



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2748

Appeal PA07-441

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/Téloc: 416-325-9188
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

The requester submitted a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records related to an investigation into the actions of certain staff at the Toronto Regional Office of the Ministry of Health and Long-Term Care (the Ministry) regarding the requester's daughter.

The information I seek is the details of [the] investigation, including but not limited to, the instructions for this investigation from the [Ministry], [the investigator's] notes made during the investigation, details of communications with [named employees], and other people interviewed, details of communications with others involved and the final report.

The Ministry identified 144 records as responsive to the request and granted access to a large number of them. The Ministry withheld 29 records, claiming that 24 of them were excluded from the *Act* by the operation of section 65(6) (labour relations and employment records). In this decision letter, the Ministry also relied on sections 12 (Cabinet records) and 19 (solicitor-client privilege) to deny access to the other records.

The requester, now the appellant, appealed the decision.

Mediation was not successful in resolving the appeal and it was transferred to the adjudication stage of the appeal process, where it was assigned to me to conduct an inquiry.

I sent a Notice of Inquiry outlining the issues to the Ministry, initially, seeking its representations. I requested that the Ministry clarify what exemptions it would rely on in the alternative for the records that are subject to the claim of exclusion under section 65(6), in the event that I found that section 65(6) did not apply.

The Ministry submitted representations that addressed all of the issues as requested, but focussed most particularly on the claim that the records are removed from the ambit of the *Act* as a result of the operation of section 65(6)3. The Ministry also clarified its position by stating that all 29 records at issue are excluded from the *Act* under section 65(6)3.

Next, I sent a modified Notice of Inquiry to the appellant, along with a copy of the Ministry's non-confidential representations. The appellant submitted representations for my review. It should be noted that the appellant sent a second letter containing submissions, which she advised should replace her initial set of representations.

RECORDS:

There are 384 pages, or 29 records, remaining at issue in this appeal. The records consist of emails, correspondence, memoranda, notes and reports.

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)3.

As this is a “threshold” issue that determines whether or not I have jurisdiction to continue with an inquiry under the *Act*, I am obliged to consider the possible application of section 65(6)3 to all of the records. If I find that the exclusion applies to any or all of the records, and that none of the exceptions in section 65(7) applies, it follows that I lack jurisdiction to review the issue of access, or denial thereof, to those records.

General Principles

Section 65(6)3 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:

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

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 “employment of a person” refers to the relationship between an employer and an employee. 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 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*].

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. Employment-related matters are separate and distinct from matters related to employees' actions [*Ontario (Ministry of Correctional Services) v. Goodis* [2008] O.J. No. 289 (Div. Ct.)].

Representations

The Ministry submits that the records at issue in this appeal cannot be separated from the context in which they were created: that is, in response to the appellant's complaint that certain Ministry staff had not properly discharged their employment duties in managing the appellant's daughter's care. The Ministry maintains that it has consistently treated and considered the complaints and resulting investigation as an employment-related, human resources issue. The Ministry submits that, in this context:

The records are necessarily employment-related records that were collected, prepared, maintained and used specifically in meetings, discussions and communications about an employment-related matter. Furthermore, as the employer of the employees who were the subject of the investigation, the Ministry naturally has a direct and substantial interest in that employment-related matter. Whether Ministry employees have improperly discharged their employment duties and responsibilities is a fundamental employment-related matter that falls within the purview of human resources management; therefore the records that relate to the Ministry's determination of that issue must necessarily be employment-related as well.

The Ministry submits that the scope and purpose of its investigation in the present matter, and the investigator's use of the information collected, amounted to an "employment-related exercise" analogous to the situation described by the Divisional Court in *Reynolds v. Ontario (Information and Privacy Commissioner)*, [2006] O.J. No. 4356. The Ministry quotes an excerpt from the reasons of Justice Lane, as follows:

[T]he terms of reference are clearly asking Mr. Osborne to examine the conduct of the City personnel in the preparation of the RFP, the evaluation of the responses and the selection of the preferred proponent. This is beyond doubt an employment-related exercise. The interviews with the applicant were part of this exercise ... and accordingly were meetings about employment-related matters... Secondly, the terms of reference specifically ask that Mr. Osborne meet with the applicant to discuss an aspect of her employment with the City ... Further, there is no doubt that Mr. Osborne used the information collected, including that from the applicant, in his report... I conclude that ... the applicant's meetings with Mr. Osborne were about employment-related matters. (emphasis added in original) [at paragraph 66]

With respect to the first part of the test for exclusion under section 65(6)3, the Ministry states that the records fall into two categories: interview notes, summaries, draft and final versions of the investigation report, which were written or prepared and maintained by the Ministry investigator; and correspondence, emails and various other records collected or used by the investigator for his investigation and report-writing.

