Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3619

Appeals PA14-217 and PA14-499

Ministry of Health and Long-Term Care

June 13, 2016

Summary: The appellant made two access requests for records relating to the decision of the Ministry of Health and Long-Term Care (the ministry) to discontinue coverage, in 1998, of pre-travel medicine services under the Ontario Health Insurance Plan (OHIP). The ministry disclosed some records but withheld others, including on the basis of the exclusion at section 65(6)3 (employment or labour relations). The appellant appealed the ministry's decisions in both requests. He also questioned the reasonableness of the ministry's search for records in response to one of his requests.

This order disposes of the issues in both appeals. The adjudicator finds that all the records at issue relate to recommendations of joint committees of the ministry and the Ontario Medical Association about amendments to the OHIP Schedule of Benefits having impact on the payments made to physicians by the ministry under OHIP. She finds the records are labour relations records excluded from the *Act* under section 65(6)3, and that the exception to the exclusion at section 65(7)1 does not apply. She also upholds the ministry's search for records in Appeal PA14-499. She dismisses both appeals.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 1, 65(6)3, 65(7).

Orders and Investigation Reports Considered: P-1422, PO-1721, PO-2497.

Cases Considered: *Ontario (Solicitor General) v. Mitchinson*, 2001 CanLII 8582 (ON CA), leave to appeal refused [2001] S.C.C.A. No. 507; *Ontario (Minister of Health and Long Term Care) v. Mitchinson*, 2003 CanLII 16894 (ON CA); *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC).

OVERVIEW:

[1] This order disposes of the issues raised in two appeals brought by the appellant as a result of two requests he made to the Ministry of Health and Long-Term Care (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The appellant sought information relating to the ministry's decision to discontinue coverage of travel medicine services under the Ontario Health Insurance Plan (OHIP).

[2] The background information that follows is taken from the parties' representations, publicly-available material on the ministry's website, and previous decisions that have addressed similar issues.

Background

[3] Under the *Health Insurance Act*, Ontario residents are entitled to coverage for medically necessary services provided by physicians. Generally, physicians bill OHIP for these services. The Schedule of Benefits for Physician Services, enacted by regulation under the *Health Insurance Act*, lists the services that are insured and prescribes the fee amounts payable to physicians for those services. Physicians are paid under OHIP only if the service is listed in the Schedule of Benefits, and is provided in accordance with the conditions specified there.

[4] The Schedule of Benefits is the responsibility of the ministry. Any changes to the Schedule are made by regulation under the *Health Insurance Act*, and must be approved by Cabinet.

[5] Both the ministry and physicians have an interest in any changes to the Schedule of Benefits. Recommendations for changes can come from various sources. One of these is the agreements made between the ministry and the Ontario Medical Association (OMA), the membership organization for physicians in Ontario that is authorized to act as their sole representative in negotiations with the ministry about the amounts payable to physicians under OHIP.

[6] In 1991, the ministry and the OMA established the Joint Management Committee with a mandate to improve the management of medical services and achieve more value for health care spending in Ontario. The Joint Management Committee established a Joint Review Panel to review proposed changes to the Schedule of Benefits, further to a 1993 agreement between the ministry and the OMA to remove some non-essential medical services from OHIP coverage. While this process resulted in some amendments to the Schedule of Benefits, the appellant reports that these amendments did not include the delisting of travel medicine services.

[7] In 1997, the ministry and the OMA made a new agreement that, among other things, established the Physician Services Committee. This committee was charged with monitoring "utilization" growth—growth in the use of insured services and the factors that affect the use of insured services—and developing recommendations to improve

the quality and effectiveness of medical care in Ontario.

[8] A subcommittee called the Utilization Subcommittee studied and made recommendations to the Physician Services Committee on utilization changes. Based on the findings of the subcommittee and other factors, the Physician Services Committee recommended to the ministry that travel medicine services be removed from the Schedule of Benefits. In July 1998, pre-travel medicine services were delisted from OHIP.

The requests, and the ministry's decisions

[9] The appellant identifies himself as a physician with a practice and academic interest in travel and tropical medicine, who is concerned about the health and other consequences to Canadians of the decisions, made by several provinces in the 1990s, to delist pre-travel medical services from their health insurance plans. He intends to produce a manuscript for peer-review publication on the health policy rationales that informed the decisions to delist in the various provinces. As part of his research, the appellant reports having made access-to-information requests in several provinces. The two appeals before me relate to two access requests made to the ministry for information about the recommendation and decision by the Physician Services Committee and the ministry to remove travel medicine services from the Ontario Schedule of Benefits.

[10] In his request giving rise to Appeal PA14-217, the appellant sought access to the following:

> [A]ny and all information and/or data within the Government of Ontario (including the [ministry] AND the Ontario Health Insurance (OHIP) AND the Physician Services Committee (PSC)) from January 1 1990 to December 31 1999 directly associated with the recommendation and decision by the Physician Services Committee and the Minister of Health to deinsure "all travel medicine services" from the Ontario fee-for-service schedule in July 1, 1998. The priority search period is the year prior to the notice to deinsure (i.e., the fiscal year of April 1 1997 to March 31 1998, as well as the period up to the announcement on July 30 1998). If feasible, I would then like to search within the rest of the decade for same…

[11] The ministry located eight records in response to the request and granted the appellant partial access to them. Portions of the records were withheld on the basis of the exclusion at section 65(6) for labour relations records, or under the exemption at section 12 (Cabinet records), or because they were not responsive to the request. The ministry also advised the appellant that it had not located any records created before 1998.

[12] After the appellant appealed the ministry's decision to this office, the ministry

granted access to the non-responsive portions of the records. The appellant withdrew his appeal in relation to the information withheld under section 12. The only records at issue in Appeal PA14-217, therefore, are those that are claimed to be excluded under section 65(6).

