



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

ORDER PO-2931

Appeal PA09-423

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 following information in relation to a specific motor vehicle accident:

At this time, we are requesting a complete copy of the OPP [Ontario Provincial Police] investigative file in relation to the collision, including but not limited to the following:

- Witness statements
- Handwritten investigative notes of [4 named constables]
- Any photographs taken at the scene of the collision
- Any supplemental reports completed

The Ministry located the responsive records and granted access to them. In the decision, the Ministry advised that some of the information had been removed and marked as non-responsive because it related to other matters. The Ministry also referred the requester to the involved Ontario Provincial Police detachment for photographs and the Technical Scene Investigation.

The Ministry subsequently located additional records and issued another decision letter denying access to them pursuant to section 49(b) (personal privacy) of the *Act*.

The requester, now the appellant, appealed the Ministry's decision.

During the course of mediation, the Ministry located additional responsive records and issued a further decision letter in which it advised that the exemption previously claimed also applied to these records. The Ministry also explained that following a further review of all of the withheld records, it became evident that these records pertain to an employment related matter and that they are also claiming the exclusionary provision in section 65(6) (labour relations and employment records) of the *Act* to deny access to all of the records. The Ministry also clarified that the withheld records contain information that the Ministry has marked as non-responsive because it related to other matters.

As mediation did not resolve the issues in this appeal, the file was referred to adjudication where an adjudicator conducts an inquiry. I sent a Notice of Inquiry, setting out the facts and issues in this appeal, to the Ministry seeking its representations. I received representations from the Ministry. I then sent a copy of the Ministry's representations to the appellant, along with a Notice of Inquiry. I received representations in response. I then sent the appellant's representations to the Ministry and sought reply representations. I received reply representations from the Ministry. The Ministry also advised me that the information on pages 20 to 24 which had been marked as responsive was actually non-responsive.

RECORDS:

The records at issue in this appeal consist of 26 pages of police officers' hand-written notes that are numbered pages 11 to 36.

DISCUSSION:

RESPONSIVENESS OF RECORDS

I will first determine whether portions of pages 11 to 15 and 19 to 36 which were identified by the Ministry as non-responsive to the appellant's request are actually responsive to the request.

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;

. . .
- (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).

Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour [Orders P-134 and P-880].

To be considered responsive to the request, records must "reasonably relate" to the request [Orders P-880 and PO-2661].

The Ministry submits that:

The records that are at issue in this appeal are the notes of 5 OPP officers that were created in 2007 and 2009 as a result of the appellant's verbal complaint against a probationary OPP officer arising from the probationary officer's investigation of a motor vehicle collision. The officers all worked at the same detachment.

In 2009, the appellant filed a formal complaint with the Professional Standards Bureau of the OPP. The complaint was dismissed due to the fact that it was filed more than 6 months since the cause of the complaint had originated...

The OPP originally took the position that [the information at issue was] not responsive to the request because they are not part of the investigative file generated in respect of the collision, which is what the requester was seeking. Rather, the above-noted records were generated in response to a public complaint about how the investigation was handled. The OPP submits that these are 2 separate issues, and that the requester was advised accordingly.

The appellant did not provide representations on this issue.

Analysis/Findings

As stated above, the appellant is seeking a complete copy of the OPP investigative file in relation to a collision, including but not limited to the following:

- Witness statements
- Handwritten investigative notes of [4 named constables]
- Any photographs taken at the scene of the collision
- Any supplemental reports completed

Based upon my review of the records, I note that pages 26 to 35 do not contain non-responsive information. Concerning the remaining information identified as non-responsive in pages 11 to 15, 19 to 25 and 36, I agree with the Police that this information is non-responsive as it is not reasonably related to the request. Furthermore, this non-responsive information is not related to a public complaint about how the investigation into the motor vehicle accident was handled.

LABOUR RELATIONS AND EMPLOYMENT RECORDS

The Ministry relies on the exclusionary provision in section 65(6)3 of the *Act*. I will now determine whether this section excludes the information at issue that is responsive to the appellant's request which is contained on pages 11 to 19 and 25 to 36 of the records. Section 65(6)3 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.

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

In *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991, the Ontario Divisional Court defined “relating to” in section 65(5.2) of the *Act* as requiring “some connection” between the records and the subject matter of that section.

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].

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)*, cited above].

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 caused by its employees [*Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.)].

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. Employment-related matters are separate and distinct from matters related to employees’ actions [*Ministry of Correctional Services*, cited above].

The Ministry submits that it was acting as an employer and the terms and conditions of the employment of a probationary police officer were at issue. In this regard, it states that:

The records in question are police officers notes that were prepared in response to a verbal public complaint against a probationary OPP police officer...

[T]he records were prepared to document discussions that took place as part of the internal investigation of the complaint. These records could have been used in any subsequent hearing involving the probationary officer, or in any subsequent action taken by the appellant against the OPP...

[The OPP] has a strong interest as an employer in ensuring that its probationary officers are being properly trained, and that they act in accordance with all laws, policies and procedures. The failure of the OPP to do so exposes the OPP to liability, and the risk of the public's trust in the OPP being undermined, thereby threatening its very mandate to serve.

