

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER PO-3705

Appeal PA15-546

Ministry of Community Safety and Correctional Services

March 1, 2017

**Summary:** The appellant submitted 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 access to a copy of the Ontario Provincial Police (OPP) Background Investigative Report (the report) that the OPP prepared in respect of her application to become an Auxiliary member. The ministry relied on the employment or labour relations exclusion in section 65(6) of the *Act* to withhold the report. The adjudicator upholds the ministry's decision that the report is excluded from the *Act*, pursuant to section 65(6).

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

**Orders and Investigation Reports Considered:** Orders MO-3010, PO-3327, MO-2721-I, PO-2952, and MO-1249.

**Cases Considered:** *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, 2003 CanLII 16894 (ON CA).

### BACKGROUND:

[1] The appellant submitted 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 access to a copy of the Ontario Provincial Police (OPP) Background Investigative Report (the report) that the OPP prepared in respect of her

application to become an Auxiliary member.

[2] The ministry located the responsive record and issued a decision denying access to it. The ministry relied on the employment or labour relations exclusion in section 65(6) of the *Act* to withhold the report. In its decision, the ministry specified paragraphs 1, 2 and 3 of section 65(6).

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

[4] Mediation was attempted, but did not resolve the issues in this appeal. As a result, the appeal was moved to adjudication for a written inquiry under the *Act*. The adjudicator initially assigned to this appeal sought and received representations from the ministry and the appellant. She shared these representations in accordance with section 7 of the Information and Privacy Commissioner's *Code of Procedure and Practice Direction Number 7*. The appeal was then transferred to me for a disposition.

[5] In this order, I find that the record is excluded from the *Act* under section 65(6)3.

## **RECORDS:**

[6] The sole record at issue is the OPP Background Investigation Report relating to the appellant as provided to this office.

## **DISCUSSION:**

### **Does section 65(6) exclude the report from the *Act*?**

[7] Section 65(6) states, in part:

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

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

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

[8] 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*.<sup>1</sup> In this case, it does not appear that any of the exceptions in section 65(7) are relevant to the record at issue.

[9] The type of records excluded from the *Act* by section 65(6) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees' actions.<sup>2</sup>

### ***Analysis and findings***

[10] I will begin by discussing section 65(6)3.

[11] For section 65(6)3 to apply, it must be established 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.

[12] In this appeal, the parties agree that the record at issue was "collected, prepared, maintained, or used" by the ministry, in relation to "meetings, consultations, discussions or communications" about the suitability of the appellant to be an OPP Auxiliary member. After carefully reviewing the record, I find that the record was "collected, prepared, maintained, or used" by the ministry, in relation to "meetings, consultations, discussions or communications". I find, therefore, that the first two parts of the test are met.

[13] I now turn to part 3.

[14] 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. In this case, it is evident that the appellant's

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<sup>1</sup> Section 65(6) does not prohibit an institution from exercising its discretion to disclose records outside of the access regime established by the *Act*. See Order PO-2639.

<sup>2</sup> *Ontario (Ministry of Correctional Services) v. Goodis*, 2008 CanLII 2603 (ON SCDC).

relationship with the ministry was not part of a collective bargaining arrangement or an analogous relationship. As such, the meetings, consultations, discussions and communications that took place were not about "labour relations" matters.

[15] I will now determine whether these meetings, consultations, discussions and communications were about "employment-related" matters.

[16] In her representations, the appellant asserts that, as the report related to a volunteer position rather than an employment position, the section 65(6) exclusion does not apply. She relies on Order MO-1249, where this office found that personnel records about auxiliary members with the Sudbury Regional Police Service were not related to "employment" within the meaning of section 65(6). In that order, Adjudicator Laurel Cropley reviewed several dictionary definitions of the term "employment". She found that they supported the view that "employment" involves being remunerated for an activity. Therefore, she concluded that, as auxiliary members are not remunerated for their work, they are not employed.

