

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-3010

Appeal PA09-461-2

Ministry of Community Safety and Correctional Services

November 16, 2011

Summary: The appellant made a request to the ministry for records relating to a particular incident which took place at his home involving the OPP. The ministry claimed that some of the responsive records were excluded from the *Act* pursuant to sections 65(6)1 and 3. The ministry also claimed that certain records were exempt pursuant to sections 14(1)(e), (i) and (l). The appellant claimed that responsive records should exist for parts of his request. The majority of the records were found to be excluded from the *Act* pursuant to section 65(6)1 as they relate to an incident which is the subject of a disciplinary hearing against an OPP officer. A portion of the responsive operational manual was found to be exempt under section 14(1)(i). The ministry's search for responsive records was upheld as reasonable.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss.14(1)(e), (i), (l), 65(6)1 and 3.

Orders and Investigation Reports Considered: M-835, MO-2428, PO-2658.

OVERVIEW:

[1] The appellant made a 10-part 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 access to:

1. The incident report of [two named officers];

2. The reports for drawing a firearm as per Ontario Regulations – *Police Services Act – Equipment and Use of Force*, R.R.O. 1990, Reg. 926, s. 14.5(1)(a);
3. All field notes of [two named officers];
4. Recordings of any 911 calls made related to [specified address] and/or its primary resident [appellant] between 16:00 and 19:00 hours on [specified date];
5. Any videotapes with records footage taken by either [two named officers] either remotely or through their vehicle;
6. Any videotapes with recorded footage from inside the OPP detachment at [specified address] taken with [named officer, appellant and other named individuals] all together and alone individually with Officer from 12:00 to 16:00 hours on [specified date];
7. Any notes from [named sergeant and named officer] of the OPP detachment regarding [specified address] and a pick-up of a dead dog between 18:00 and 22:00 hours on [specified date];
8. Any other notes from the OPP regarding the above incident;
9. All records of complaints and/or disciplinary action in respect of [two named officers] related or unrelated to the above incident; and
10. Any internal policies/procedures regarding normal equipment carried by officers for use of force and extreme force.

[2] The ministry located the responsive records to items 1, 2, 3, 4, 7 and 9 of the request and denied access to them on the basis that they "...concern a matter that is currently under investigation." Access was denied in accordance with the discretionary exemptions at section 49(a) with reference to sections 14(1)(a), (b), (c), 14(2)(a) and section 49(b) with reference to the presumption in section 21(3)(b) and the factor in section 21(2)(f) of the *Act*. The ministry also claimed that the records were excluded from the *Act* under section 65(6) and that some of the information is not responsive to the request. Finally, the ministry also advised that records responsive to items 5, 6 and 8 of the request do not exist.

[3] The ministry subsequently issued a supplementary decision granting partial access to the record responsive to item 10. Access was denied to the severed portions

of the record pursuant to the discretionary law enforcement exemptions in sections 14(1)(e), (i), (l) of the *Act*.

[4] During mediation, the ministry advised the appellant of the following:

- It was no longer relying on section 14(1)(b) for records responsive to items 1, 2, 3, 4, 7 and 9, as the investigation had been completed.
- Access to records responsive to items 1, 2, 3, 7 and 9 of the request was denied in accordance with sections 14(1)(a), (c), (e), (i), (l), 14(2)(a), 49(a), 49(b), 65(6) of the *Act*.
- The responsive records relate to a matter that is currently under review by the Ontario Civilian Police Commission.
- Access to the 911 records that were responsive to item 4 of the request were denied pursuant to the discretionary personal privacy exemption in section 49(b).

[5] Also during mediation, the appellant indicated to the mediator that he believes that records must exist relating to items 5 and 6 of his request. The ministry conducted an additional search for records but it advised the mediator that no records exist relating to items 5, 6 and 8 of the request. The issue of reasonable search was added to the scope of the appeal with respect to records responsive to items 6 and 8 of the appellant's request. The appellant confirmed that he accepts that no responsive records exist for item 5 of his request.

[6] Finally, during my inquiry into the appeal, the ministry issued an additional supplementary decision with respect to two additional 911 audio records responsive to item 4 of the request. The ministry claimed that these records were excluded from the scope of the *Act* pursuant to sections 65(6)1 and 3.

[7] During the inquiry into this appeal, I sought representations from the ministry and the appellant. I received representations from the ministry only. The appellant was contacted about whether he wished to make representations and he declined.

[8] In this decision, I uphold the ministry's decision, in part.