The Ministry submits that part two of the section 65(6)3 test is met because all of the records were collected, prepared, maintained and/or used in relation to meetings with individuals for the investigation and communications with the Ministry to report the results. The Ministry also states:

The IPC has held that records used by an investigator in relation to the preparation of a report are “communicated” to the officials of the institution by way of a final report, and that records collected, prepared, or used by the institution in relation to an internal investigation of employees and are collected, prepared and used by the institution in relation to “communications” about the internal investigation. [MO-1186, MO-1523]

In its submissions specific to part three of the test, the Ministry reiterates its position that an investigation of employee conduct is fundamentally an employment-related matter. The Ministry submits that the records in this appeal are distinguishable from those at issue in *Goodis* (cited above), which related to allegations of abuse perpetrated by employees of a government Ministry, because the records at issue in the present appeal:

relate to an investigation of employee actions within the scope of their work responsibilities, where the negligent performance of those duties may lead to disciplinary action within an internal, human resources process

The Ministry submits, furthermore, that the meetings and communications to which the records relate are all concerned with the fundamental employment-related question of whether the employees performed their work responsibilities properly in relation to the management of the appellant’s daughter’s care.

Finally, the Ministry submits that it had a direct and immediate “interest” in the determination of the issue regarding the adequacy of the employees’ discharge of their work responsibilities. The Ministry states that:

The nature of that interest is itself inherently employment related because if the allegations had been proven, the resulting report might have led to disciplinary action by the Ministry, as employer, against the employees (as occurred in the Reynolds case). This potential scenario is distinct from the situation in the Goodis case, where the employees’ actions might have led to the *Crown’s* vicarious liability [emphasis in original].

In her representations, the appellant argues that the Ministry's characterization of the records at issue as employment-related does not provide the correct context. The appellant takes the position that the real issue is the Ministry's failure to provide appropriate or adequate care to her daughter. The appellant mentions certain specific allegations related to her daughter's care, and refers to the involvement and alleged responsibility of two Ministry employees whose conduct was reviewed by the lawyer appointed by the Ministry.

With specific reference to the possible application of section 65(6)3 of the *Act*, the appellant submits that the criteria for the three-part test for exclusion have not been met, and that the records are not subject to exclusion. In reference to the information set out in the Notice of Inquiry regarding section 65(6), the appellant notes that the exclusion is not intended to "exclude all records concerning the actions or inactions of an employee..." As I understand it, the appellant is arguing that because this matter is more properly characterized as one necessitating a review of the inadequate *services* and *care* provided to her daughter, it is not about the terms and conditions of any individual's employment, at its core. The appellant concludes her submissions by stating:

This is not a matter of employment related issues... It is about a family's right to access documentation and information about an unnecessary institutionalization of our ... daughter and the Ministry's involvement in this matter.

Analysis and Findings

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.

For the reasons that follow, I find that the records at issue in this appeal are excluded from the *Act* pursuant to section 65(6)3.

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 am satisfied that the Ministry-appointed investigator collected or prepared the records in the course of conducting his investigation and writing his

report. Accordingly, 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 all of the records 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. The Ministry takes the position that the records are substantially connected to an employment-related matter, while the appellant disagrees with this characterization. In my view, however, the

conclusion that the records relate to an employment-related matter is inescapable. If not for the complaint lodged by the appellant about the care provided to her daughter by employees of the Ministry, and the resulting investigation, the records themselves would not have been created.

Furthermore, past orders of this office, and from the courts, support the exclusion of records related to an institution's investigation into complaints against members of its own workforce because of the potential for disciplinary action against the employee. In *Goodis* (cited above), the Court affirmed that the type of records excluded from the *Act* by section 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 this appeal, the creation of the records at issue stems from the Ministry retaining senior legal counsel from another ministry to investigate and evaluate allegations of misconduct regarding two Ministry employees. The investigator's report and conclusions were presented to Ministry officials and formed the basis for their decision regarding possible disciplinary action against two members of their own workforce. In the circumstances, therefore, I find that the records demonstrably qualify as employment-related matters in which the Ministry has "an interest". Accordingly, I find that the third requirement of section 65(6)3 has been established for the records.

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.

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: _____
Daphne Loukidelis
Adjudicator

December 17, 2008
