

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-3784

Appeal PA14-409-2

Ministry of Community Safety and Correctional Services

November 22, 2017

**Summary:** The ministry received a request for video surveillance from security cameras at a specified detention centre. The ministry identified three videos as responsive to the request and denied access to them in their entirety. The ministry claimed that Video 1 is excluded from the scope of the *Act* under section 65(5.2) as it is a record relating to a prosecution and that videos 1 and 3 are excluded from the scope of the *Act* under section 65(6) as the information amounts to labour relations or employment related information. The ministry also claimed a number of law enforcement exemptions and the personal privacy exemption to the records in the event that the exclusions were not found to apply. Subsequently, the ministry disclosed Video 2 to the appellant; therefore, it is no longer at issue.

In this order, the adjudicator finds that Video 1 is subject to the exclusion at section 65(5.2) and Video 3 is subject to the exclusion at section 65(6), thereby removing both records from the scope of the *Act*. As a result, the ministry's decision not to disclose the information to the appellant is upheld.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 14(1)(i), (j), (k) and (l), 65(5.2) and 65(6)1.

### OVERVIEW:

[1] The Ministry of Community Safety and Correctional Services (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

...all video surveillance from all security cameras at Elgin Middlesex Detention Centre [EMDC]. Please make this available for the time period of whenever security cameras were installed at EMDC to present day.

Please ensure to make available any existing video dating back as early as possible.

[2] The request was subsequently clarified to the following:

All video in regards to [named individual] who was involved in an incident at EMDC in summer of 2013. In addition to the specified footage, I am asking for all other video that is currently being retained by Elgin Middlesex Detention Centre. In regards to a time frame, no limit on time frame.

[3] The ministry identified three videos as responsive and denied access to them pursuant to the discretionary law enforcement exemptions at sections 14(1)(a), (i), (j), (k), (l), and 14(2)(d), and the mandatory personal privacy exemption at section 21(1), taking into account the presumption against disclosure for records related to an investigation into a possible violation of law at section 21(3)(b) of the *Act*. The ministry also indicated that one of the videos was excluded from the scope of the *Act* under section 65(5.2), stating:

Section 65(6.2) states that the *Act* does not apply to a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed.

The ministry is of the opinion that section 65(5.2) is also applicable in the circumstances of your request. As a result, a portion of the record you have requested is not accessible under the *Act* at this time.

[4] The requester, now the appellant, appealed the ministry's decision.

[5] During mediation, the appellant confirmed that he is pursuing access to all of the withheld records. He also raised the possible application of the public interest override at section 23 of the *Act*. The ministry advised that it maintains its position that none of the withheld records should be disclosed.

[6] As a mediated resolution could not be reached, the file was transferred to the adjudication stage of the appeal process for an adjudicator to conduct an inquiry. The adjudicator who was assigned to this file began the inquiry by inviting the ministry to provide representations, which it did.

[7] In its representations, the ministry dropped its reliance on the exclusion for records relating to a prosecution at section 65(5.2) for Video 3 but retained it for Video 1. In addition, the ministry claimed that the exclusion for labour relations and employment related information at section 65(6) applies to Videos 1 and 3.

Subsequently, the adjudicator added the possible application of that exclusion as an issue on appeal.

[8] The adjudicator then invited the appellant to submit representations. The appellant chose not to make submissions.

[9] Following a review of the ministry's representations, the file and the records, the adjudicator with carriage of the file contacted the ministry for clarification with respect to the records. Additionally, the adjudicator advised the ministry that she had not been provided with a copy of Video 2. The ministry provided clarification with respect to all three videos and also provided the adjudicator with a copy of Video 2.

[10] Following additional queries from the adjudicator regarding videos 2 and 3, the ministry responded that upon further review, it was prepared to disclose Video 2. As a result, the ministry issued a supplemental access decision to the appellant, disclosing Video 2 to him, in its entirety. Accordingly, Video 2 is no longer at issue in this appeal.

[11] With respect to Video 3 the ministry clarified that although it had previously identified Video 3 as containing 6 hours of footage, it had provided the adjudicator with approximately twelve hours of footage on 2 discs that are mostly duplicative. It explained that at the time the video was recorded the ministry was working with new technology and, to ensure that all relevant footage was captured, it was downloaded twice, with additional time being recorded both before and after the incident. The ministry stated that it believed that despite the duplication, both are responsive to the request, and it addressed the twelve hours of footage in its representations.

[12] The file was then assigned to me. As some time had passed since this office had communicated with the ministry, I sought confirmation that the prosecution upon which the ministry was relying to claim the exclusion at section 65(5.2) for Video 1 had not yet been completed. In late August 2017, the ministry confirmed that a trial date had been set for the fall of 2017.

[13] In this order I find that Video 1 is excluded from the scope of the *Act* pursuant to section 65(5.2) as it amounts to a record relating to an ongoing prosecution. Additionally, I find that the exclusion for records relating to labour relations and employment information at section 65(6)1 applies to Video 3. Accordingly, I uphold the ministry's decision not to disclose these videos to the appellant and dismiss the appeal.

## **RECORDS:**

[14] The records at issue in this appeal consist of video surveillance footage. The two videos that remain at issue and the exemptions claimed for each are described in the following table.