[17] Past decisions frequently offer useful guidance by illustrating legal principles that assist in achieving consistent and predictable results for administering and applying the *Act*. The common law doctrine that decisions should be guided by precedent is known as *stare decisis*. However, I am not bound by *stare decisis* and may depart from an earlier interpretation of the same provision, particularly when doing so is required due to more recent developments by the Court of Appeal and this office.

[18] Since Order MO-1249, the interpretation of section 65(6) and its municipal equivalent (section 52(3) of the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)*) has evolved and these sections have been applied to relationships involving individuals who are not "employees" in a traditional sense.

[19] In *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*,<sup>3</sup> the Court of Appeal had to determine whether the Physician Services Committee and its records were employee-related matters for the purposes of section 65(6). It determined that, although physicians are not "employees" of the provincial government, the relationship between the government and physicians, and the work of the Physician Services Committee representing physicians on issues such as remuneration, was covered by section 65(6). In coming to this conclusion, the Court of Appeal states:

The phrase [labour relations] is not defined in that *Act*, and its ordinary meaning can extend to relations and conditions of work beyond those relating to collective bargaining. Nor is there any reason to restrict the meaning of "labour relations" to employer/employee relationships; to do so would render the phrase "employment-related matters" redundant.

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<sup>3</sup> 2003 CanLII 16894 (ON CA).

[20] This decision is significant as the Court of Appeal has expanded the definition of labour relations, covering the collective bargaining relationship, as well as analogous relationships.

[21] In Order MO-2721-I, this office found that records prepared by a municipality as part of a comprehensive review of its fire department's management and organizational structure were about "labour relations" matters, despite the fact that the department was staffed almost entirely by volunteers. In that order, the adjudicator noted that the records reviewed the fire department's operations and structure, "including the services provided by the volunteer fire fighters and the future management and staffing of the department."

[22] In Order MO-3010, Assistant Commissioner Sherry Liang concluded that the dismissal of a volunteer football coach by a school board was not an "employment-related" matter for the purposes of section 52(3)3 of the *MFIPPA*, which is the equivalent to section 65(6)3. Assistant Commissioner Liang commented on previous IPC orders that have applied the section 65(6) exclusion to relationships between an individual and an institution that have the "trappings of employment"<sup>4</sup>:

It is clear from the decisions in this area that where the phrase "employment-related matters" has been extended to cover relationships between an institution and individuals who are not typical employees, those relationships contain many of the indicia of employment...

It is not hard to imagine the variety of volunteer relationships that can exist between a volunteer and an institution to which that person is devoting time. Some of these volunteer relationships bear little resemblance to others, in matters such as time commitment, control over the activities, performance expectations and recruitment process. Some, in short, may exhibit the "trappings of employment" while others do not...

[23] I agree with the reasoning set out in the above-noted Court of Appeal decision and these previous orders.

[24] In the ministry's representations, the ministry asserts that Auxiliary members' roles and responsibilities have the requisite "trappings of employment". It points out that Auxiliary members can have the authority of a police officer, receive many benefits, and are regulated by statute. The ministry acknowledges that Auxiliary members do not receive salaries but asserts that this by itself is not determinative. It also asserts that Auxiliary members go through a selection process which tests for similar aptitudes and abilities as police officers. The ministry further relies on PO-3262 for the legal principle that the decision not to hire a job candidate does not negate the application of section

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<sup>4</sup> In coming to this conclusion, I note that Assistant Commissioner Liang considered the above-noted Court of Appeal decision.

65(6)3.

[25] I note that the appellant did not provide any representations with regards to the issue of whether or not Auxiliary members' roles and responsibilities have the requisite "trappings of employment".

[26] In the appeal before me, it is evident that, if the appellant was successful at being appointed, the appellant and the ministry would not have had an employee-employer relationship in the traditional sense. As acknowledged by the ministry, Auxiliary members do not receive salaries. However, I agree with the ministry that this fact by itself is not determinative. As Assistant Commissioner Liang stated, unpaid employment *might*, in given circumstances, be sufficiently akin to paid employment that is covered by the section 65(6)3 exclusion. What is determinative is whether their relationship contains the indicia of employment or trappings of employment.

