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

ORDER PO-2982

Appeal PA09-381

Ministry of Community Safety and Correctional Services

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BACKGROUND:

This appeal concerns records that were created as a result of the appellant's complaint against two Ontario Provincial Police (OPP) officers. The appellant filed her complaint with the OPP Professional Standards Bureau (the PSB). The PSB dismissed the appellant's complaint. The appellant then requested that the Ontario Civilian Police Commission[1] (the Commission) review the PSB's decision to dismiss her complaint. The statutory scheme for filing such complaints is set out in the *Police Services Act*[2]. In 2007, the Commission upheld the PSB's decision to dismiss the complaint.

NATURE OF THE APPEAL:

The appellant made a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry of Community Safety and Correctional Services (the ministry) for a specified Commission file which also relates to a PSB file that arose out of the appellant's complaint about the conduct of two OPP officers.

The ministry located responsive records and granted partial access to the requested case file held by the Commission. It also withheld access to the remaining portions of the file pursuant to the discretionary personal privacy exemption in section 49(b), in conjunction with section 21(1) of the *Act*. The ministry also noted that some of the records were excluded from the scope of the *Act* pursuant to section 65(6) (labour relations and employment related matters).

The appellant appealed the ministry's decision.

During mediation, the appellant provided a list of records that she believed should have been located as responsive to her request and were not provided to her, or identified in the index provided by the ministry. This list was provided to the ministry but, the ministry has not provided these records to the appellant. Accordingly, the reasonableness of the ministry's search is an issue in the appeal. The appellant also removed specific pages of the record and other information from the scope of the appeal.

During the inquiry into this appeal, I sought and received representations from the ministry and the appellant. Representations were shared in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction* number 7.

RECORDS:

The records remaining at issue consist of the following:

Page number	General Description	Exclusion/Exemption
2 -3	Correspondence	Section 65(6)

[1] This body was previously known as the Ontario Civilian Commission on Police Services (OCCPS).
[2] The public complaints process in the *Police Services Act* was amended and the ministry notes that the appellant's complaint appears to have been filed under the old process.

Page number	General Description	Exclusion/Exemption
23 -31	Correspondence and police reports	Section 65(6)
41	Correspondence	Section 65(6)
43 – 76	Correspondence	Section 65(6)
79 – 80	Correspondence	Section 65(6)
82 – 83	OCCPS Public Complaints Review Panel – Case Summary	Section 65(6), 49(b)
85 – 129	Correspondence and records from PSB	Section 65(6)

DISCUSSION:

RES JUDICATA and ISSUE ESTOPPEL

The ministry submits that this office has found that some of the records at issue were already excluded from the scope of the *Act* by an IPC decision dated February 1, 2010. The ministry states:

> …the records that the Commission has received from the OPP Professional Standards Bureau ought to be excluded from this appeal on the basis of res judicata…
>
> As IPC analyst Althea Knibb wrote in her February 1st decision, there is a body of IPC jurisprudence that has determined that *"disciplinary matters involving police officers are 'employment-related' matters for the purposes of section 65(6)"*. The records that are OPP Professional Standards Bureau created fall squarely within this scope, as they were created to review the conduct of the 2 OPP constables.

I reviewed the records at issue in the current appeal as well as the request which was the subject of the February 1, 2010 decision and found that the ministry is referring to Records 23 – 31 and 44 – 76, and 85 – 129. These records contain the references to the same PSB file number dealt with by the IPC analyst in her February 1, 2010 decision.

Past orders of this office have dealt with the issue of applying the principles of res judicata or issue estoppel to tribunal decisions. Adjudicator Sherry Liang in Order MO-1907 set out this office's rationale on the application of these principles to decisions of this office.

> In Order PO-1676, Assistant Commissioner Tom Mitchinson considered whether the doctrine of issue estoppel applied to decisions of this office:
>
> > Some authorities assert that issue estoppel cannot apply to administrative tribunals, although this view is not universally accepted. In Administrative Law (3rd edition) by David J. Mullan (Carswell, 1996), the author states at page 274:

> The extent to which res judicata and issue estoppel pertain in the administrative process is uncertain. The bulk of authority holds either that they have no application or that they apply in a different and less decisive form than they do in the context of regular litigation.