[13] In his request giving rise to Appeal PA14-499, the appellant sought access to the following information:

1. A copy of the terms of reference of the Joint Management Committee (JMC) from 1991 …

2. Any and all minutes from the JMC meetings where "travel assessments/immunizations" was discussed … as Item 14 on the JRP [Joint Review Panel] list.

3. Any and all correspondence within the JMC secretariat where "travel assessments/immunizations" (and similar terms) was discussed. ….

4. I request any and all information on the separate lists from the OMA and the [ministry] in their original form and uncensored referenced in Document 4, … over the summer and fall of 1993 (the time frame of my original request).

5. Any and all additional forms of information describing "travel assessments/immunizations" from the inception of the JMC in 1991 up to the JRP process starting in November 1993 that is not included in points 1-4.

[14] The ministry located two records responsive to this request. Before making its decision on access, it notified the OMA as a third party whose interests may be affected by disclosure of the records, in accordance with section 28 of the *Act*.

[15] The OMA objected to disclosure of one of the records. The ministry then issued a final decision to the appellant, granting full access to one record and withholding, in its entirety, the record that the OMA objected to disclosing. The ministry relies on the exclusion at section 65(6) to withhold this record. The OMA concurs with the ministry's claim, and also claims, in the alternative, that the record qualifies for the mandatory exemption at section 17(1)(a) (third party information) of the *Act*.

[16] The appellant appealed the ministry's denial of access to the record, and also asserted that additional records responsive to his request ought to exist. These are the matters at issue in Appeal PA14-499.

[17] As neither appeal was resolved at the mediation stage, both files were transferred to the adjudication stage of the appeal process. Although separate inquiries were conducted in Appeals PA14-217 and PA14-499, due to the overlap in the subject matter of the records and in the parties' arguments on the issues, I have decided to issue this order to dispose of both appeals.

[18] In this order, I uphold the ministry's reliance on section 65(6)3 to withhold the records at issue in Appeals PA14-217 and PA14-499. I also find the ministry conducted a reasonable search for records responsive to the request in Appeal PA14-499. I dismiss the appellant's appeals.

RECORDS:

Appeal PA14-217

There are four records at issue, which are described in the ministry's index of records as follows:

- Correspondence from the Physician Services Committee [PSC] to Minister of Health and President of OMA – March 16, 1998
- OMA/MOH Utilization Sub-Committee Recommendations presented to PSC March 6, 1998
- Table – Tightening/Modernization of Utilization Sub-Committee Items – Estimated Saving for Fiscal year 1998/1999
- Report of the PSC Subcommittee on Utilization

Appeal PA14-499

There is one record at issue, a 25-page report entitled *Report of the Joint Management Committee Working Group on Marginally Insured Services*, dated August 19, 1992.

The appellant has also claimed that many additional records responsive to his request ought to exist.

ISSUES:

A. Does the exclusion for employment or labour relations records at section 65(6) apply to the records at issue in Appeals PA14-217 and PA14-499?

B. If the record in Appeal PA14-499 is not excluded under section 65(6), does the mandatory exemption for third-party information at section 17(1) apply?

C. Did the ministry conduct a reasonable search for records in Appeal PA14-499?

DISCUSSION:

A. Does the exclusion for employment or labour relations records at section 65(6) apply to the records at issue in Appeals PA14-217 and PA14-499?

[19] The ministry claims that the records at issue in both appeals are excluded from the operation of the *Act* by virtue of section 65(6)3. The affected party OMA claims that the record at issue in Appeal PA14-499 is excluded under section 65(6)3 as well as

under section 65(6)2.

[20] If any of the exclusions in section 65(6) applies to the records, and none of the exceptions at section 65(7) applies, there is no right of access under the *Act*.

[21] Paragraphs 2 and 3 of section 65(6) state:

> 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 …
>
> > 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.

[22] I will begin by considering whether section 65(6)3 applies to the records at issue in both appeals.

Representations of the parties

The ministry's representations

[23] The ministry submits that the nature of its relationship with physicians in Ontario, and the way it negotiates with them, are determinative of the application of the exclusion to the records. Although practising physicians are not employed by the ministry, the ministry makes payments to physicians in Ontario under OHIP, based on the fees established in the Schedule of Benefits.

[24] The records at issue in Appeal PA14-217 concern the work of the Utilization Subcommittee, which was struck to study utilization on behalf of the Physician Services Committee. The ministry describes all the records as relating to recommendations made by the subcommittee to the Physician Services Committee, and the recommendations made by the Physician Services Committee to the ministry and OMA, about amendments to the Schedule of Benefits.

[25] Similarly, the ministry describes the record at issue in Appeal PA14-499 as a report that was prepared, maintained and used by the ministry, as a member of the Joint Management Committee, for the purpose of ministry-OMA negotiations regarding amendments to the Schedule of Benefits.

[26] In both cases, the ministry observes that recommendations regarding, and that have a direct impact on, the Schedule of Benefits have a concomitant direct impact on

the amount of and the conditions that apply to the payments made by the ministry to physicians in Ontario. As a result, the ministry submits, records relating to these recommendations are about labour relations within the meaning of section 65(6)3. In addition, these are labour relations matters in which the ministry has a direct and substantial financial interest.

[27] Throughout its submissions, the ministry refers to previous orders of this office and case law that it suggests decided issues and involved records that are very similar to the issues and records in the appeals before me. Consistent with that jurisprudence, the ministry urges me to find that the records at issue in these appeals are excluded from the operation of the *Act*. I will refer to these cases and decisions as relevant in my analysis, below.