RECORDS:

[9] The records remaining at issue consist of the following:

- Item 1: Occurrence Reports (pages 1 – 12)
- Item 3: Notes of two named officers (pages 13 – 31 and pages 32 – 36)
- Item 4: 911 call
- Item 7: Notes of two named officers (pages 37 – 38 and 39 – 47)
- Item 9: Records relating to a named OPP officer (pages 48 – 79)
- Item 10: Use of Force Manual (pages 80 – 90)
- Item 11: Two 911 calls

ISSUES:

- A. Are the records excluded from the *Act* pursuant to paragraphs 65(6)1 and/or 3?
- B. Do sections 14(1)(e), (i) or, (l) exempt the operation policy records responsive to item 10 of the request from disclosure?
- C. Was the ministry's exercise of discretion proper?
- D. Was the ministry's search for records responsive to items 6 and 8 of the appellant's request reasonable?

DISCUSSION:

A. ARE THE RECORDS EXCLUDED FROM THE *ACT* PURSUANT TO PARAGRAPHS 65(6)1 AND/OR 3?

[10] The ministry submits that all the records, with the exception of those records responsive to item 10, are excluded on the basis that they are employment records and fit within the exclusion in either paragraphs 1 or 3 of section 65(6). Section 65(6) reads, in part:

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.

[11] 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*.

[12] 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."

[13] 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].

[14] 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].

[15] 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].

[16] The ministry provided a background of events surrounding this request and its claim of the exclusionary provisions in sections 65(6)1 and 3. The ministry explains that as a result of the incident which is the subject matter of the request, the appellant

brought a complaint against one of the OPP officers involved in the incident. The OPP investigated the complaint, but the appellant was not satisfied with its findings and asked that the decision be reviewed by the Ontario Civilian Police Commission (the "Commission").

[17] The ministry notes that as the appellant's complaint was filed prior to the October 2009 amendments to Part V of the *Police Services Act* (the *PSA*), the review process was dealt with according to that part of the *PSA* in force prior to October 2009. The Commission made a number of findings and directed the OPP to initiate a disciplinary hearing into the matter within 90 days.

Section 65(6)1

[18] For the exclusion in paragraph 1 of section 65(6) to apply, the ministry must meet the following three-part test:

1. the record was collected, prepared, maintained or used by an institution or on its behalf;
2. this collection, preparation, maintenance or usage was in relation to proceedings or anticipated proceedings before a court, tribunal or other entity; and
3. these proceedings or anticipated proceedings relate to labour relations or to the employment of a person by the institution.

Part 1 – records must be collected, prepared or used by the OPP

[19] The ministry submits that the records were clearly collected, prepared and used by the members of the OPP. The ministry notes that most of the records are computer print-outs from the OPP Internal Affairs data base. It further notes the following:

- Pages 11 and 12 are a Use of Force report filed as a result of the incident;
- Page 53 is a Record of Discipline form
- Three of the records are the audio recordings of 911 calls.

[20] The other records not mentioned by the ministry are the occurrence summary (responsive to Item 1) and the police officer notes (responsive to Items 3 and 7). I find that all of these records were prepared, collected and used by the OPP in reference to the incident and relate to the involved OPP officer. Accordingly, the ministry has met part one of the test.

Part 2 – The records must be collected, prepared, maintained or used in relation to proceedings or anticipated proceedings before a tribunal or other entity

[21] The word “proceedings” means a dispute or complaint resolution process conducted by a court, tribunal or other entity which has the power, by law, binding agreement or mutual consent, to decide the matters at issue [Orders P-1223 and PO-2105-F].

[22] For proceedings to be “anticipated”, they must be more than a vague or theoretical possibility. There must be a reasonable prospect of such proceedings at the time the record was collected, prepared, maintained or used [Orders P-1223 and PO-2105-F].

[23] The ministry submits that this office’s jurisprudence has established that disciplinary hearings under Part V of the *PSA* qualify as “proceedings” before a tribunal or other entity for the purpose of the exclusion. In particular, the ministry cites Order MO-2428 where Adjudicator Catharine Corban summarized this office’s approach to disciplinary hearings under Part V of the *PSA*:

This office has found that a disciplinary hearing conducted under Part V of the *Police Services Act* qualifies as a dispute or complaint resolution process conducted by a tribunal or other entity which has, by law, the power to decide disciplinary matters. As such, prior orders have consistently held that these hearings are properly characterized as “proceedings” for the purposes of section 52(3)1 [see, for example, Orders M-835, M-840, M-899, PO-1797 and MO-2216].

[24] I agree with this approach and apply it here. The ministry has provided me with evidence that a disciplinary hearing of the identified OPP officer is anticipated, at the time it made its representations. I find that the disciplinary hearing is a proceeding for the purposes of the exclusion and that the ministry has met part two of the test.

