65(6)3 test.

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

To satisfy Part 3 of the section 65(6)3 test, the Ministry must establish that the meetings, consultations, discussions or communications that took place were about labour relations or employment-related matters in which the Ministry has an interest.

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.)].

In the circumstances of this particular appeal, there is no evidence before me that would suggest that the meetings, discussions, consultations and communications that took place were about the collective bargaining relationship between the Ministry and its employees, including the two OPP officers. I find, therefore, that these meetings, discussions, consultations and communications were not about “labour relations.”

The term “employment-related matters” refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship [Order PO-2157].

The meetings, discussions, consultations and communications that took place involved potential disciplinary matters involving the two OPP officers identified in the appellant’s complaints. This office has found that disciplinary matters involving police officers are “employment-related matters” for the purposes of section 65(6)3 of the *Act* [Orders PO-2499 and PO-2426].

In a recent decision, 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 [*Ontario (Ministry of Correctional Services) v. Goodis* [2008] O.J. No. 289]. In particular, the Court stated the following with respect to the meaning of sections 65(6)1 and 3:

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.

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:

... 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.)

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."

The remaining question is whether these meetings, discussions, consultations and communications were about employment-related matters "in which the institution has an interest." 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)*, cited above].

In my view, the Ministry has an interest in the employment-related matters in the records at issue that extends beyond a "mere curiosity or concern." As the employer of OPP officers, the Ministry clearly has more than a trifling interest in the PSB Bureau Commander's decisions with

respect to the complaints filed against the two OPP officers and the outcome of the subsequent reviews conducted by OCCPS.

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

Conclusion

Given that the Ministry has met the three-part section 65(6)3 test, I find that the records at issue 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)1.

The Ministry claims that some of the withheld portions of one record (Case Summary – OCCPS Public Complaints Review Panel, pp. 7-8) fall within the section 65(6)1 and 3 exclusions, but simultaneously claims that the withheld portions are also exempt under the discretionary exemption in section 49(b) of the *Act*. I have found that all of the records at issue in this appeal, including the withheld portions of the Case Summary, are excluded from the scope of the *Act* under section 65(6)3. Consequently, the discretionary exemption in section 49(b) of the *Act* has no application with respect to the withheld portions of this record.

ORDER:

I uphold the Ministry's decision that the *Act* does not apply to the records at issue.

Original signed by: _____
Colin Bhattacharjee
Adjudicator

_____ April 7, 2008