The OMA's representations

[28] The OMA supports the ministry's reliance on section 65(6)3 to exclude the record at issue in Appeal PA14-499. It provided additional information on the ministry-OMA negotiations process at the time of the record's creation, which informs the background discussion above.

The appellant's representations

[29] The appellant makes wide-ranging representations in support of his view that the records at issue in both appeals ought to be disclosed.

[30] On the matter of the exclusion, the appellant begins by objecting to the 1995 amendments to the *Act* that incorporated certain exclusions, including section 65(6)3, into the *Act*. The appellant is of the view that the amendments were self-serving on the part of the government of the time, and that the incorporation of exclusions contradicts the purposes of the *Act*, which include providing a right of access to government information in accordance with the principles that information should be available to the public, and that exemptions from the right of access should be limited and specific.[1]

[31] Accepting that the exclusions at section 65(6) are now a part of the *Act*, the appellant objects to what he describes as government misuse of this section to shield from public scrutiny meaningful health policy documents and other information with the potential to embarrass public servants. The appellant argues that any interpretation of section 65 that would permit this result is an improper interpretation. He also objects to any interpretation of the exclusions that would permit qualifying records to be permanently excluded from the *Act*, without regard to their age or current sensitivity. On these points, he urges this office to decline to apply, or to challenge by way of appeal, the decisions of the Ontario Divisional Court and the Ontario Court of Appeal to which the ministry refers in its representations, and which the appellant concedes may support the application of the exclusion to the records in these appeals. I will address

[1] *Act*, section 1(a).

the case law relevant to the issues in these appeals in the discussion of my findings, below.

[32] Most of the appellant's representations do not directly address the application of the claimed exclusion to the records, and instead raise more general concerns that the appellant asks that I take into account in deciding these appeals. As the appellant's representations on these other issues are extensive, I will only summarize them here. For the appellant's benefit, I confirm that I have considered all his submissions in arriving at my decision.

[33] Some of the appellant's concerns can be described as general concerns about the freedom-of-information process in Ontario. These include his view that the process is biased against citizens, who are expected to file requests for access and pursue appeals against the government, which typically has more resources at its disposal than do requesters. He objects to the absence of an advocacy function within this office or another ombudsman office to assist requesters in appeals against the government. The appellant also identifies what he perceives as "implicit conflicts of interest" that may bias decision-makers in the freedom-of-information process. These include the present government's failure to revisit the inclusion of section 65(6) in the *Act*, despite its public position of promoting open government, and individual-level bias, as where a public servant responsible for certain policy decisions is the individual responsible for responding to an access request for information relating to these same decisions. The appellant also alleges bias on the part of this office, because of its failure to challenge court decisions that have overturned IPC orders on the application of section 65(6).

[34] This relates to the appellant's concerns about what he perceives as a troublesome trend in the application of the section 65(6) exclusion in Ontario. The appellant asserts that the 2001 decision of the Ontario Court of Appeal in *Ontario (Solicitor General) v. Mitchinson* ("2001 decision"),[2] addressing the general nature and scope of the exclusion, was wrongly decided, and that court and IPC decisions issued following the 2001 decision have allowed the government to continue to misapply section 65(6) in a manner that is not compliant with the purposes of the *Act*. He cites certain developments since that decision, including the passage of time, that he believes militate in favour of a new approach to section 65(6), and he proposes a different interpretation that would support his preferred approach. I will address some of these arguments in more detail in my discussion of my findings, below.

[35] Finally, the appellant makes public interest arguments in support of disclosure of the records to him. He argues that even if there is a legally sound basis for concluding that section 65(6) applies to the records in these appeals, it is unfair and unethical to withhold historically important documents on that basis. I will canvass these arguments below.

[36] The appellant asks that his general concerns about the existence of and the

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[2] 2001 CanLII 8582 (ON CA), leave to appeal refused [2001] S.C.C.A. No. 507.

interpretation of section 65(6) be considered in both appeals. He also makes some submissions that address the application of the exclusion to the specific records at issue in each appeal.

[37] For Appeal PA14-217, the appellant denies that the ministry could have a current interest in records dating from 1998 and 1999 on the delisting of pre-travel medicine services, given that the delisting has occurred, and these services are not currently publicly insured. In the alternative, the appellant claims that the exception to the exclusion at section 65(7) applies to the records, as he submits they can be characterized as agreements between the ministry and the OMA, a trade union.

[38] He also distinguishes the records in this appeal from those considered in *Ontario (Minister of Health and Long Term Care) v. Mitchinson* ("the 2003 decision").[3] In the 2003 decision, the Court of Appeal held that records relating to the Physician Services Committee's recommendations for changes to the Schedule of Benefits, including the 1998 delisting of pre-travel medical services, were excluded under section 65(6)3. In the appellant's submission, the records considered there involved discussions of extraneous labour relations and money issues, whereas his request in Appeal PA14-217 was carefully focused to exclude those matters. He also submits that his request differs from the earlier request as his request is for historical information, unlike the earlier request, which was for information that was, at that time, "fresh or controversial information." He concludes that the information he now seeks can no longer be of any practical interest to the ministry or the OMA, unless it is "to hide all past dealings that may be against public interest and the spirit of" the *Act*.

[39] In Appeal PA14-499, the appellant describes the record at issue as important health policy information dating from 1991 to 1994 about a public process to discuss the delisting of various health care services. The appellant places great emphasis on the fact that the record, a report dated August 1992, pre-dates the 1995 amendments to the *Act* that incorporated the exclusions at section 65(6). In the appellant's submission, section 65(6) cannot apply to records that were created before that section was added to the *Act*.