Part 3 – The proceedings or anticipated proceedings must relate to the employment of a person by the institution

[25] The ministry submits that this office’s jurisprudence also supports a finding that disciplinary hearings under Part V of the *PSA* relate to “employment” of a person for the purposes of the exclusion.

[26] Based on my review of the records, I find that the disciplinary hearing that was to take place involving the appellant’s complaint against the OPP officer relates to the employment of a person by the institution for the purposes of section 65(6)1. In Order M-835, the former Assistant Commissioner Tom Mitchinson found that police officers

are subject to penalties under the *PSA* following disciplinary actions and the proceedings “can only reasonably be characterized as employment related actions.” I adopt this finding for the purposes of this appeal.

[27] Moreover, I consider the application of the decision in *Goodis*, cited above, which was set out in Order PO-2658 by Adjudicator Colin Bhattacharjee, on the application of sections 65(6)3:

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].

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.”

[28] I find Adjudicator Bhattacharjee’s analysis equally applicable to the analysis under the third part of the section 65(6)1 test and apply it here. I have reviewed the records the ministry has claimed are excluded under this provision and find that they relate to the incident which took place at the appellant’s home and is the subject of the appellant’s complaint against the named officer. I find that the records relate to the employment of a person, specifically the OPP officer, because of the potential for disciplinary action against the officer. Accordingly, I find that the proceedings were related to employment and I am satisfied that the ministry has met Part 3 of the section 65(6)1 test.

[29] Further, I find that the exceptions set out in section 65(7) do not apply to the records.

[30] As the ministry has satisfied the three-part test for the application of section 65(6)1, I find that the records responsive to items 1, 2, 3, 4, 7, 9 and 11 of the appellant’s request are excluded from the application of the *Act*.

[31] I will now proceed to consider the application of section 14(1) to the Use of Force manual information.

B. DO SECTIONS 14(1)(e), (i) OR (l) APPLY TO EXEMPT THE OPERATIONAL POLICY MANUAL INFORMATION FROM DISCLOSURE?

[32] The ministry claims the application of the section 14(1)(e), (i) and (l) exemptions for the information withheld on pages 80 – 90. I note that these pages of record do not contain any personal information and are operational policy manual information only. These sections state:

A head may refuse to disclose a record where the disclosure could reasonably be expected to,

- (e) endanger the life or physical safety of a law enforcement officer or any other person;
- (i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;
- (l) facilitate the commission of an unlawful act or hamper the control of crime.

Section 14(1)(e)

[33] The ministry submits that section 14(1)(e) applies to exempt the information withheld on pages 83 through 87. The ministry submits that these pages of record contain detailed procedures for tear gas use and firearm storage, repair and use and disclosure would result in the following:

- Individuals who wish to thwart law enforcement would use this information for their countermeasure plans.
- Would-be criminals may use the information to take calculated risks about the OPP firepower in future altercations.

[34] Accordingly, the ministry argues that disclosure of the information on these pages could endanger the life and public safety of OPP officers and the general public. Finally, the ministry submits that it need only demonstrate that the reason for withholding disclosure is not a "frivolous or exaggerated expectation of endangerment to safety."¹

[35] In the case of section 14(1)(e), the institution must provide evidence to establish a reasonable basis for believing that endangerment will result from disclosure. In other words, the institution must demonstrate that the reasons for resisting disclosure are not frivolous or exaggerated [*Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.)].

[36] A person's subjective fear, while relevant, may not be sufficient to establish the application of the exemption [Order PO-2003].

[37] The term "person" is not necessarily confined to a particular identified individual, and may include any member of an identifiable group or organization [Order PO-1817-R].

[38] Based on my review of the information withheld on pages 83 through 87 I find that section 14(1)(e) does not apply to exempt the information. The withheld information can be described, in my view, as generalized administrative information. I am unable to find that disclosure of this information could endanger the life and public safety of OPP officers or the general public.

¹ *Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)*, cited above.

Section 14(1)(i)

[39] The ministry claims that this exemption applies to the withheld information on pages 85 through 87 as these pages contain procedures for protecting the security of firearms. The ministry argues that disclosure of these procedures could jeopardize the security of the firearm storage.

[40] Based on my review of the information, I find that section 14(1)(i) only applies to part of the information withheld on page 86 which consists of detailed information on the storage of OPP firearms and their location. I find that disclosure of this information could reasonably be expected to endanger the security of the firearms and procedures governing them. The rest of the information, as described above, is generalized administrative information only and I find that its disclosure could not be expected to endanger the security of OPP firearms and is not exempt under section 14(1)(i).