However, *Rasanen v. Rosemount Instruments Ltd.* (1994), 17 O.R. (3d) 267, 112 D.L.R. (4th) 683 (Ont. C.A.), which dealt with the question of whether a tribunal decision can be the basis of issue estoppel before a court, would appear to suggest that issue estoppel, in some form, may be available in tribunal proceedings. In obiter comments made by Madam Justice Abella at pages 280-281, she states:

> ... the Policy objectives underlying issue estoppel, such as avoiding duplicative litigation, inconsistent results, undue costs, and inconclusive proceedings, are enhanced in appropriate circumstances by acknowledging as binding the integrity of tribunal decisions.
> ...
>
> There is no basis for restricting the application of issue estoppel to decisions made by judges in the ordinary course of litigation.

The Ontario Court of Appeal explained the law of estoppel in the case of *Minott v. O'Shanter Development Co.*, (1999), 42 O.R. (3d) 321. Mr. Justice Laskin begins his discussion of estoppel as follows:

> I will first discuss the general principles underlying issue estoppel and then apply them to this case. Issue estoppel prevents the relitigation of an issue that a court or tribunal has decided in a previous proceeding. In this sense issue estoppel forms part of the broader principle of res judicata. ... Res judicata itself is a form of estoppel and embraces both cause of action estoppel and issue estoppel. Cause of action estoppel prevents a party from relitigating a claim that was decided or could have been raised in an earlier proceeding. ... Issue estoppel is narrower than cause of action estoppel. It prevents a party from relitigating an issue already decided in an earlier proceeding, even if the causes of action in the two proceedings differ.

> The overall goal of the doctrine of res judicata, and therefore of both cause of action estoppel and issue estoppel, is judicial finality. "The doctrine prevents an encore, and reflects the law's refusal to tolerate needless litigation." [Holmested and Watson, Ontario Civil Procedure, v. II, s. 21 subsection 17[3]]
>
> ...
>
> Issue estoppel has pervasive application and extends not just to decisions made by courts but, as this court's judgment in *Rasanen* affirms, also to decisions made by administrative tribunals. Whether the previous proceeding was before a court or an administrative tribunal, the requirements for the application of issue estoppel are the same. In *Angle* [*Angle v. M.N.R.* (1974), 47 D.L.R. (3d) 544 p. 555 (S.C.C.)] , Dickson J. set out three requirements, relying on English authority.
>
> > Lord Guest in *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)*, [1967] 1 A.C. 853 at p. 935, [H.L.] defined the requirements of issue estoppel as:
> >
> > > ... (1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and, (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.
>
> These three requirements have consistently been applied by Canadian courts.

In Order P-1392, former Inquiry Officer Anita Fineberg stated:

> In addition, the Commissioner's office may dismiss an appeal pursuant to section 52(1) without conducting an inquiry. One of the circumstances in which this may be done is if the appeal involves the same parties, issues and records which had previously been considered.

I agree with the above rationale and adopt it for the purposes of this appeal. The three-part test for issue estoppel is as follows:

(i) The question to be decided in the second proceeding is the same question that was decided in the first proceeding;

(ii) The decision in the first proceeding is final; and

(iii) The same parties to the earlier decision or their privies are the same persons as the parties to the subsequent proceedings.

[*Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248 at 253-4][3]

The appellant submits that the doctrine of res judicata cannot apply in the circumstances of the present appeal because the two files are not the same. I assume that the appellant means that the requests for information were different. However, even if the requests were different, the ministry has identified responsive records which are the same in both instances. Therefore, I conclude that I am able to determine whether I am estopped from making a finding on these records.

I accept that the issue of whether Records 23 – 31 and 44 – 76, and 85 – 129 are excluded from the scope of the *Act* is the same question decided by the Intake Analyst in her February 1, 2010 letter, in which she states that the issue was whether:

> …the requested records relate to a PSB investigation of police officers and are therefore employment-related matters pursuant to section 65(6) of the *Act*, and excluded from the scope of the *Act*.

After finding that the records as a whole relate to employment-related matters and are excluded from the scope of the *Act* pursuant to section 65(6), the Intake Analyst closed the appellant's file. Accordingly, I find that both the first and second parts of the test have been met.