[40] Alternatively, the appellant argues that the report is not "formally labour relations" within the meaning ascribed to that term in the 2003 decision. He states that the purpose of the activities of the Joint Management Committee was to create direction for the Joint Review Panel to conduct a public process to select medical services for consideration for delisting from coverage. The appellant states that the Joint Management Committee discussed this public process in meetings, and that the report at issue in this appeal is important to understanding how and why the Joint Review Panel ran the process as it did.

[41] The appellant observes that despite the ministry's claim that the report of the Joint Management Committee is excluded from the *Act*, the ministry provided him with

[3] 2003 CanLII 16894 (ON CA).

that committee's Terms of Reference, as well as all the documentation of the Joint Review Panel which reported to that committee. He challenges the claim that the record is about an excluded labour relations matter, given that the ministry released related information that pre- and post-dates the report; he presumes that the latter type of information was disclosed to him on the basis it is not labour relations information. He asserts that all this information must be labour relations information, or that none is; it is his view that none of it qualifies as labour relations information under section 65(6).

[42] The appellant also states that he has received from other provinces delisting information that is similar to what he has requested from the ministry. He suggests that this supports his right of access in these appeals.

[43] Finally, the appellant challenges the standing of the OMA to act for physicians in this appeal. He states that it is physicians, and not the OMA, who are the direct recipients of public funds, and who are thus the ones who are actually affected by any labour relations matters. The appellant questions why the *Act* should be interpreted to prevent individual physicians, who are paid by government, from understanding how the ministry negotiated with their agent, the OMA.

Analysis and findings

[44] To begin, given the OMA's statutory role as the sole representative of Ontario physicians in negotiations regarding changes to the Schedule of Benefits, and its participation in the creation of the records at issue in these appeals, I find reasonable the treatment of the OMA as an affected party. Although the appellant observes that the OMA's position and his are at odds in these appeals, and that the OMA does not therefore represent his interests as an individual physician, I am satisfied that the appellant had the opportunity to present his own arguments in favour of his opposite position, and to adequately represent his own interests in these appeals.

[45] I also dismiss the appellant's argument based on his objection to the amendments to the *Act*, made under the *Labour Relations and Employment Statute Law Amendment Act, 1995* (Bill 7), which excluded labour relations and employment records from the application of the *Act*. The appellant notes that this office raised concerns about the breadth of these amendments when Bill 7 was introduced in 1995.[4] Nonetheless, Bill 7 passed through the normal legislative process, received Royal Assent and came into force in November 1995. Since that date, the *Act* and its municipal counterpart have had no application to labour relations and employment records.

[46] While the appellant suggests that the removal of such records from the *Act*'s right of access cannot be a proper interpretation of section 65(6), the intention of the

[4] The appellant refers specifically to correspondence on this issue between the then-Information and Privacy Commissioner and the then-Minister of Labour and then-Chair of Management Board of Cabinet in October, November and December, 1995.

legislators is evident in the explanatory note to Bill 7,[5] as well as in the government's description of the purpose of the amendments during the bill's first reading.[6] Moreover, although the appellant questions the constitutional validity of the exclusions, and alludes to a violation of his rights under section 2 of the *Canadian Charter of Rights of Freedoms*, he does not make specific representations on this issue, nor has he filed a Notice of Constitutional Question as required under section 109 of the *Courts of Justice Act* and section 12 of this office's *Code of Procedure*. It is therefore unnecessary for me to address these claims here.

[47] The main arguments raised by the parties involve the significance of decisions of the court that have considered the scope of section 65(6), and its application to records that may be similar to those at issue in these appeals. Both the ministry and the appellant refer to the 2003 decision of the Ontario Court of Appeal.[7] In that decision, the court found that the relationship between the government and physicians, and the work of the Physician Services Committee, qualified for the exclusion at section 65(6)3. The court held that the term "labour relations" in section 65(6) is not restricted to employer-employee relationships, and extends to relations and conditions of work beyond those relating to collective bargaining. The court found, specifically, that the term "labour relations" applies to the relationship between the government and physicians. The court also held that the "meetings, consultations, discussions and communications" that take place in discharging the mandate of the Physician Services Committee fall within the meaning of that phrase as it appears in section 65(6)3.

[48] In the result, the court held that the *Act* did not apply to records relating to the Physician Services Committee's recommendations for the fiscal year 1998-1999, including those about changes to travel medicine services. In making this finding, the court reversed an IPC order that had found the exclusion did not apply to the records, on the basis that the relationship between the government and physicians did not qualify as an employer-employee relationship.[8] The IPC had found that the records were not "about labour relations" (or about employment-related matters) for the purpose of section 65(6)3.

[49] Since the 2003 decision, an expanded definition of labour relations, covering the collective bargaining relationship as well as analogous relationships, has been applied by this office to different types of these analogous (or "employment-like") relationships.[9] This definition has also been found to apply to the work of other

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[5] The explanatory note to Part IV of Bill 7 states, in part: "The *Freedom of Information and Protection of Privacy Act* and the *Municipal Freedom of Information and Protection of Privacy Act* are amended. Neither Act will apply with respect to certain records relating to labour relations and employment matters. No disclosure will be made under outstanding requests and access orders."

[6] "As part of [Bill 7] … we propose to amend the *Freedom of Information and Protection of Privacy Act* ... to ensure the confidentiality of labour relations information": Hon. David Johnson (Chair of Management Board of Cabinet), Official Report of Debates, October 4, 1995.

[7] See footnote 3.

[8] PO-1721.