Section 14(1)(l)

[41] The ministry claims the application of this exemption for the withheld information on pages 84 through 87 as disclosure of this information would reveal sensitive firearm and tear gas information. The ministry argues that disclosure could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime as the information contains certain tactics and strategies which are not widely known and could be used by individuals in an altercation with the police.

[42] As stated above, I have found the withheld information on these pages of record to be generalized or administrative information about tear gas usage and the storage and care of the firearms. I am unable to find that disclosure of this information could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime. Accordingly, I find that section 14(1)(l) does not apply to the information at issue.

[43] As I have found that a portion of page 86 is exempt under section 14(1)(i), I will consider the ministry's exercise of discretion with respect to this portion of the record only.

[44] The rest of the pages 83 - 87 that I have not found exempt under sections 14(1)(e), (i) and (l) should be disclosed to the appellant as the ministry has not claimed any additional exemptions for this information and no mandatory exemptions apply.

C. WAS THE MINISTRY'S EXERCISE OF DISCRETION PROPER?

[45] The section 14(1)(i) exemption is discretionary and permits the ministry to disclose the information, despite the fact that it could withhold it. An institution must

exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[46] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[47] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

[48] The ministry submits that it exercised its discretion properly taking into consideration the fact that disclosure of the information might jeopardize the security and safety of OPP officers and the general public. Based on my review of the way in which the ministry applied the exemption and the information withheld, I find that the ministry properly considered the exemption and the interests it seeks to protect, the fact that the record did not contain the appellant's personal information and its historical practice in dealing with similar information. I find the ministry's exercise of discretion to be proper.

D. WAS THE MINISTRY'S SEARCH FOR RECORDS RESPONSIVE TO ITEMS 6 AND 8 OF THE APPELLANT'S REQUEST REASONABLE?

[49] The appellant submits that records responsive to items 6 and 8 of his request should exist.

[50] 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.

[51] 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].

[52] 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].

[53] 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].

[54] 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].

[55] The institution was asked to provide a written summary of all steps taken in response to items 6 and 8 of the request. In support of its position that its search for responsive records was reasonable, the ministry submitted an affidavit by the detachment commander of the OPP detachment for the community where the incident took place. The ministry explains that the interviews which are the subject of item 6 of the request were not taped at the OPP detachment as it is up to the discretion of the OPP officer conducting the interview whether the interview is taped. The OPP does not have a policy requiring the taping of interviews.

[56] As noted above, items 6 and 8 of the appellant's request were for the following:

- Any videotapes with recorded footage from inside the OPP detachment taken with named officer, appellant and other named individuals all together and alone with officer at a specified date and time.
- Any other notes from the OPP regarding the incident.

[57] The detachment commander affirmed the following with respect to the search for records:

- He undertook a search for responsive records including the videotapes from inside the OPP detachment and any notes from the OPP regarding the incident.
- Records were searched at the detachment level and the notes of the OPP officers were provided as well as the incident report from the OPP's RMS Niche database.
- No video tape records were found to exist.

- FOI office requested a further search for audio/video copies of the interviews conducted by an OPP officer with the witnesses. The officer advised that the discussions took place in the soft interview room and he did not record the discussions.
- He confirms that there are no video tape recordings in relation to the incident and that no further notes exist at the detachment relating to the incident.

[58] The appellant did not provide representations and he did not provide the reasonable basis for his belief that responsive records should exist.

[59] As stated above, the ministry is not required to prove with absolute certainty that no further records exist. The ministry must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. Based on my review of the ministry's representations, I find that its search for records was reasonable. The OPP conducted two searches for the responsive records. I accept its evidence that the interview of the witnesses at the detachment were not recorded in the circumstances. I find the ministry's search for records responsive to items 6 and 8 of the appellant's request to be reasonable and I dismiss the appellant's appeal of this issue.

ORDER:

1. I uphold the ministry's decision that the records responsive to items 1, 3, 4, 7, 9 and 11 are excluded from the *Act*.
2. I order the ministry to disclose pages 80 – 90 (with the exception of a portion of page 86) to the appellant by **December 16, 2011** by providing him with a copy of that record.
3. I uphold the ministry's decision to deny access to the portion of the record on page 86 which I have identified on the highlighted copy of that page of record sent with this order. For the sake of clarity, I have highlighted the portion of that page that is **not** to be disclosed.
4. In order to verify compliance with order provision 2, I reserve the right to require that the ministry provide me with a copy of the record sent to the appellant.

Original Signed by: _____
Stephanie Haly
Adjudicator

November 16, 2011