

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3642

Appeal PA15-261

Ministry of Community Safety and Correctional Services

August 5, 2016

Summary: The appellant, a representative of a non-governmental organization, sought access to records relating to nuclear emergency management in the province. He appealed the ministry's decision to grant partial access to responsive records. By the close of the inquiry stage, there remained at issue only two discrete severances to the minutes of a meeting of the Nuclear Emergency Management Coordinating Committee that was attended by government and non-government representatives. The ministry claimed the exclusion at 65(6)3 (employment or labour relations) for one severance and the exemption at section 13(1) (advice or recommendations) for the second severance. In this order, the adjudicator applies the record-specific approach to find that the first severance to the meeting minutes is not excluded under section 65(6)3, and she orders the ministry to issue a decision on access to it. She also rejects the ministry's section 13(1) claim for the second severance, and orders that it be disclosed to the appellant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 13(1), 65(6)3.

Orders and Investigation Reports Considered: Orders MO-3163, PO-2613, PO-3572.

OVERVIEW:

[1] The appellant represents a non-governmental organization that has been advocating for public review and upgrades to Ontario's offsite nuclear emergency plans. On its behalf, the appellant made a request to the Ministry of Community Safety and Correctional Services (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to nuclear emergency management. Parts 3

and 4 of his request sought access to:

- The agenda, minutes and power point decks used at the October 2014 meeting of the Nuclear Emergency Management Coordinating Committee; and
- All briefing notes, including presentation decks, provided to the minister in October 2014 regarding nuclear emergency planning and preparedness.

[2] The Nuclear Emergency Management Coordinating Committee is a committee whose membership includes representatives from federal, provincial and municipal governments and industry organizations. The ministry describes the committee as a collaborative mechanism for the protection of public safety in relation to nuclear power plants. The October 2014 meeting was attended by representatives from all levels of government, as well as some stakeholders, chiefly from the utilities sector.

[3] The appellant reports that his organization was invited to present to the committee in November 2013, but has not been publicly consulted on nuclear emergency matters since that time. For this reason, he seeks information about committee deliberations on public consultations with his organization and related groups.

[4] The ministry granted partial access to responsive records. It denied access to other records, in whole or in part, citing exemptions at sections 12(1) (Cabinet records), 13(1) (advice or recommendations), 14(1)(i) (security), 18(1)(d) (financial interests of Ontario) and 22(a) (information publicly available), and the exclusion at section 65(6) (labour relations or employment-related matters) of the *Act*.

[5] The appellant appealed the ministry's decision to this office.

[6] During mediation, the appellant withdrew his appeal in relation to information withheld pursuant to sections 14(1)(i), 18(1)(d) and 22(a) of the *Act*. He also confirmed he does not seek access to the withheld portion of one page. Accordingly, those exemptions and withheld records are not at issue in this appeal.

[7] The appellant confirmed his interest in pursuing access to all other records or parts of records to which the ministry denied access. He also claimed a public interest in disclosure of the withheld information. As a result, the application of the public interest override at section 23 is an issue in this appeal.

[8] At the close of mediation, the ministry continued to rely on sections 12, 13(1) and 65(6) to withhold information on several pages of records. As no further mediation was possible, this file was transferred to the adjudication stage of the appeal process for an inquiry under the *Act*.

[9] During the inquiry process, the ministry and the appellant provided representations that were shared in accordance with this office's *Code of Procedure* and *Practice Direction Number 7*. The ministry issued a revised decision during the inquiry

stage, resulting in the disclosure of additional pages and part pages to the appellant and the withdrawal of the ministry's reliance on section 12 of the *Act*. As a result of these developments, there remain at issue only two discrete severances in meeting minutes documenting an October 22, 2014 meeting of the Nuclear Emergency Management Coordinating Committee. The ministry relies on sections 65(6)3 and 13(1) of the *Act* to withhold these severances.

[10] In this order, I find that both claims fail. I find that the exclusion at section 65(6)3 cannot apply to one severance in the larger record comprising the meeting minutes, and I order the ministry to issue a decision on access to this severance. I also reject the ministry's decision to withhold a second severance on the basis of section 13(1). I order the ministry to disclose this severance to the appellant.

INFORMATION AT ISSUE:

[11] At issue are discrete severances appearing in items 2 and 4 of the meeting minutes for the October 22, 2014 meeting of the Nuclear Emergency Management Coordinating Committee. Both severances appear on the page numbered 92 in the ministry's disclosure package to the appellant.

ISSUES:

- A. Does the exclusion for labour relations or employment related matters at section 65(6)3 apply to one severance to the meeting minutes?
- B. Does the discretionary exemption for advice or recommendations at section 13(1) apply to a second severance to the meeting minutes? If so, did the ministry exercise its discretion under section 13(1)?
- C. If section 13 applies, is there a compelling public interest in disclosure of the withheld information that clearly outweighs the purpose of the section 13 exemption?