[9] Orders PO-2501, PO-2952 and others.

subcommittees of the Physician Services Committee.[10] In Order PO-2497, in particular, this office found that records of a subcommittee of the Physician Services Committee charged with determining medical malpractice issues, including the reimbursement of medical malpractice fees, were about labour relations matters.[11] On judicial review of Order PO-2497, the Divisional Court upheld the adjudicator's finding that the subcommittee records were excluded under section 65(6)3 ("2008 decision").[12] In doing so, the court applied the definition of "labour relations" articulated by the Court of Appeal in the 2003 decision.[13]

[50] The parties also refer to the 2001 decision of the Ontario Court of Appeal.[14] In that decision, having regard to the purpose for which the section was enacted, and the wording of section 65(6)3 as a whole, the court found that the phrase "in which the institution has an interest" refers to matters involving an institution's own workforce, and does not require that the interest be a legal interest (although the court accepted that the interest must be more than mere curiosity or concern). The court also found that once effectively excluded from the *Act*, records remain excluded: if section 65(6) applies at the time of a record's collection, preparation, maintenance or use, the exclusion does not cease to apply at later date. The court rejected the notion that an institution's interest in a matter is time-limited.

[51] The ministry and the appellant recognize that the principles set out in the 2001 and 2003 decisions have been applied in many subsequent orders of this office considering the exclusions in the *Act* and its municipal counterpart.[15] For the ministry, this supports the finding that section 65(6)3 applies to the records here. The ministry states that the records at issue in these appeals are the product of the work of the ministry and the OMA (through the Utilization Subcommittee in Appeal PA14-217, and the Joint Management Committee in Appeal PA14-499), and relate to meetings, consultations, discussions and communications about amendments to the OHIP Schedule of Benefits. The ministry submits that these records are similar to the types of records that were found to be excluded in the 2003 decision and in Order PO-2497.

[52] The appellant makes extensive arguments in support of his view that these cases were wrongly decided and should not be followed. To start, appellant is of the view that the 2001 decision "derailed the freedom of information process in Ontario," by beginning a trend of courts no longer giving deference to IPC decisions considering the exclusions, and he asserts that this decision is no longer good law. He identifies defects in the 2001 decision that he proposes may be the basis for future challenges to the

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[10] Orders PO-3091 and PO-2497.

[11] As the appellant observes, some of the records that were found to be about labour relations in Order PO-2497 were subsequently excepted from the exclusion under section 65(7) of the *Act* (with this result upheld on judicial review; see next footnote). I will address the appellant's argument about the applicability of section 65(7) later in my analysis.

[12] 2008 CanLII 45005 (ON SCDC).

[13] See footnote 3.

[14] See footnote 2.

[15] Section 52(3) of the *Municipal Freedom of Information and Protection of Privacy Act*.

decision, including: the court's application of a higher standard in reviewing the IPC orders below;[16] its failure to appreciate the primary purposes of the *Act*; its disregard for the IPC's knowledge, skill and experience when it overturned the IPC orders that were the subject of review; and its failure to recognize, as a later court did, that the OMA is a "trade union" for the purposes of section 65(7).[17]

[53] The appellant also raises public interest grounds for overturning the 2001 decision, and all subsequent court decisions that have, in his view, applied the exclusions too liberally. He objects to any interpretation of section 65(6) that would exclude from access records that explain the rationale of the Ontario government's decision to delist pre-travel medical services in 1998, especially given that other Canadian jurisdictions followed with their own decisions to delist these services. He asserts that Ontario's decision has thus had significant impacts on health policy across the country, and on the capacity of our health care system to address global threats to the health of Canadians. More generally, the appellant argues that section 65(6) should not be interpreted to allow government to hide important historical policy documents that are of interest to academics or independent clinical experts like himself, or that might be embarrassing to government officials.

[54] I am not persuaded by the appellant's arguments for departing from the principles set out in the court decisions and IPC orders canvassed above. The appellant's position derives from the fact he disagrees with the results of these decisions. He does not himself seek judicial review of any IPC orders, or make representations to distinguish the records considered in those cases from the records at issue here. The appellant's dissatisfaction with those outcomes is not a basis for substituting his preferred interpretation of section 65(6) for the principles established by the courts and applied by this office.

[55] I will now consider the application of section 65(6)3 to the records at issue in these appeals, in light of the principles established by the jurisprudence.

[56] In order to find that records are excluded under section 65(6)3, the ministry must establish that:

1. the records were collected, prepared, maintained or used by the ministry or on its behalf;

2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and

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[16] The appellant states that the court in the 2001 decision improperly reviewed for correctness the then-Assistant Commissioner's decisions regarding the application of section 65(6) to records in three appeals, whereas the "normal administrative standard" is reasonableness.

[17] The appellant refers to the 2008 decision (see footnote 12). I will review his arguments about the application of section 65(7) later in this analysis.

3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the ministry has an interest.

[57] As noted above, the 2003 decision[18] expanded the meaning of "labour relations" to refer to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships, and not merely to employer-employee relationships. As also noted, the 2001 decision[19] broadened the definition of "interest" beyond a legal interest in labour relations or employment-related matters, and established that the institution's interest need not be a current interest.

[58] In addition, the court has defined the phrases "relating to" and "in respect of," as they appear in section 65(5.2) of the *Act*, as requiring "some connection" between records and the subject matter of the section of the *Act* in which they appear.[20] This office has adopted this definition for the same phrases and analogous ones ("in relation to," "relates to") appearing in the *Act* and its municipal counterpart.[21] As a result, for the collection, preparation, maintenance or use of a record to be "in relation to" the matters set out in section 65(6)3, it must be reasonable to conclude that there is "some connection" between them.[22]

[59] In this case, I am satisfied that the records at issue in both appeals meet all three parts of the test for exclusion under section 65(6)3.

