

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3037

Appeal PA11-42

Ministry of Tourism and Culture

January 16, 2012

Summary: The appellant sought access to records “related to concerns about expense claims or financial improprieties” at the Niagara Parks Commission in 2001 and 2002. The Ministry of Tourism and Culture took the position that the identified responsive records were excluded from the scope of the *Act* on the basis of section 65(6)3. The ministry’s decision that section 65(6)3 applies to the records is upheld.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, s. 65(6)3 and regulation 460.

Orders and Investigation Reports Considered: PO-1969-F, PO-2615 and PO-2952.

Cases Considered: *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457 (Div. Ct.).

OVERVIEW:

[1] The Niagara Parks Commission is an agency of the Ministry of Tourism and Culture (the ministry). According to its website its role is to protect the natural and cultural heritage along the Niagara River for the enjoyment of visitors while maintaining

financial self-sufficiency. The Niagara Parks Commission is an institution subject to the *Freedom of Information and Protection of Privacy Act*.¹

[2] This appeal arises out of a request to the ministry for access to records “related to concerns about expense claims or financial improprieties at the Niagara Parks Commission in 2001 and 2002.”

[3] After notifying the Niagara Parks Commission (NPC) and receiving their position on disclosure the ministry issued its access decision. Relying on the exclusionary provision at section 65(6) of the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*), the ministry denied access to four letters it identified as responsive to the request.

[4] At mediation the ministry confirmed that if the letters were not excluded from the *Act*, then it would rely on the mandatory exemption at section 21(1) (invasion of privacy) of *FIPPA* to deny access to them.

[5] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeal process where an adjudicator conducts an inquiry under the *Act*.

[6] I commenced the inquiry by inviting representations from the ministry and a number of individuals whose interests may be affected by disclosure of the letters (the affected parties). The ministry and one affected party provided representations. I shared them with the appellant in accordance with section 7 of the IPC’s Code of Procedure and Practice Direction number 7. The appellant decided not to provide any representations.

[7] In the discussion that follows, I conclude that section 65(6)3 of *FIPPA* operates to exclude the four letters from the ambit of the *Act*.

DISCUSSION:

[8] The ministry takes the position that by operation of section 65(6)3 of *FIPPA*, the *Act* does not apply to the four letters.

[9] Section 65(6)3 reads:

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 The Niagara Parks Commission is listed as an institution subject to the *Freedom of Information and Protection of Privacy Act* in regulation 460.

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

[10] 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.

[11] If the records fall within any of the exceptions in section 65(7), the *Act* applies to them. In my view, none of the exceptions apply to the four letters.

[12] 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 in the context of the institution's possible vicarious liability in relation to those actions, as opposed to the employment context.²

[13] With respect to the scope of the exclusionary provision in section 65(6), Swinton J. for a unanimous Court, wrote in *Ontario (Ministry of Correctional Services) v. Goodis*³ (*Goodis*) 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,

² See, *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457 (Div. Ct.) at paragraph 31.

³ See footnote 2.

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.

[14] 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, at paragraph 29 of *Goodis*, 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."

[15] Section 65(6)(3) 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*.⁴

Part 1: collected, prepared, maintained or used

[16] The ministry submits that the first of the four letters is an anonymous complaint letter received by the NPC pertaining to the alleged misconduct of an employee of the NPC. The ministry submits that this led to the creation of the three following letters. The ministry submits that:

[The second letter] was prepared by the NPC employee at issue for the purpose of responding to NPC management about the allegations. [The third letter] was prepared by a senior manager of NPC for the purpose of responding to the NPC employee about the allegations. [The fourth letter] was prepared by the senior manager for the purpose of informing the NPC's board of directors about the resolution of the complaint.

[17] I have reviewed the four letters and find that they were collected, prepared, maintained or used by the NPC. Accordingly, I am satisfied that part one of the test has been met with respect to these records.

Part 2: meetings, consultations, discussions or communications

[18] The ministry submits that the collection, preparation, maintenance and usage of the letters were in relation to discussions and communications between the NPC employee who was the subject of the complaint and its management while assessing, reviewing and investigating the complaint. The ministry submits that:

⁴ Orders P-1560 and PO-2106.

The records themselves constitute written communications about an employment-related matter. [The last letter], in particular, refers to a review/consultation/discussion that occurred between the NPC employee at issue and the senior manager.

[19] I have reviewed the letters and am I satisfied that they were collected, prepared, maintained or used by the NPC in relation to consultations and communications pertaining to an assessment, review and investigation arising out of a complaint about the conduct of an NPC employee.

[20] As a result, I find that part two of the test under section 65(6)3 has been satisfied.

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

[21] 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.⁵ 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.⁶ The institution that has the interest may not be the same entity that received the request.⁷

[22] I am satisfied that the assessment, review and investigation arising out of the complaint is one in which the NPC was acting as an employer, and terms and conditions of employment or human resources questions were at issue. In my view, the letters were prepared, maintained or used by the NPC in relation to consultations and communications about the investigation of the conduct of its employee. I am therefore satisfied that the four letters relate directly to "employment-related matters" for the purpose of section 65(6)3.⁸

[23] The next question under part three is whether the employment-related matters are matters in which the NPC "has an interest." The ministry submits that:

[The NPC] has the requisite interest in the employment-related matter at issue. The interest is not a "mere curiosity or a concern". As an employer, the NPC has a direct interest in allegations of misconduct involving its employees.

⁵ Order PO-2157

⁶ *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to the S.C.C dismissed [2001] SCCA No. 509.

⁷ See Orders PO-2106 and PO-2615.

⁸ See Orders PO-1969-F and PO-2952.

[24] As set out above, it is clear that the letters were collected, prepared, maintained or used by the NPC in relation to consultations and communications pertaining to the assessment, review and investigation arising out of a complaint about the conduct of an NPC employee. In this situation, I am satisfied that the NPC was acting as an employer, and terms and conditions of employment or human resources questions were at issue, as referred to by Swinton J. in the *Goodis* decision.

[25] Accordingly, I conclude that the issue addressed in the letters was in relation to employment-related matters in which the NPC "has an interest" within the meaning of section 65(6)3 and part three of the section 65(6)3 test has been met.

[26] In summary, I find that the ministry has established all of the requirements of section 65(6)3; the letters were collected, prepared, maintained and used by the NPC in relation to discussions and communications about employment-related matters in which the NPC has an interest. Also, it is clear that none of the exceptions in section 65(7) applies. Accordingly, I find that the letters fall within the parameters of section 65(6)3 and are, therefore, excluded from the scope of the *Act*.

[27] As a result, it is not necessary for me to determine whether the letters are also subject to the mandatory exemption at section 21(1) of the *Act*.

ORDER:

I find that the *Act* does not apply to the records.

Original signed by: _____
Steven Faughnan
Adjudicator

January 16, 2012