DISCUSSION:

A. Does the exclusion for labour relations or employment related matters at section 65(6)3 apply to one severance to the meeting minutes?

[12] The ministry seeks to exclude one discrete bullet point in the meeting minutes on the basis of section 65(6)3 of the *Act*. This section 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 ...

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

[13] If section 65(6) applies to a record, and none of the exceptions found in section 65(7) applies, the record is excluded from the scope of the *Act*.

[14] For section 65(6)3 to apply, the ministry must establish that:

1. the record was collected, prepared, maintained or used by an institution or on its behalf;
2. this collection, preparation, maintenance or usage was in relation to 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.

[15] The information sought to be excluded under section 65(6)3 appears under the heading item 2 in the committee meeting minutes. The majority of the meeting minutes, including the remainder of the discussion under this heading, has been disclosed to the appellant. The severance appears in a portion of the meeting minutes documenting the committee chair's update to committee members on activities of the Office of the Fire Marshal and Emergency Management, and specifically on the progress of the development of a new branch complex. While discussion of the new complex's location and construction has been disclosed to the appellant, one portion of this discussion has been withheld on the basis that it concerns workforce labour relations at the complex, a matter in which the ministry says it has an inherent interest as an employer.

[16] I accept that the severance appears in meeting minutes that were prepared by the Office of the Fire Marshal and Emergency Management, a branch of the ministry, which chaired the meeting at a government office on the ministry's behalf. I also accept that the meeting minutes were prepared "in relation to" meetings, consultations, discussions or communications. "In relation to" in this context has been interpreted to mean it must be reasonable to conclude that there is "some connection" between the record's collection, preparation, maintenance or use and the subjects in paragraphs 1, 2 or 3 of section 65(6).¹ It is evident, based on the nature of record itself, that it was prepared "in relation to," and has some connection to, the discussions at the committee meeting that the record documents.

[17] However, the ministry has not claimed that the exclusion applies to the record—the meeting minutes—as a whole. Instead, the ministry seeks to withhold only one

¹ Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

discrete portion of one item of discussion in the record under section 65(6)3. In making this claim, it is possible the ministry is implicitly acknowledging that the record, as whole, was not prepared in relation to discussions about labour relations or employment-related matters within the meaning of section 65(6)3.² In that case, the ministry's claim is that a portion of a record can qualify for exclusion, even where the record in which it appears is not itself excluded. This raises the question of whether an exclusion can apply to a record in part. I conclude that it cannot.

[18] This office has consistently taken the position that the exclusions at section 65(6) of the *Act* (and the equivalent section in the *Act's* municipal counterpart) are record-specific and fact-specific.³ This means that in order to qualify for an exclusion, a record is examined as a whole. This whole-record method of analysis has also been described as the "record-by-record" approach when applied by this office in considering the application of exemptions to records.⁴

[19] This approach to the consideration of exclusions is illustrated in previous orders of this office that have addressed whether an exclusion applies to a record based on the inclusion within the record of an excluded portion. In these orders, this office has applied the record-specific and fact-specific analysis to consider whether the record, as a whole, qualifies for the claimed exclusion.

[20] In Order MO-3163, for example, the adjudicator considered an internal police training video containing, as examples of inappropriate officer behaviour, two discrete clips for which the police claimed certain exclusions. The adjudicator examined the record—the training video—as a whole, and concluded that it did not qualify for any of the claimed exclusions, irrespective of whether portions of the record (the individual clips) might themselves qualify for exclusion in another context (which question was not before the adjudicator). Similarly, in Order PO-2613, this office held that evidence of an institution's regular use of some portions of a database of job positions, job descriptions, classification standards and evaluations for labour relations or employment-related proceedings and negotiations did not support the exclusion of the database, as a whole, under section 65(6)1 or 65(6)2 of the *Act*.⁵ I applied this same

² The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships. The meaning of "labour relations" is not restricted to employer-employee relationships: Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, cited above.

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.

³ See Orders M-797, P-1575, PO-2531, PO-2632, MO-1218, PO-3456-I and many others.

⁴ The "record-by-record" method of analysis for dealing with requests for records of personal information is set out in Order M-352. Under this method, the unit of analysis is the whole record, rather than individual paragraphs, sentences or words contained in a record. In addition, where the information at issue is the withheld portion of a record that has been partially released, the whole of the record (including released portions) is analyzed in determining a requester's right to access the withheld information.

⁵ These sections state:

whole-record-based approach most recently in Order PO-3572, in which an institution sought to exclude under section 65(6)2 budget records of approximately 10,000 line items each, based on its claim that it maintained or used certain line items in each of the records for labour relations negotiations. In that order, I found that the actual use of some information in the records for an excluded purpose was not sufficient to bring the records, as a whole, within the scope of the claimed exclusion.

