



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2809

Appeal PA08-239-2

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*) for access to the requester's correctional service file, including his medical records, during his incarceration at a named Regional Detention Centre. In response, the Ministry issued a decision letter in which it provided access to the records in part. Access to the remaining records was denied on the basis of a number of identified exemptions in the *Act*.

The requester (now the appellant) appealed the Ministry's decision to deny access to the records that were withheld, and Appeal PA08-239 was opened by this office.

During the mediation process the Ministry agreed to expand the scope of the original request. The Ministry noted that the request was specifically for a copy of the appellant's correctional file, and advised that there may be additional records about an investigation that were not in the appellant's correctional file, but may be located in the Correctional Investigation and Security Unit (CISU). The Ministry agreed to conduct an additional search for those records.

Following the further search, the Ministry located additional records and issued a subsequent decision to the appellant (the second decision). In this second decision, the Ministry identified that it had located an investigation report prepared by the CISU in relation to the investigation of an allegation against correctional staff. The Ministry's decision also stated that access to the record was denied, in its entirety, on the basis that the record is excluded from the scope of the *Act* due to the exclusionary provision in section 65(6) of the *Act*.

After receiving this second decision, the appellant advised that he was no longer appealing the Ministry's initial decision, and that appeal PA08-239 could be closed. However, the appellant indicated that he was appealing the Ministry's second decision – that is – the decision to deny access to the investigation report prepared by the CISU. As a result, the current appeal (PA08-239-2) was opened.

During mediation the Ministry confirmed its position that the responsive record should be excluded from the scope of the *Act* because it relates to employment and labour relations matters concerning the correctional officers involved in the matter. Also during mediation, the Ministry confirmed that it relied on section 65(6) 1, 2 and 3 of the *Act* to withhold access to the records.

Mediation did not resolve this appeal, and it was transferred to the inquiry stage of the process. I sent a Notice of Inquiry to the Ministry, initially, and the Ministry provided representations in response. I then sent the Notice of Inquiry, along with a severed copy of the Ministry's representations, to the appellant. The appellant also provided representations in response.

RECORD:

The record at issue in this appeal is a 65-page investigation report prepared by the CISU, including a number of appendices as well as two compact discs with audio and video recordings.

DISCUSSION:

LABOUR RELATIONS AND EMPLOYMENT RECORDS

The Ministry takes the position that the *Act* does not apply to the record because it falls within the exclusion in section 65(6).

General Principles

Section 65(6) of the *Act* states:

Subject to subsection (7), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:

1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.
3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

If section 65(6) applies to the record, and none of the exceptions found in section 65(7) applies, the record is excluded from the scope of the *Act*.

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 term “labour relations” refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships [Order PO-2157, *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.)].

The 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].

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 [*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*”).

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

Introduction

For section 65(6)3 to apply, the institution 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.

Requirement 1: Was the record collected, prepared, maintained or used by the Ministry or on its behalf?

The Ministry takes the position that the record was collected, prepared, maintained and used by the Ministry. The record at issue is a report prepared by the Ministry’s Correctional Investigation and Security Unit (CISU) in relation to the CISU investigation of an allegation against Ministry correctional officers. On this basis, I am satisfied that the record was collected, prepared, maintained and/or used by the Ministry.

Requirement 2: Was the record collected, prepared, maintained and/or used in relation to meetings, consultations, discussions or communications?

In support of its position that the record was collected, prepared, maintained and/or used in relation to meetings, consultations, discussions or communications, the Ministry states:

... the CISU investigation report at issue was prepared, maintained and used by the Ministry in relation to the allegation made by [the appellant against correctional officers]. The information contained in the CISU report was collected for the very same purpose [and] ... for the purposes of investigating the allegations of serious misconduct by Ministry correctional officers.

The Ministry also identifies the scope and mandate of the CISU as follows:

The responsibilities of the CISU include overseeing high profile investigations involving alleged serious violations of ministry policies and procedures with respect to offenders and/or Ministry employees.

The authority for CISU investigations in relation to Ministry employees is found in section 22(1) of the *Ministry of Correctional Services Act*:

The Minister may designate any person as an inspector to make such inspection or investigation as the Minister may require in connection with the administration of this Act, and any person employed in the Ministry who obstructs an inspection or investigation or withholds, destroys, conceals or refuses to furnish any information or thing required by an inspector for the purposes of the inspection or investigation may be dismissed for cause from employment.

In addition, the Ministry provides additional information about the record:

The CISU investigation in this particular instance was requested by a Deputy Regional Director with the Ministry's Adult Institutional Services. The usual process for the communication of such completed CISU investigation reports is that two copies of the CISU investigation report are provided to the Regional Director. The Regional Director sends one of the copies to the responsible correctional institution superintendent for review and, if necessary, the preparation of an action plan to address any findings in the report.

The Ministry also states that the CISU investigation report was communicated to Ministry staff. Based on the Ministry's representations and my review of the record, I am satisfied that the record was collected, prepared and/or used in relation to meetings, consultations, discussions or communications.

Part 3: Were the meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest?