The probationary period for OPP officers is, by definition, a trial period during which the OPP evaluates the probationary officer's suitability for ongoing employment. Probationary officers who are found not to have suitable skills or abilities can be dismissed. All probationary officers in OPP detachments are assigned 'coaches', who are senior police officers whose role is to mentor the probationary officer. The coach of the probationary officer, in this instance, was actively involved in the investigation against the probationary officer. His notes are part of the records that are the subject of this appeal.

The reputation of the OPP rests on the professionalism of its members. The mere suggestion that one of its officers did not act professionally triggers an interest that the OPP has in addressing the complaint, and in reviewing the actions of the police officer. The OPP takes public complaints seriously...

The OPP must, as an employer, ensure that its member police officers meet the statutory duties imposed under section 42 of the *PSA [Police Services Act]*...

In addition, when the verbal complaint was received, the appellant could have subsequently submitted a complaint to the Professional Standards Bureau or to the Ontario Civilian Police Commission, which would have further increased the legal interest of the OPP in the records. The OPP prepared the records in anticipation that the verbal complaint would be followed up with a formalized written complaint. That the appellant would not end up filing the written complaint within the allotted time frame was not something that was then known...

The appellant relies on the case of *Ministry of Correctional Services* (cited above) and submits that she did not make a complaint into the conduct of the probationary police officer. Rather, she wanted to find out information as to whether this officer conducted a breathalyzer test on the other driver. She states that:

Following the collision, there were inconsistent reports relating to whether or not a breathalyzer test had been administered at the scene. Witnesses ...identified alcohol on [the other driver's] breath; it was understood that a breathalyzer test had been administered. There were some indications following the incident, however, that a breathalyzer test had not been administered. The verbal concern raised by the [the appellant] following the collision went to the facts of the case, i.e. whether or not a breathalyzer had actually been administered. It was made in furtherance of the investigation of [the] collision. The [appellant] expressed no concerns or desires to reprimand the investigating officer for his actions or inactions, as demonstrated by their failure to file a formal complaint against the officer. A failure to administer a breathalyzer test would speak to [the other driver's] liability in the collision, and not to any liability of the Crown in [the appellant's] civil action relating to the collision...

It is submitted that the OPP mistakenly chose to frame [the appellant's] inquiry as a disciplinary matter...

In reply, the Ministry submits that:

The appellant requested access to an investigative file. The appellant received access to many of the records that were requested. Some of the records that were generated relate to a separate employment-related matter in which the OPP has an interest, and those records are excluded from the *Act*...

[The appellant's] argument mistakenly suggests a bad faith motive on the part of the OPP for excluding records. The records were excluded because the OPP believes that the *Goodis* [cited above] decision states they should be.

Analysis/Findings

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.

The appellant's request was for the OPP's file in relation to a specified collision. The OPP is part of the Ministry. Based upon my review of the request and the appellant's representations, I find that the appellant was requesting information about the collision and not seeking to obtain information related to matters in which the Ministry is acting as an employer. However, in the present appeal, the information at issue relates to the terms and conditions of employment or human resources questions are at issue, as they were in the case of *Ministry of Correctional Services*, cited above.

In particular, in spite of the wording of the appellant's request, the portions of the records at issue contain information concerning an OPP investigation into the conduct of a probationary officer. This investigation resulted from the appellant's verbal inquiry into the conduct of the probationary police officer who performed the investigation into the motor vehicle accident that the appellant was involved in. As an employer, the OPP examined the conduct of this officer in response to the information provided by the appellant. Whether or not the appellant intended to initiate a formal complaint against this officer, the information she provided to the OPP about the officer was of such a nature that the OPP independently decided to investigate this probationary officer's actions. This investigation could have resulted in the officer being subject to disciplinary proceedings or even the termination of his employment.

Section 44(3) of the *PSA* anticipates a procedure to be followed by the OPP when considering the termination of a probationary officer. This section states that:

A board may terminate a police officer's employment at any time during his or her probationary period but, before doing so, shall give the police officer reasonable information with respect to the reasons for the termination and an opportunity to reply, orally or in writing, as the board may determine.

Based upon my review of the records, I find that the Ministry prepared, maintained and used the records in relation to discussions or communications about employment-related matters concerning the probationary police officer. This is an employment-related matter in which the Ministry has an interest. Employment-related matters are separate and distinct from matters related to employees' actions [*Ministry of Correctional Services*, cited above].

The fact that the appellant did not submit a written complaint to the Professional Standards Bureau or to the Ontario Civilian Police Commission is irrelevant. The appellant's verbal inquiry to the OPP as to the actions of the probationary police officer led to an OPP investigation into the employment-related conduct of this officer. As stated above, in the circumstances of this appeal, this investigation could have resulted in the probationary OPP officer being terminated under section 44(3) of the *PSA*.

Therefore, I find that the records are subject to section 65(6)3. Furthermore, I find that none of the exceptions to section 65(6) in section 65(7) apply.

As the records are excluded from the application of the *Act* under section 65(6)3, I am unable to consider whether they are also exempt by reason of the personal privacy exemption in section 49(b).

ORDER:

I uphold the Ministry's decision and dismiss the appeal.

Original Signed by: _____
Diane Smith
Adjudicator

November 24, 2010