[60] First, I accept that the records in Appeal PA14-217 were collected, prepared, maintained and used by the ministry, or by the Utilization Subcommittee and the Physician Services Committee of which the ministry was a part, in relation to meetings, consultations, discussions and communications between the ministry and the OMA. Similarly, I accept that the record in Appeal PA14-499 was collected, prepared, maintained or used by the ministry, as a member of the Joint Management Committee, in relation to meetings, consultations, discussions and communications between the ministry and the OMA. This satisfies parts one and two of the test for exclusion.

[61] I also have no trouble accepting that, in both cases, the meetings, consultations, discussions and communications are about labour relations matters of interest to the ministry.

[62] I accept the analogy drawn by the ministry between the joint ministry-OMA committee records considered in the 2003 decision[23] and those at issue here. The ministry notes that in the earlier decision and the appeals before me, the records were generated by joint committees considering physician work issues, and specifically

[18] Footnote 3.
[19] Footnote 2.
[20] *Ontario (Attorney General) v Toronto Star*, 2010 ONSC 991 ("*Toronto Star*").
[21] Among others, see Orders MO-2537, MO-2589 and MO-3088.
[22] Order MO-2589; see also *Toronto Star*, at footnote 20 above.
[23] Footnote 3.

amendments to the Schedule of Benefits that prescribes the fees payable to physicians under OHIP. The court in the 2003 decision found that the relationship between the ministry and physicians qualifies as a labour relations relationship, because the ministry bargains collectively with the OMA on behalf of physicians. This office has accepted this characterization of the ministry-physician relationship in subsequent orders,[24] and I apply it in these appeals to find these are labour relations matters.

[63] In making this finding, I reject the appellant's attempt to distinguish the record in Appeal PA14-217 from the records in the 2003 decision, based on his submission that the latter records involved extraneous labour relations issues. I have reviewed the records in Appeal PA14-217, and I am satisfied they relate to negotiations between the ministry and the OMA about changes to the Schedule of Benefits, a labour relations matter.

[64] I also reject the appellant's claim that the record at issue in Appeal PA14-499 is not "formally labour relations" because it was created as part of a public process of considering medical services for potential delisting. The appellant states that other documents relating to that public process—namely, the Joint Management Committee's Terms of Reference, and records of the Joint Review Panel that reported to the committee—were disclosed to him, and he disputes that the record in Appeal PA14-499, the report of the Joint Management Committee, can be an excluded labour relations record if these related records are not.

[65] The documents disclosed to the appellant as part of his request in Appeal PA14-499 are not before me. Without making a finding on the nature of those documents, I observe that an institution may decide to release records to a requester outside the *Act*. In any event, the ministry's disclosure of those other documents, and the public nature of the consultation process leading to the creation of the record, have no bearing on the question of whether the record is excluded under section 65(6)3. I have reviewed the record, and I accept that it relates the ministry-OMA negotiations about changes to the Schedule of Benefits. I conclude that the records in both appeals relate to labour relations matters.

[66] I also accept, as the court did implicitly in the 2003 decision, that these labour relations matters are matters in which the ministry has an interest. I agree that records relating to recommendations for changes to the Schedule of Benefits are labour relations matters of interest to the ministry.

[67] The appellant argues that the ministry cannot be said to have a current interest in the records given their age, and the fact they document recommendations for delisting that have been implemented, as pre-travel medicine services are not currently publicly insured. The records in Appeal PA14-217 date from 1998 and 1999. The record in Appeal PA14-499 dates from 1992, and, in the appellant's submission, contains important health policy information dating from 1991 to 1994. The appellant also

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[24] Orders PO-2497, PO-3091 and others.

proposes that the fact the 1992 record pre-dates the 1995 amendments to the *Act* that incorporated the exclusions is determinative, and that section 65(6)3 therefore cannot apply to that record.

[68] The timing criteria for the application of the exclusions has been considered in past orders of this office.[25] In Order P-1422, for example, the request was for records pre-dating the November 10, 1995 in-force date of the exclusions, but was made more than one year after the exclusions had taken effect. In that order, the adjudicator considered the earlier order P-1258, which concluded that the relevant factor is the date on which a request is submitted. In other words, while requests made prior to the in-force date of the amendments are subject to the law prior to the enactment of Bill 7, requests made after that date are subject to the law post-enactment, and thus to the exclusions.

[69] The adjudicator in Order P-1422 found this interpretation consistent with the law relating to the retroactive application of statutes. I agree. Applying this interpretation to the facts in that appeal, the adjudicator in Order P-1422 considered whether the exclusions applied to the records for which they had been claimed. The situation in Appeal PA14-499 is analogous. Although the record at issue in that appeal pre-dates the introduction of the exclusions, the request was made long after their incorporation into the *Act*, and is subject to the *Act*'s provisions in effect at the time of the request. I dismiss this aspect of the appellant's appeal.

[70] I also reject the appellant's assertion that section 65(6)3 requires that the ministry's interest in a labour relations matter be a current interest, and his alternative proposal that I read in a time limit to the applicability of the exclusions. He suggests these measures are necessary to ensure the public is not permanently barred from accessing valuable historical records. The court in the 2001 decision addressed this very issue, explicitly rejecting the notion of time limitations on the applicability of the exclusions.[26] In that decision, the court concluded that the time-sensitive element of section 65(6) is contained in its preamble, which provides that the *Act* "does not apply" to records that satisfy the elements of the claimed exclusion. The court found no basis in the plain wording of the exclusion or in the *Act*'s purposes to import a time limitation on the application of the exclusions. As a result, if section 65(6) applies at the time the records are collected, prepared, maintained or used, the records remain excluded; the exclusion does not cease to apply at some later date.[27] This office has since adopted this approach to considering the application of the exclusions.[28]

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[25] Orders P-1258, M-962, P-1422 and others.
[26] 2001 decision (see footnote 2), paras. 32, 36-40.
[27] Ibid, para. 38.
[28] For example, see Order PO-2073-R, reconsidering Order PO-1696 after the issuance of the 2001 decision. The adjudicator in Order PO-1696 had found that section 65(6)3 did not apply, including because the employment-related matters to which the records related were not current matters. On reconsideration in light of the 2001 decision, this office found that section 65(6)3 applied to the records despite the absence of a current interest.