Lastly, it is apparent that the parties to this office's earlier decision and the present appeal are the same, namely the ministry and the current appellant. As all three parts of the test have been met, I find that the requirements for issue estoppel have been established in regard to Records 23 – 31 and 44 – 76, and 85 – 129. I find that the policy of judicial finality would be undermined if I were to review the issue of access to these records once again. These records are, therefore, excluded from the scope of this appeal and I will not address them further in this decision.

I will now consider the exclusionary provision of section 65(6) of the *Act* for the remaining records at issue.

LABOUR RELATIONS AND EMPLOYMENT RECORDS

The ministry submits that Records 2 – 3, 41, 43, 79 – 80 and parts of Records 82 – 83 should be excluded from the scope of the *Act* pursuant to section 65(6)3 which 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:

[3] Set out in Order MO-2494.

> 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. Should that definition be adopted for the words, "in relation to" in section 65(6)? If so, for section 65(6) to apply, there must be some connection between "a record" and either "proceedings or anticipated proceedings", "negotiations or anticipated negotiations" or "meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution 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. The meaning of "labour relations" is not restricted to employer-employee relationships [*Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.). See also Order PO-2157.].

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].

Section 65(6) may apply where the institution that received the request is not the same institution that originally "collected, prepared, maintained or used" the records, even where the original institution is an institution under the *Municipal Freedom of Information and Protection of Privacy Act* [Orders P-1560 and PO-2106].

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].

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.

In support of its position that this section applies, the ministry cites Order PO-2658 where Adjudicator Colin Bhattacharjee found that records relating to a PSB investigation of complaints filed against two OPP officers and the subsequent review by the Commission of the two decisions fell within the exclusion of section 65(6)3. The ministry submits that this decision establishes that records of this type are "employment-related" because of the potential for disciplinary action against the two officers. Further, the ministry submits that this order establishes that the ministry has an interest in the records sufficient to bring the records within the scope of section 65(6)3.

The ministry's representations on the three-part test to establish the application of section 65(6)3 state the following:

> Part 1 – The records were collected, prepared, maintained or used by the OPP for the purpose of an OPP Professional Standards Bureau investigation, and a subsequent review of that decision by the Commission;
>
> Part 2 – The records were collected, prepared or used in relation to meetings, consultations, discussions and communications generated by the complaint that was filed by the Appellant with the OPP Professional Standards Bureau, and that was subsequently reviewed by the Commission. These records were either communicated between the OPP and the Commission, or they were used internally with the Commission, in relation to the review of the decision of the OPP Professional Standards Bureau.
>
> Part 3 – The review of police conduct is by its very nature employment-related, which the ministry has a strong interest in, because it is integral to the successful operation of the OPP.

The appellant submits that Order PO-2658 is not relevant to my consideration[4]. On the application of the three-part test the appellant submits the following:

[4] The appellant submits that this Order deals with collective bargaining which is clearly not the case.

> Part 1 – there is no interest on the part of the appellant to discover the results of the investigation (if any) into her complaint that the officer falsified records. There is only an interest in having the records that are kept corrected.
>
> Part 2 – there is no interest on the part of the appellant to review minutes of meetings, etc where there is no mention of her or her activities. Where there are references to her and her activities, she has a right under section 47(2) of the *Act* to have them corrected.
>
> Part 3 – A review of police conduct may be, in a vacuum, employment-related, but in a greater view, a review of police conduct is important with respect to the actions of officers when dealing with members of the public…When an officer attempts to defend a blatant disregard for their duty to the public under the Human Rights Code, those actions are not employment-related and, therefore, the record of those actions and defences is not to be excluded.

In my view, Order PO-2658 is relevant to the present appeal as it too involves a request for records given to the Commission from the OPP regarding an appellant's complaint against an OPP officer.

Part 1: collected, prepared, maintained or used

I accept that Records 2-3, 41, 43, 79, 80 and parts of 82 and 83 were collected, prepared, maintained or used by the OPP for the purpose of the PSB investigation of the appellant's complaint, and the subsequent review of that decision by the Commission.