The type of records excluded from the *Act* by section 65(3) 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 in the context of the institution's possible vicarious liability in relation to those actions, as opposed to the employment context. (See, *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 Div. Ct. (Goodis))

The phrase “labour relations or employment-related matters” has been found to apply in the context of:

- a job competition [Orders M-830, PO-2123]
- an employee’s dismissal [Order MO-1654-I]
- a grievance under a collective agreement [Orders M-832, PO-1769]
- disciplinary proceedings under the *Police Services Act* [Order MO-1433-F]
- a “voluntary exit program” [Order M-1074]
- a review of “workload and working relationships” [Order PO-2057]
- the work of an advisory committee regarding the relationship between the government and physicians represented under the *Health Care Accessibility Act* [*Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*], [2003] O.J. No. 4123 (C.A.)]

The phrase “labour relations or employment-related matters” has been found *not* to apply in the context of:

- an organizational or operational review [Orders M-941, P-1369]
- litigation in which the institution may be found vicariously liable for the actions of its employee [Orders PO-1722, PO-1905]

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 [*Solicitor General* (cited above)].

The Ministry’ representations

In support of its position that the record falls within the exclusion in section 65(6)3, the Ministry states:

The information contained in the CISU investigation report was collected for the purposes of investigating the allegations of serious misconduct by Ministry correctional officers. The alleged serious misconduct on the part of Ministry employees is a matter in which the Ministry, as an employer, has an interest. ...

The Ministry clearly has an interest in an internal investigation report prepared by the CISU in relation to their investigation of alleged serious misconduct of employees who are part of its workforce. The requested investigation report came into existence directly as a result of the CISU investigation into [the appellant’s] allegations of misconduct by Ministry employees. The Ministry submits that incidents of serious misconduct by employees have the potential to result in the imposition of discipline by the employer.

The CISU investigation report was communicated to Ministry staff for use in relation to employment-related matters in which the Ministry, as an employer, clearly has an interest.

The Ministry also refers to an earlier court decision in which the exclusionary provision of section 65(6) was found to apply to complaints about employees. The Ministry states:

The Court of Appeal has ruled on the correct interpretation of the section 65(6) exclusions in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355. In the *Solicitor General* case, one of the three appeals dealt with by the Court of Appeal was relating to Order P-1618, in which the Adjudicator found that the section 65(6)1 and 3 exclusions did not apply to records relating to a complaint about the conduct of police officers. In that case, the requester sought the public complaint file that arose out of an investigation by the police officers into an alleged assault. The Court of Appeal quashed the former Assistant Privacy Commissioner's decision that section 65(6) did not apply to the complaint records ...

The Ministry then refers to the more recent decision in *Ministry of Correctional Services v. Goodis et al.* (2008), 89 O.R. (3d) 457 (Div. Ct), which arose as a result of a judicial review of Orders PO-1905, PO-1999 and Reconsideration Order PO-2102-R. It indicates that records at issue in that matter related to allegations of employee misconduct and abuse between 1975 and 1995. The Ministry then states:

The Ministry had claimed that section 65(6) applied to the requested records in their entirety. In support of its position, the Ministry had argued that the requested records were relevant in respect to an ongoing civil action against the Ministry. On this matter ... the Divisional Court stated,

The exclusion in 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 cause by its employees.

In relation to the types of records that fall within the ambit of section 65(6), the Divisional Court ... commented,

The fact that the *Act* applies to the documents in subclauses 1 to 3 of section 65(7) suggests 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.

With respect to the matter of employee-related investigations and the possibility of discipline being imposed by the employer, the Divisional Court ... referred to the Court of Appeal's decision in *Solicitor General* and commented,

...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.

The Ministry takes the position that these court decisions support its view that the record in this appeal falls within the exclusionary wording of section 65(6). The Ministry also provides representations in support of the view that the exclusionary provision is not time-sensitive, and that the record continues to fit within the exclusionary language of section 65(6).

The appellant's representations

The appellant also refers to the Divisional Court decision in *Ontario (Ministry of Correctional Services) v. Goodis* (2008), and posits that the Court "expressly rejected" the Ministry's argument that allegations of employee misconduct are "employment-related matters" within section 65(6). In support of his position, he refers to the portion of that decision in which the Court stated:

Employment-related matters are separate and distinct from matters related to employee actions.

The appellant also notes that the Divisional Court in that case found that the interpretation of the exclusionary provision suggested by the Ministry of Correctional Services in that case "... would seriously curtail access to government records and thus undermine the public's right to information about government. If [the Ministry's] interpretation were accepted, it could potentially apply whenever the government is alleged to be vicariously liable because of the actions of its employees."

In addition, the appellant takes issue with the Ministry's argument that the Ontario Court of Appeal decision in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001) is precedent for establishing that the file documenting an investigation of a complaint is "employment-related". The Court of Appeal in that case had stated:

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.

The appellant submits that this statement by the court is *obiter*, and does not bind my decision in this appeal. He takes the position that, in that case, there was no dispute that the documents at issue were employment-related, and that that issue was not before the Court, as the parties had

agreed that the file was excluded under section 65(6). He also points out that the Court in that decision had also stated:

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.