[71] I therefore reject the appellant's proposal that I distinguish, on the basis of the passage of time and the alleged absence of a current interest, the records at issue from those considered in the 2003 decision,[29] which were also records relating to the Physician Services Committee's recommendations for changes to the OHIP Schedule of Benefits. I also reject his request that I read in a 20-year expiry period for the applicability of the exclusions, like those specified in the exceptions to some of the exemptions contained in the *Act*.[30]

[72] I therefore find that all three parts of the test for exclusion are met, and the records in both appeals are excluded from the *Act* under section 65(6)3.

[73] The appellant asks that if I make such a finding, I consider whether the records are nonetheless subject to the *Act* under one of the exceptions to the exclusion. The exceptions are set out at section 65(7), which states:

> This Act applies to the following records:
>
> 1. An agreement between an institution and a trade union.
>
> 2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.
>
> 3. An agreement between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees.
>
> 4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment.

[74] Citing the 2008 decision,[31] the appellant claims the exception at paragraph 1 applies, on the ground the OMA has been recognized by this office and the court as a "trade union" for the purposes of section 65(7)1. He proposes that the 2008 decision, post-dating the 2001 and 2003 decisions, has changed the treatment of the OMA for the purposes of the labour relations exclusion.

[75] In the 2008 decision, the Divisional Court upheld the adjudicator's finding in Order PO-2497 that agreements between the OMA and the ministry qualified for exclusion under section 65(6)3, but were nonetheless subject to the *Act* because of the

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A later court observed that section 65(5.2) is the only "time-limited" exclusion under the *Act*, based on the plain language of that section: *Toronto Star*, see footnote 20.

[29] Footnote 3.

[30] The appellant alludes to sections 12(2)(a) and section 13(3) of the *Act*.

[31] Footnote 12.

exception at section 65(7)1. This turned on the adjudicator's finding that the OMA is a "trade union" for the purpose of section 65(7)1. That term is not defined in the *Act*.

[76] Applying the modern rule, or the purposive approach, to statutory interpretation,[32] and the presumption of coherence[33] in reading the exclusions at section 65(6) together with the exceptions at section 65(7) and in light of the overall purpose of the *Act*, the adjudicator concluded that the term "trade union" in section 65(7)1 is not limited to the context of an employer-employee relationship, and that the OMA is a trade union for the purposes of the exception. She concluded that the agreements between the ministry and the OMA were subject to the exception at section 65(7)1, and were therefore accessible under the *Act*. The court in the 2008 decision upheld the adjudicator's interpretation of section 65(7)1, and her finding that the agreements were not excluded from the *Act*.

[77] There is no suggestion from the parties that the records at issue in these appeals are agreements between the ministry and the OMA, or any other body that qualifies as a trade union for the purpose of section 65(7)1, and it is evident on my review of the records that they are not.

[78] The appellant urges that I nonetheless treat the records in Appeal PA14-217 as agreements because, in his submission, the records were generated in the context of an "informal agreement" reached by the ministry and OMA as early as 1993, during the earlier Joint Management Committee and Joint Review Panel process, to cut costs from OHIP, and specifically to delist pre-travel medicine services. Therefore, he suggests, the records in Appeal PA14-217, dating from 1998 and 1999, document discussions and communications about the delisting of these services that were, in reality, simply a formalization of this prior agreement, and not true discussions or negotiations. On this basis he asks that I treat any portion of the records addressing pre-travel medicine services as agreements between the ministry and the OMA, a trade union, for the purpose of section 65(7)1.

[79] I find this argument has no merit. First, on my review of the records, I find no reason to conclude they comprise an agreement of any sort, formal or not, between the ministry and the OMA. I find unpersuasive the appellant's argument that earlier discussions between the ministry and the OMA about pre-travel medicine services amounted to an agreement, so that any subsequent discussions of this topic can themselves be considered agreements. This suggested interpretation of the term

[32] A purposive approach aims to establish the Legislature's intent by reading the words of the statute in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the statute, its purposes and the intention of the Legislature. The Supreme Court of Canada affirmed this approach to statutory interpretation in *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), and in many others.

[33] The presumption of coherence is the presumption that statutory provisions are meant to work together and fit together logically to form a rational, internally consistent framework which serves the purpose of the statute as a whole. The presumption of coherence is described in *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Toronto: Butterworths, 2002), p. 262.

"agreement" stretches the word beyond its ordinary meaning, including the one applied by this office, as the product of a negotiation process.[34] The court in the 2008 decision applied this same definition to the term as it appears in section 65(7):

> The Legislature has made it clear in s. 65(7) that while documents relating to labour relations negotiations are excluded from [the *Act*], the product of such negotiations is not to be excluded.[35]

[80] I find no basis to conclude the records in Appeal PA14-217 are agreements within the meaning of section 65(7)1. I have also considered whether any of the other exceptions at section 65(7) applies, and find that none does.

[81] Finally, I dismiss the appellant's arguments for disclosure based on public interest and related considerations. The public interest override at section 23 of the *Act* has no application to records found to be excluded from the *Act*. In addition, the benefits to public health and safety and to academic research of access under the *Act* are not relevant considerations under section 65(6). This is evident from the plain wording of sections 65(6) and 65(7), and in the legislators' articulation of the purposes of the exclusions on the introduction of Bill 7.[36]

[82] I also found irrelevant to my determination of these issues the appellant's observations about the results of his access requests made in other jurisdictions, and his general concerns about the administration of the *Act* in this province. The appellant may wish to direct his comments and suggestions for amendments to the *Act* to his Member of Provincial Parliament.