As in Order PO-2658, I find that the records at issue consist of correspondence and related documents passing between the Commission and the PSB in connection with its review. Accordingly, these records were also collected and maintained by the OPP.

In Order PO-2658, Adjudicator Bhattacharjee also considered whether the OPP was an institution for the purposes of the Part 1 test. He finds:

> 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.

I adopt the rationale set out in that order and apply it here. I find that the records at issue were collected, prepared, maintained or used by an institution and Part 1 of the section 65(6)3 test has been met.

Part 2: meetings, consultations, discussions or communications

It is evident from my review of the records that meetings, consultations, discussions and communications took place involving both the OPP and the Commission with respect to the records at issue. 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 and Part 2 of the test has been met.

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

In Order PO-2658, Adjudicator Bhattacharjee found that the records at issue in that appeal were "employment-related" because of the potential for disciplinary action against the two officers and thus the meetings, discussions, consultations and communications which took place were about employment-related matters.

Similarly, I find that the records at issue in the present appeal, which reflect the contents of employment-related meetings, consultations, discussions or communications, are about employment-related matters. The records relate to the Commission's review of the PSB's decision on the appellant's complaint against two officers. I agree with the finding of Adjudicator Bhattacharjee that as there is the potential for disciplinary action against the two officers, the records at issue are about employment-related matters.

Next, I must consider whether the 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)* v. *Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355].

In Order PO-2658 Adjudicator Bhattacharjee found that the ministry had a sufficient interest in the employment-related matters in the records at issue. He found that:

> 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.

I agree with this rationale and apply it here. I am satisfied that the ministry has an interest in the employment-related matters which are the subject of the records. Accordingly, I find that part 3 of the section 65(6)3 test has been met.

Further, I find that none of the exceptions in section 65(7) apply to the records at issue. Given that the ministry has met the three-part section 65(6)3 test and section 65(7) does not apply, 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 consider the application of the section 49(b) or section 21(1) exemptions to the records. Further, I do not need to consider the application of the public interest override in section 23.

I will now consider whether the ministry's search for responsive records was reasonable.

SEARCH FOR RESPONSIVE RECORDS

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 [Orders P-85, P-221 and 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 [Orders P-624 and PO-2559]. To be responsive, a record must be "reasonably related" to the request [Order PO-2554].

A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request [Orders M-909, PO-2469, PO-2592].

A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control [Order MO-2185].

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 [Order MO-2246].

The appellant submits that the following records were not located by the ministry in its search for responsive records:

- Documents provided to the OPP in Orillia by the appellant, her sister and niece.
- Notes made by a police officer who sat with the appellant and her niece.
- Field notes and occurrence report dated August 16 or August 17, 2006.

The ministry provided an affidavit of the Senior Advisor of the Ontario Civilian Police Commission as evidence that its search for records was reasonable. The affiant swore the following:

- She conducted the first search on September 17, 2009 for responsive records.
- As a result of that search, two Request for Review files were identified. The affiant then conducted a search of the Commission's database and located the two review files.
- Once the review file numbers were located, a search of the file cabinets where the files are kept was searched. The review files relating to the appellant were located.
- The affiant conducted another search on September 23, 2010 after the appellant appealed the ministry's decision to this office. Again, the same two review files were identified.

The appellant's request was for records held by the Commission relating to a specified PSB file number and specified Commission file number. In my view, there is nothing ambiguous in the appellant's request and the request relates solely to information in the Commission's files. The records that the appellant claims should exist are records of the OPP officers. These records, if they exist, would have been sent from the PSB to the Commission with the other responsive records. In this case, these records were not sent from the PSB to the Commission and I find that the appellant has not established that these records should exist at the Commission.

I find the ministry's search to be reasonable in the circumstances. The institution was able to identify the records relating to the appellant and locate the responsive records with the searches it conducted. The appellant's submission that additional records should exist does not, in my view, establish a reasonable basis for concluding that additional records would be located if I ordered the ministry to conduct further searches. Therefore, I uphold the ministry's search as reasonable and dismiss the appellant's appeal on this issue.

ORDER:

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

2. I uphold the ministry's search.

Original signed by: July 20, 2011
Stephanie Haly
Adjudicator