



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2643

Appeal PA-060181-1

Ministry of Community Safety and Correctional Services



Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Télé: 416-325-9188
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

The Ministry of Community Safety and Correctional Services (the Ministry) received a four-part request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information:

1. Complete repair records up to and including the present date for [an identified laser unit].
2. The training records and training certificates in the use of Laser and Radar speed monitoring devices ... for [a named police officer].
3. The work schedule and work assignments for [the named police officer] on [four specific dates].
4. All notes and records regarding all traffic tickets issued by [the named police officer] on [same four specific dates].

The Ministry identified 28 pages of records as responsive to the request, and issued a decision letter to the requester which identified that no repair records responsive to the first part of the request exist. With respect to items 2 and 3 of the request, (training records and work schedule and assignments for the named officer), the Ministry stated that these records were excluded from the scope of the *Act* because of the exclusionary provision in section 65(6).

In response to item 4 of the request, the Ministry denied access to this information on the basis of the exemption in section 49(a) (discretion to refuse requester's own information) in conjunction with sections 14(1)(a) and (l) (law enforcement) and section 19 (solicitor-client privilege), as well as the exemptions in sections 21(1) and 49(b) (personal privacy) of the *Act*.

The requester (now the appellant) appealed the Ministry's decision.

During mediation, the Ministry withdrew its reliance on section 19 of the *Act*, and that section is no longer at issue in this appeal. Also during mediation, the Ministry identified three additional pages of responsive records and, in a supplementary decision letter, stated that these records were also excluded from the operation of the *Act* under section 65(6). These additional records form part of the records at issue in this appeal.

In addition, the Ministry identified certain information contained in the records as not responsive to the request, and the responsiveness of portions of some records was identified as an issue in this appeal.

Mediation did not resolve this appeal and it was transferred to the inquiry stage of the process. The adjudicator originally assigned to this appeal sent a Notice of Inquiry to the Ministry seeking representations on the issues. The Ministry provided representations in response and, in its representations, the Ministry stated that it was no longer relying on the exemption in section 14(1)(a) of the *Act* to deny access to the records. The application of that section is no longer at issue in the appeal.

In addition, concurrent with its submissions, the Ministry issued a revised decision letter to the appellant, granting partial access to one page of the records.

The adjudicator then sent the Notice of Inquiry, with a complete copy of the Ministry's submissions, to the appellant. The appellant did not provide representations in response.

The file was subsequently transferred to me to complete the adjudication process.

RECORDS:

There are 31 pages of records which consist of Traffic Unit Weekly Statistics including a summary document (pages 1-7), work schedules (pages 8 and 9) and Police Officer's notes (pages 10 -31).

DISCUSSION:

RESPONSIVENESS OF RECORDS/SCOPE OF THE REQUEST

As identified above, the Ministry takes the position that certain records and portions of records are not responsive to the request, and the responsiveness of those records or portions of records is an issue in this appeal.

The Ministry provided a copy of the records in which it shaded the records and portions of the records which it states are not responsive to the request. These shaded records include portions of pages 1, 2, 6, 8, 9, 10, 12, 13, 14, 19, 20, 22, 23 and 28 - 31, and all of pages 3, 4, 5 and 7, as well as the facsimile information contained on the top of each page of the records. The Ministry's representations on this issue state:

... the Ministry is of the view that parts of the records at issue contain information that is not responsive to the appellant's request.

The Ministry submits that shaded information on pages 1 to 31 relating to the faxing of records was created as direct a result of the receipt of the appellant's request The Ministry submits that this administrative information was created as a direct result of the necessity of producing the records requested by the appellant. The Ministry submits that similar information was found to be not responsive to a [request under the *Act*] by Adjudicator Sherry Liang in Order PO-2254.

The Ministry submits that the shaded information on pages 1 to 9 that does not specifically reference the time period identified in the appellant's request and does not concern the named constable is not responsive to the appellant's request. The appellant's request specifically seeks information concerning the "work schedule" and "work assignments" for the named constable on specific dates.

Information about other individuals, other dates or other matters is not responsive to the appellant's request.

With respect to the information requested in part 4 of the appellant's request, the Ministry submits that the shaded information on pages 10 to 28 is not responsive to the appellant's specific request for access to "... all notes and records regarding all traffic tickets issued by [the named constable] on [the specified date]."

The shaded information reflects administrative and operational matters (including officer on and off duty times) that do not relate to traffic tickets issued by the named constable on the dates in question. Such information is not responsive to the appellant's request.

With respect to part 2 of the appellant's request, the Ministry submits that the shaded information contained on pages 29 to 31 is administrative and operational information that does not constitute "training records" relating to the named constable. As a result this information is not responsive to the appellant's request.