[21] In each of these cases, the question is whether the collection, preparation, maintenance or use of the record, as a whole, is sufficiently connected to an excluded purpose so as to remove the entire record from the scope of the *Act*. This approach to the exclusions is consonant with the language of the exclusions, which applies to records that meet the relevant criteria. I also find it corresponds to the Legislature's decision not to incorporate into the *Act* a requirement for the severance of excluded records, in contrast to its treatment of records subject to the *Act's* exemptions.⁶

[22] In this case, the ministry does not claim that the record, as a whole, is excluded under section 65(6)3. In any event, on my review of the record's contents (the majority of which have been disclosed to the appellant), and in consideration of the record's purpose—to document a meeting whose stated objective is to enhance preparedness and coordination between government, nuclear facilities and other agencies in responding to nuclear and radiological emergencies—I am satisfied that the record would not itself qualify for the section 65(6)3 exclusion. As the application of an exclusion must be considered in the context of the whole record, I conclude that the withheld portion of the record cannot qualify for exclusion, whether or not I were to accept the ministry's claim that this discrete portion is about "workforce labour relations."

[23] As this information is not excluded from the right of access in the *Act*, I will order the ministry to issue a decision on access to it.

Subject to subsection (7), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:

1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.

In the result, the adjudicator found the database was excluded under section 65(6)3, based his satisfaction that the database, as a whole, had been collected, prepared, maintained or used for meetings, consultations, discussions or communications about labour relations or employment-related matters.

⁶ Section 10(2) of the *Act* states: "If an institution receives a request for access to a record that contains information that falls within one of the exemptions under sections 12 to 22 and the head of the institution is not of the opinion that the request is frivolous or vexatious, the head shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions."

B. Does the discretionary exemption for advice or recommendations at section 13(1) apply to a second severance to the meeting minutes? If so, did the ministry exercise its discretion under section 13(1)?

[24] The ministry claims that a second severance in the record is exempt under section 13(1) of the *Act*. This section states:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

[25] The information at issue appears under the heading item 4 in the committee meeting minutes, documenting the committee's discussion of strategies for the public engagement of non-governmental organizations. The ministry seeks to withhold one discrete portion of the discussion under section 13(1) on the basis that it contains recommendations provided by meeting attendees that would reveal a particular course of action that was being considered at the meeting.

[26] I do not accept the ministry's claim. This is because I am not satisfied that disclosure of the withheld information would reveal advice or recommendations, or that any advice or recommendations was given by public servants or other individuals employed or retained in the service of an institution.

[27] The purpose of section 13 is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.⁷

[28] "Recommendations" refers to material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised, and can be express or inferred. "Advice" has a broader meaning, and includes lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made, and the views or opinions of a public servant as to the range of options to be considered by the decision maker, even if they do not include a specific recommendation on which option to take.⁸

[29] The ministry states that it views the Nuclear Emergency Management Coordinating Committee, whose meeting discussions are captured in the record, as being part of the deliberative process of government decision-making related to the promotion of nuclear safety. It observes that the committee operates in relation to the Provincial Nuclear Emergency Response Plan, which is mandated by statute and is subject to ministerial approval.⁹ The ministry thus argues that the withheld information

⁷ *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.

⁸ See above at paras. 26 and 47.

⁹ The ministry cites section 8 of the *Emergency Management and Civil Protection Act*.

comprises recommendations of a committee involved in the deliberative process of government decision-making, as required by section 13(1).

[30] The committee's membership includes representatives from federal, provincial and local government organizations and agencies. The list of participants at the October 22, 2014 meeting captured in the record indicates that in addition to committee members, meeting attendees included representatives of nuclear facilities and another private sector organization. The information sought to be exempted is not attributed in the record to any particular meeting attendee; in the ministry's representations, it is described as a recommendation made by meeting attendees, which, the ministry notes, includes ministry employees.

[31] I am not satisfied that the presence of ministry employees among meeting attendees transforms any advice or recommendations of that group into the advice or recommendations of public servants or other individuals employed or retained by an institution. I am also not persuaded by the ministry's characterization of the committee as part of the deliberative process of government decision-making, based on its statement that the committee "operates in relation to" the provincial strategy for nuclear safety. The ministry has not explained the role of committee discussions in any government decision-making and policy-making, or described to whom any advice or recommendations of committee meeting attendees may be directed, or how the withheld information reflects advice or recommendations of meeting attendees that would be considered and accepted or rejected by an ultimate decision-maker. In the absence of evidence to support the claim that the withheld information informs government decision-making, I am not satisfied that the exemption at section 13(1) applies.

[32] Given this, it is unnecessary for me to consider the government's exercise of discretion under section 13(1), or whether the public interest override applies in these circumstances. I order disclosure of the second severance.

ORDER:

1. I do not uphold the ministry's decision under section 65(6)3. I order the ministry to issue a decision on access to the information withheld under this section, treating the date of this order as the date of the request.
2. I do not uphold the ministry's decision under section 13(1). I order the ministry to disclose the information withheld under this section by **August 26, 2016**.

Original Signed by: _____

Jenny Ryu
Adjudicator

August 5, 2016