On this basis, the appellant states that, in conducting my review of the documents at issue and whether they are excluded under section 65(6), I must ensure that the section 65(6) exemption is only applied to those documents that are “employment-related” as that term has been defined.

Finally the appellant states:

[T]he IPC must distinguish information found in documents that pertains to employment (ie. workload, dismissal, job competitions) from all other matters related to employee actions, which are clearly not exempt from the *Act*. The “terms and conditions of an employment” exemption does not automatically include all information derived from an investigation of the facts regarding an employee-related incident, which is the document at issue in this appeal. To exempt such a broad sweep of information would be an error and seriously curtail access to government records, and thus undermine the public’s right to information about government.

Findings

This office has considered the application of section 65(6)3 (and its equivalent in the *Municipal Freedom of Information and Protection of Privacy Act*, section 52(3)3) to records held by an institution on a number of occasions. Many of these cases have turned on the issue of whether the preparation, collection, maintenance or use of a record is “in relation to” a labour relations or employment-related matter.

In this appeal, the only record at issue is the investigation report prepared by the CISU in the course of its investigation of alleged serious misconduct by Ministry employees, who are part of its workforce. Incidents of serious misconduct by Ministry employees have the potential to result in the imposition of discipline by the employer.

Previous orders of this office, including the decision in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), have consistently found that investigations of complaints about employees by an employer are employment-related, as they could result in disciplinary action against the employee.

Furthermore, with respect to the scope of the exclusionary provision, Swinton J. for a unanimous Court, wrote in *Ontario (Ministry of Correctional Services) v. Goodis* (2008) that:

In *Reynolds v. Ontario (Information and Privacy Commissioner)*, [2006] O.J. No. 4356, this Court applied the equivalent to s. 65(6) found in municipal freedom of information legislation to documents compiled by the Honourable Coulter Osborne while inquiring into the conduct of the City of Toronto in selecting a proposal to develop Union Station. The records he compiled in interviewing Ms. Reynolds, a former employee, were excluded from the *Act*, as Mr. Osborne was carrying out a kind of performance review, which was an employment-related exercise that led to her dismissal (at para. 66). At para. 60, Lane J. stated,

It seems probable that the intention of the amendment was to protect the interests of institutions by removing public rights of access to certain records relating to their relations with their own workforce.

Cautioning that there is no general 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 by a third party, Swinton J. also pointed out that “(w)hether or not a particular record is ‘employment related’ will turn on an examination of the particular document.”

I agree with and adopt the analysis set out above for the purpose of making my determinations in this appeal. I also note that the nature of the record at issue in this appeal is different than the types of records that were at issue in *Ontario (Ministry of Correctional Services) v. Goodis* (2008).

The record at issue in this appeal is the investigation report prepared by the CISU in the course of its investigation of alleged serious misconduct by Ministry employees, and has the potential to result in the imposition of discipline by the employer. In these circumstances, I am satisfied that the record falls within the scope of the exclusionary wording in section 65(6)3. The record clearly relates to matters in which the institution is acting as an employer, and the terms and conditions of employment or human resources questions are at issue, as discipline of the employees could result from the investigation.

As identified by the Divisional Court, whether or not a particular record is “employment related” will turn on an examination of the document. In the circumstances of this appeal, the record in question is that actual report compiled and prepared by the CISU, and relates to the Ministry’s relations with its own workforce. Accordingly, I am satisfied that it falls within the scope of the exclusionary wording in section 65(6)3.

I make this finding notwithstanding the fact that the appellant has commenced an action against the Ministry in relation to the actions of its employees, and also in the recognition (as identified by both parties in this appeal) that the Divisional Court has specifically stated that employment-

related matters are separate and distinct from matters related to employees' actions in the context of the institution's possible vicarious liability in relation to those actions.

I also note the following statement by Senior Adjudicator John Higgins in Order M-927 (dealing with a similar provision of the *Municipal Freedom of Information and Protection of Privacy Act*). In that appeal, a request was made for records including pages from a police officer's notebook, witness statements, a Motor Vehicle Collision Report, and photographs of damaged vehicles. Senior Adjudicator Higgins stated as follows in determining that these records did not fall within the scope of the exclusionary section, even though a subsequent complaint about the actions of the police officer was received:

Section 52(3) is record-specific and fact-specific. If this section applies to a specific record, in the circumstances of a particular appeal, and none of the exceptions listed in section 52(4) are present, then the record is excluded from the scope of the *Act* and not subject to the Commissioner's jurisdiction. ...

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.

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*.

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):

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.

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.

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 this excerpt from Order M-927, Senior Adjudicator Higgins clearly identifies 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 record at issue in this appeal.

The record at issue in this appeal is the CISU investigation report, and I am satisfied that the exclusion in section 65(6)3 applies to the complete report, as this record was collected, prepared or maintained directly in relation to the complaints about the actions of Ministry employees.

ORDER:

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

Original signed by: _____

Frank DeVries
Adjudicator

July 30, 2009 _____