Finding

The issue of the responsiveness of records was addressed by Adjudicator Anita Fineberg in Order P-880. That order dealt with a re-determination of the issue of responsiveness following the decision of the Divisional Court in *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197.

In that case, the Divisional Court characterized the issue of the responsiveness of a record to a request as one of relevance. In Order P-880, Adjudicator Fineberg noted the court's guidance and commented as follows:

In my view, the need for an institution to determine which documents are relevant to a request is a fundamental first step in responding to the request. It is an integral part of any decision by a head. The request itself sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as responsive to the request. I am of the view that, in the context of freedom of information legislation, "relevancy" must mean "responsiveness". That is, by asking whether information is "relevant" to a request, one is really asking whether it is "responsive" to a request. While it is admittedly difficult to provide a precise definition of "relevancy" or "responsiveness", I believe that the term describes anything that is reasonably related to the request.

I agree with Adjudicator Fineberg's approach and adopt it for the purpose of this appeal.

The original request, as set out above, is quite specific. It states that it is for certain repair records, training records and certificates for a named police officer, the work schedule and work assignments for the named officer on four specific dates, and notes and records regarding all traffic tickets issued by the named officer on those dates.

I have carefully reviewed the portions of the records shaded by the Ministry to determine if those portions are “reasonably related to the request.” My review of the shaded portions confirms the Ministry’s description of those records as set out in its representations. Specifically, the shaded top portion of each page contains facsimile information which relates to administrative matters postdating the request. The remaining shaded portions of pages 1 - 9 relate to police officers or time periods not included in the appellant’s request. The remaining shaded portions of Records 10 - 31 relate to matters other than the specific ones requested by the appellant.

Accordingly, I find that all of pages 3, 4, 5 and 7, and the shaded portions of pages 1, 2, 6, 8, 9, 10, 12, 13, 14, 19, 20, 22, 23 and 28 - 31 are not responsive to the request.

SECTION 65(6) – APPLICATION OF THE ACT

The Ministry takes the position that the portions of pages 1, 2, 6, 8, 9 and 29 - 31 which are responsive to the request fall outside the scope of the *Act* by virtue of the operation of section 65(6)3, which 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:

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

General Principles

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*.

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 “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)3: matters in which the institution has an interest

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

Representations

In support of its position that the *Act* does not apply to the responsive records at issue in this discussion, the Ministry submits the following:

... Ministry staff collected, prepared, maintained and/or used the information in the record[s] at issue in relation to discussions and communications in respect to work scheduling, work assignment, attendance, work performance, compensation issues and training issues relating to the employment of the constable named in the appellant's ... request. The records reflect the employer-employee relationship between the Ministry and the named OPP officer. The Ministry, as an employer, is responsible for scheduling employees for duty and for ensuring that employees are appropriately compensated. This type of information is routinely communicated to management, scheduling and payroll staff of the Ministry.

...

The Ministry is of the view that the information in the subject records was collected, prepared, maintained and/or used for discussions and communications in relation to employment-related matters. The subject records contain information relating to staff scheduling, work assignment, attendance, work performance, compensation issues and training. These are clearly matters relating to the management of the Ministry's workforce. The Ministry, as an employer, has an interest in information relating to such activities. This type of information is routinely communicated to management, scheduling and payroll staff of the

Ministry for employment and other purposes. The records are about inherently employment-related matters.

The Ministry submits that the wording of the appellant's request clearly indicates that the appellant is focusing on issues relating to one particular officer, the named constable. The appellant specifically seeks records relating to the "training", "work schedule" and "work assignments" of the named constable. Such information is clearly by its very nature employment-related.

The Ministry submits that all three requirements in section 65(6)3 of [the *Act*] have been satisfied.

Findings

Part 1: Were the records collected, prepared, maintained or used by the Ministry or on its behalf?

Based on the representations of the Ministry and on my review of the records themselves, which consist of timesheets, weekly statistics of identified personnel, and notebook entries made by a police officer, I find that the records that the Ministry claims fit within the exclusionary language of section 65(6)3 were collected, prepared, maintained or used by the Ministry or on its behalf.

Part 2: Was the collection, preparation, maintenance or usage in relation to meetings, consultations, discussions or communications?

Based on the material before, I am satisfied that pages 1, 2, 6, 8, 9 were collected, prepared, maintained or used "in relation to ... meetings, consultations, discussions or communications." Records 1, 2, 6, 8 and 9 consist of forms prepared either by the police officer or by management. On my review of these pages, I am satisfied that, due to the nature of these forms and based on the representations of the Ministry, these records communicate or summarize the information contained in them relating to staff scheduling, work assignment, attendance, work performance and compensation issues to various staff of the Ministry for employment and other purposes. Accordingly, I conclude that the Ministry has satisfied the second part of the three-part test for these records.