[83] For all the reasons above, I find the records are excluded under section 65(6)3. They are not excepted from the application of the exclusion by section 65(7). The *Act* does not apply to the records.

B. If the record in Appeal PA14-499 is not excluded under section 65(6), does the mandatory exemption for third-party information at section 17(1) apply?

[84] Because of my findings under Issue A, above, it is unnecessary for me to consider the OMA's alternative argument in Appeal PA14-499.

C. Did the ministry conduct a reasonable search for records in Appeal PA14-499?

[85] The appellant asserts that additional records must exist beyond the two records

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[34] Orders P-1104, M-1143, PO-1902-F and others considering the exemptions in the *Act* and its municipal counterpart for third party information.

[35] 2008 decision (see footnote 12), at para. 35.

[36] However, as I observed above, an institution may decide to release records to a requester outside the *Act*.

identified by the ministry in Appeal PA14-499. He believes that records responsive to his broad request for information relating to the Joint Management Committee from 1991 should include all materials dating from 1991 to the completion of the Joint Review Process in 1994.

[86] 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.[37] 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.[38] To be responsive, a record must be "reasonably related" to the request.[39]

[87] 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.[40] I asked the ministry to provide details of its search for responsive records, and to do so in the form of an affidavit signed by the person who conducted or who was responsible for coordinating the search.

[88] The ministry provided an affidavit from the business analyst in its Health Services branch who coordinated the search for records in response to the appellant's request. The analyst reports that her regular job duties and knowledge included coordinating freedom-of-information searches in the branch, as well as matters related to ministry payments to physicians under OHIP.

[89] The analyst explains that the Health Services branch has a regular retention period for records and supporting documentation about policy initiatives and projects leading to the development or revision of a policy. The retention period for these records is 10 years plus the current fiscal year. After that period, records are transferred to the Ontario Archives. The ministry provides a copy of the Government of Ontario's *Common Records Series for Policy and Planning Functions*[41] that confirms this information.

[90] Given the 10-year retention period, the analyst explains that at the time of the request, she expected the ministry to have records dating back to April 1, 2004. Because of the historical nature of the requested records, the ministry was not expected to have retained any responsive records. The analyst reports that she nonetheless emailed managers within the branch to request that they ask applicable staff to search for responsive records. The analyst states that she forwarded the exact text of the appellant's request to the branch managers. Her email requested that staff

[37] Orders P-85, P-221 and PO-1954-I.
[38] Orders P-624 and PO-2559.
[39] Order PO-2554.
[40] Orders M-909, PO-2469 and PO-2592.
[41] Available online here: http://www.archives.gov.on.ca/en/recordkeeping/documents/Policy-and-Planning-Common.pdf.

conduct searches and notify her if any records were located. The email also requested that staff notify her if they believed that responsive records might have existed and were sent to Archives.

[91] The analyst states that staff members were responsible for checking their own records and records in their immediate area. One staff member searched a filing cabinet containing the files of an employee no longer with the branch. This manual search turned up two hard copy records that had been stored incorrectly, and to which the retention schedule had inadvertently not been applied. One of these records was disclosed to the appellant, and the other record is the record for which the ministry claimed the exclusion at section 65(6)3.

[92] The analyst then conducted a further search of the main filing area containing files not specifically assigned to any individual. She provides details of how she conducted that further search, and reports that it did not yield any additional records.

[93] The analyst states that it is possible that other records did exist, but that given the applicable records retention period, they would have only been retained for 10 years plus the current fiscal year, then transferred to Archives. She confirms that none of the staff members in the Health Services branch indicated that they had personal knowledge of any files that had been transferred to Archives, and that, to the best of her knowledge, there are no additional records within the branch.

[94] The appellant does not find credible the ministry's assertion that it only located two records, and those only because the records had been misfiled and not dealt with in accordance with the applicable retention policy. He reports that he contacted Ontario Archives and that it "indicated to me that the staff of [the ministry] and other government agencies were instructed in the mid-1990s to hold back sensitive policy information and keep in house." He questions whether other responsive records were lost in misfiling, or were destroyed or hidden from the public to ensure lack of access. Whatever the outcome of his appeals, he asks that this office conduct a formal audit of the ministry's record-keeping for the requested documents, and similar records for the period 1990-1995.

[95] On balance, I am satisfied the ministry conducted a reasonable search for responsive records. I accept the ministry's evidence that an experienced employee coordinated the searches, and that staff were properly instructed on how to conduct their own searches to locate any records that would be responsive to the appellant's request. I find credible the ministry's explanation for having located two records despite their age and the clear language of the relevant records retention policy, and I find it unsurprising that no other records were located, given the fact the two records only existed within the branch as a result of human error.

[96] I am not persuaded by the appellant's evidence that other records ought to exist within the ministry. 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.[42] I find the appellant's account of the advice of Ontario Archives staff an insufficient basis to support an order for further searches by the ministry, or for a larger review of the ministry's record-keeping practices. In sum, I am satisfied by the ministry's evidence of the steps it took to respond to the appellant's request, and of the retention policy it generally applied to documents like those he requested. I dismiss this aspect of the appellant's appeal.

[97] As I uphold the ministry's decisions under section 65(6)3 and 24, I dismiss the appeals.

ORDER:

1. I uphold the ministry's decision that the records are excluded under section 65(6)3.

2. I uphold the ministry's search for records.

Original Signed by:	June 13, 2016
Jenny Ryu Adjudicator	

[42] Order MO-2246.