[27] In this case, unlike in Order MO-3010, there is evidence about matters such as recruitment, performance standards and supervision from the OPP website<sup>5</sup> and the *Police Services Act (PSA)*.

[28] With regards to recruitment, the OPP website identifies the various steps a candidate must complete when applying for a position. These steps include: completing an application form and a release of information form; attending an interview, participating in an Aptitude (PATI) and psychological testing (besides medical and vision testing); and undergoing a background investigation. I note that the qualifications to be an OPP officer are the same as to be an Auxiliary member.<sup>6</sup> As such, the recruitment process for Auxiliary members appears to be testing for similar aptitudes and abilities as OPP officers.

[29] With regards to performance standards and supervision, the OPP website identifies a monthly commitment of a minimum 10 hours on patrol (with a regular member) or at community events and six hours on training. It also states that Auxiliary members are expected to maintain the high standards of the OPP. It also appears that Auxiliary members are being supervised by OPP officers.<sup>7</sup>

[30] As noted by the ministry, Auxiliary members are regulated by the *PSA*. Section 52 of the *PSA* governs the appointment, suspension or termination of Auxiliary members.<sup>8</sup> Under section 25 of the *PSA*, the Ontario Civilian Police Commission (the Commission) may investigate, inquire into and report on the conduct or the performance of duties of an Auxiliary member. Under section 25(4.1) of the *PSA*, the Commission may, if it concludes that an Auxiliary member, is not performing or is

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<sup>5</sup> I note that the ministry referred to and cited information from this website in its representations.

<sup>6</sup> See section 43 of the *PSA*.

<sup>7</sup> See section 52(4) and (5) of the *PSA*.

<sup>8</sup> See section 52(1), (2), (3) and (3.1) of the *PSA*.

incapable of performing the duties of his or her position in a satisfactory manner, demote, dismiss, retire, suspend or revoke the person's appointment. As noted by Adjudicator Cropley in Order MO-1249, the terms "demoted", "dismissed" or "retired" are terms normally related to "employment".

[31] In my view, these are all indicia that support a finding that, although an Auxiliary member may not be an employee in a traditional sense, their position as an Auxiliary member has many of the "trappings of employment". Accordingly, I find that the meetings, consultations, discussions and communications documented in the record about the appellant's recruitment are about "employment-related" matters, as required by part 3 of the section 65(6)3 test.

[32] However, to satisfy part 3 of this test, it must also be established that the ministry had "an interest" in these employment-related matters. 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.<sup>9</sup> In its representations, the ministry asserts that it had the requisite employment-related interest in the record because it has an interest in there being a "full and frank" internal dialogue between members of the OPP responsible for evaluating the appellant as part of its assessment of whether the appellant would make a suitable Auxiliary member. It also asserts that it has an interest in recruiting the most qualified Auxiliary members, given how closely they work with and assist OPP officers, and how in certain circumstances they have the authority of a police officer. I note that the appellant did not provide representations on this issue. Given the ministry's assertions, it is evident that the ministry had an interest in these employment-matters that extended beyond a "mere curiosity or concern".

[33] In short, I am satisfied that the ministry's collection, preparation, maintenance and use of the record at issue have "some connection" to meetings, consultations, discussions or communications about employment-related matters in which it has an interest. Accordingly, I find that the record is excluded from the *Act* under section 65(6)3.

[34] Given that the record is excluded from the *Act* under section 65(6)3, it is not necessary to determine whether the exclusions in paragraphs 1 and 2 of section 65(6) claimed by the ministry apply to the record.

## **ORDER:**

I uphold the ministry's decision that the report is excluded from the *Act* under section 65(6)3.

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<sup>9</sup> *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.

Original Signed by: \_\_\_\_\_

Lan An  
Adjudicator

\_\_\_\_\_ March 1, 2017