However, I am not satisfied that the records which comprise pages 29-31 meet the second part of the three part test. As identified above, these records consist of the police officer's notebook entries. I have found above that only portions of these three pages are responsive to the request, and the Ministry has identified that the responsive portions of these records relate to item 2 in the request (training records). I accept that these records contain information about the police officer's training; however, these records form part of the police officer's notebook entries. These entries simply record either that the author attended certain identified training, or briefly describe the nature of some aspects of the training. Although I accept the Ministry's position that information regarding training of its personnel is the type of information that "is routinely

communicated to management, scheduling and payroll staff of the Ministry for employment and other purposes”, I am not satisfied on the evidence before me that this record was collected, prepared, maintained or used “in relation to meetings, consultations, discussions or communications”. Notebook entries (and these specific entries in particular) simply record the nature of the activities conducted by the police officer on that date and at that time. I have not been provided with sufficient evidence to satisfy me that these notebook entries were collected, prepared, maintained or used in relation to meetings, consultations, discussions or communications.

As a final note, I wish to point out that my finding on these notebook entries does not suggest that notebook entries can never be excluded from the scope of the *Act* under section 65(6) (see, for example, Order MO-1615). Rather, this finding is based on my view that the second part of the three-part test under section 65(6)3 has not been met in these circumstances. Section 65(6)3 clearly requires the records to have been collected, prepared, maintained or used in relation to meetings, consultations, discussions or communications. A parallel can be drawn to the notebook entries which reflect the fact that a police officer conducted an investigation at a particular place and time. Although information of that nature, contained in an officer’s notebook, may show that the officer was on duty on a particular date and at a particular time, these records would not on that basis be excluded under section 65(6), even though they may contain information which is also contained in timesheets or work schedules (records that may be excluded under the *Act*).

In summary, I find that the responsive portions of pages 29 - 31 are not excluded from the scope of the *Act*. I will accordingly order the Ministry to issue an access decision on those pages.

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

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.)]

In addition, Order PO-2234 determined that certain records contained in the personnel files of identified employees are excluded from the scope of the *Act* under section 65(6)3.

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 [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*].

In the circumstances of this appeal, I am satisfied that the responsive portions of pages 1, 2, 6, 8 and 9, which are Traffic Unit Weekly Statistics (pages 1 and 2) including a summary document (page 6) and work schedules (pages 8 and 9), satisfy the third part of the test under section 65(6)3. I accept that these records relate to a number of employment-related matters, including days and hours worked, compensation issues, and performance issues. Accordingly, I find that these records are about “employment-related matters.”

Furthermore, based on the nature of the records and on the representations of the Ministry, I am satisfied that the Ministry has an interest in these employment-related matters. As set out above, the phrase “in which the institution has an interest” has been interpreted to mean more than a “mere curiosity or concern” and to refer to matters involving the institution’s own workforce (*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, *supra*). The matters giving rise to the records at issue in this appeal relate to the Ministry’s management of its own workforce and, thereby, engage its interest. In addition, the Ministry’s interest as an employer is clearly more than a mere curiosity or concern (see also Reconsideration Order PO-2096-R and Order PO-2106).

Lastly, the exceptions to section 65(6) found in section 65(7) of the *Act* do not apply to the records at issue. As a result, I find that Records 1, 2, 6, 8 and 9 are excluded from the scope of the *Act* on the basis of section 65(6)3.

PERSONAL INFORMATION/INVASION OF PRIVACY

The personal privacy exemption in section 49(b) applies only to information which qualifies as “personal information” as defined in section 2(1) of the *Act*. “Personal information” is defined, in part, to mean recorded information about an identifiable individual.

The Ministry submits that the responsive portions of Records 10 - 28 contain the personal information of the appellant and other identified individuals. It submits that the records include information relating to an identifying number, symbol, or other particular assigned to the individuals (paragraph c), the addresses and telephone numbers of the individuals (paragraph d), and the individuals' names along with other information about them (paragraph h).

Based on the representations and on my review of the contents of the records, I am satisfied that the records contain the personal information of the appellant. I am also satisfied that they contain the personal information of other identifiable individuals within the meaning of the definition of that term in the paragraphs of section 2(1) referred to by the Ministry.

Invasion of Privacy

Under section 49(b) of the *Act*, where a record contains the personal information of both a requester and other individuals, and an institution determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the institution has the discretion to deny the requester access to that information.

Section 49(b) of the *Act* introduces a balancing principle. The institution must look at the information and weigh the requester's right of access to his or her own personal information against another individual's right to the protection of their privacy. If the institution determines that release of the information would constitute an unjustified invasion of the other individual's personal privacy, then section 49(b) gives the institution the discretion to deny access to the personal information of the requester.

In deciding whether the exemption in section 49(b) applies, sections 21(2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 21(2) provides some criteria for the institution to consider in making this determination. Section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Section 21(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

The Divisional Court has ruled that once a presumption against disclosure has been established under section 21(3), it cannot be rebutted by either one or a combination of the factors set out in section 21(2). A section 21(3) presumption can be overcome, however, if the personal information at issue is caught by section 21(4) or if the "compelling public interest" override at section 23 applies (*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767).

If none of the presumptions in section 21(3) applies, the institution must consider the application of the factors listed in section 21(2), as well as all other relevant considerations.

I note that, in the revised decision letter the Ministry sent to the appellant concurrent with sending its representations to this office, the Ministry provided the appellant with partial access to one page of the records. The portion of the records which the Ministry disclosed to the appellant contained the information in the record which relates specifically to the appellant.

The Ministry submits that the remaining, undisclosed portions of the records contain information which falls within the presumption in section 21(3)(b) of the *Act*. That section reads:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

Application of Section 21(3)(b) to the Records

The Ministry's representations state:

The Ministry is of the opinion that the personal information contained in the officer's notes at issue consists of highly sensitive personal information that was compiled and is identifiable as part of an [Ontario Provincial Police (OPP)] investigation into a possible violation of law. The OPP is an agency that has the function of enforcing the laws of Canada and the Province of Ontario. The *Police Services Act* provides for the composition, authority and jurisdiction of the OPP. Some of the duties of a police officer include investigating possible law violations, crime prevention and apprehending criminals and others who may lawfully be taken into custody.

The [remaining] exempt information documents law enforcement investigations undertaken by the named constable that involved the issuing of traffic tickets to individuals other than the appellant. The Ministry submits that the exempt personal information was compiled and is identifiable as part of investigations into a possible violation of law. As a result of the traffic incidents reflected in the records at issue, *Highway Traffic Act* charges were laid against individuals other than the appellant.

The Ministry then refers to Order PO-1728, in which former Senior Adjudicator David Goodis found that an investigation into a possible violation of the *Highway Traffic Act* was subject to the presumption in section 21(3)(b).

Based on my review of the undisclosed portions of the records, I am satisfied that the presumption in section 21(3)(b) of the *Act* applies to the responsive portions of Records 10 - 28. I find, accordingly, that the disclosure of these records is presumed to constitute an unjustified invasion of the personal privacy of individuals other than the appellant.

As noted above, the application of the presumptions in section 21(3) cannot be overcome by a factor or combination of factors under section 21(2). In the present appeal, the exceptions in

section 21(4) do not apply and the appellant has not raised the possible application of section 23 to the records. Accordingly, subject to my review of the Ministry's exercise of discretion, I find that the undisclosed information in the records at issue is exempt from disclosure under section 49(b).

Exercise of Discretion

The section 49(b) exemption is discretionary and permits the Ministry to disclose information, despite the fact that it could be withheld. On appeal, this office may review the Ministry's decision in order to determine whether it exercised its discretion and, if so, to determine whether it erred in doing so (Orders PO-2129-F and MO-1629).

Upon review of all of the circumstances surrounding this appeal and the Ministry's representations on the manner in which it exercised its discretion, I am satisfied that the Ministry has not erred in the exercise of its discretion not to disclose the remaining portions of the records under section 49(b). I make this finding particularly in light of the fact that the additional portion of the records provided by the Ministry to the appellant concurrent with its representations contains all of the information which relates directly to the appellant.

Having found that the portions of Records 10 - 28 remaining at issue are exempt under section 49(b) of the *Act*, it is not necessary for me to review the possible application of section 49(a) to those records.

ORDER:

1. I uphold the Ministry's decision to deny access to the undisclosed portions of Records 10-28.
2. I find that the responsive portions of Records 1, 2, 6, 8 and 9 are excluded from the scope of the *Act* on the basis of section 65(6)3, and I dismiss this part of the appeal.
3. I order the Ministry to issue an access decision to the appellant concerning the responsive portions of Records 29 – 31 in accordance with the provisions of sections 26, 28 and 29 of the *Act*, treating the date of this order as the date of the request.

Original signed by: _____
Frank DeVries
Adjudicator

February 21, 2008