<b>Record Name</b>	<b>Description</b>	<b>Sections of the Act claimed by the ministry</b>
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Video 1	Approximately 248 hours in length; contains footage relating to an incident at EMDC.	65(5.2), 65(6); 14(1)(a), (i), (j), (k), (l), 14(2)(d) and 21(1)
Video 3	Two discs approximately twelve hours long; contains video footage relating to an incident at EMDC (some duplication).	65(6); 14(1)(i), (j), (k), (l) and 21(1)

## **ISSUES:**

1. Does the exclusion for records relating to a prosecution at section 65(5.2) of the *Act* apply to exclude Video 1 from the scope of the *Act*?
2. Does the exclusion for records relating to labour relations and employment information at section 65(6) apply to exclude Video 3 from the scope of the *Act*?

## **DISCUSSION:**

### **Preliminary matter**

[15] As indicated above, in its decision letter and representations the ministry advised that in the event that the exclusions at sections 65(5.2) and 65(6) of the *Act* are not found to apply to the records at issue, the ministry claims that a number of discretionary law enforcement exemptions at sections 14(1) and (2), and the mandatory personal privacy exemption at section 21(1) apply in the alternative to exempt the information in videos 1 and 3 from disclosure.

[16] As a result of my findings below, it is not necessary for me to determine whether any of the exemptions at either sections 14(1) or (2) or section 21(1) of the *Act* apply to exempt videos 1 and 3, or information contained in those videos from disclosure.

[17] Similarly, although the appellant has raised the possible application of the public interest override provision at section 23 of the *Act*, as a result of my findings below and the fact that I am not addressing the possible application of section 21(1) to the records, it is not necessary for me to determine whether a compelling public interest in the disclosure of the records exists as contemplated by section 23 of the *Act*.

### **A. Does the exclusion for records relating to a prosecution at section 65(5.2) of the Act apply to exclude Video 1 from the scope of the Act?**

[18] Section 65(5.2) states:

This Act does not apply to a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed.

[19] The purposes of section 65(5.2) include maintaining the integrity of the criminal

justice system, ensuring that the accused and the Crown's right to a fair trial is not infringed, protecting solicitor-client privilege and litigation privilege, and controlling the dissemination and publication of records relating to an ongoing prosecution.<sup>1</sup>

[20] The term "prosecution" in section 65(5.2) of the *Act* means proceedings in respect of a criminal or quasi-criminal charge laid under an enactment of Ontario or Canada and may include regulatory offences that carry "true penal consequences" such as imprisonment or a significant fine.<sup>2</sup>

[21] The words "relating to" require some connection between "a record" and "a prosecution." The words "in respect of" require some connection between "a proceeding" and "a prosecution".<sup>3</sup>

[22] Only after the expiration of any appeal period can it be said that all proceedings in respect of the prosecution have been completed. This question will have to be decided based on the facts of each case.<sup>4</sup>

### ***Representations***

[23] The ministry claims the exclusion at section 65(5.2) applies to Video 1. It submits that it contains footage relating to a fatal incident at EDMC which resulted in the alleged murder of an inmate. The ministry submits that originally, the inmate's death led to criminal charges against three inmates and three EMDC employees and that it has been advised that, as of the date of their representations, one of the inmates is still charged with one count of second degree murder.

[24] The ministry submits that the exclusion at section 65(6.2) applies to Video 1 for the following reasons:

- second degree murder is an offence under section 235(1) of the *Criminal Code of Canada* that carries penal consequences;
- as Video 1 is required for evidentiary purposes at trial as it contains footage related to the alleged murder of the inmate, the requisite connection between the record and a pending prosecution exists; and
- as the prosecution has not been completed it is an ongoing matter.

[25] With respect to the third point indicated above, the ministry confirmed with this office, on August 30, 2017, that a trial date for this matter was scheduled for the fall of 2017.

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<sup>1</sup> *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991, March 26, 2010, Tor. Doc. 34/91 (Div. Ct.).

<sup>2</sup> Order PO-2703.

<sup>3</sup> *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, cited above; see also *Canada (Information Commissioner) v. Canada (Commissioner, RCMP)*, 2003 SCC 8, [2003] 1 S.C.R. 66 at para. 25.

<sup>4</sup> Order PO-2703.

### ***Analysis and finding***

[26] In order for the exclusion in section 65(5.2) to apply, the ministry must establish the following:

1. There is a prosecution;
2. there is some connection between the records and the prosecution; and
3. all the proceedings with respect to the prosecution have not been completed.<sup>5</sup>

[27] Based on my review of the ministry's representations, Video 1, and the circumstances of this appeal, I find that the ministry has established that the requirements have been met and that Video 1 is excluded from the scope of the *Act* by virtue of the application of the exclusion at section 65(5.2).

[28] I accept the ministry's submissions regarding the existence of a prosecution arising from a charge under section 235(1) of the *Criminal Code of Canada* and that the alleged offence carried "true penal consequences," specifically, imprisonment. I also accept the ministry's submission that the prosecution arises from the incident that is depicted on the video. Therefore, I am satisfied that the ministry has established that there is a prosecution and that there is *some connection* between Video 1 and that prosecution. Accordingly, I accept that requirements 1 and 2 set out above have been met.

[29] With respect to requirement 3, although I acknowledge that my most recent update on the prosecution from the ministry indicated that a trial was set to proceed this fall, at this time, the parties have not provided me with evidence to support a finding that all of the proceedings with respect to the prosecution can be said to have been completed.<sup>6</sup> Accordingly, I accept that requirement 3 has also been met.

[30] In conclusion, I find that Video 1 is a record relating to a prosecution of an individual subject to charges under the *Criminal Code of Canada* and that all proceedings in relation to that prosecution have not been completed. Therefore, I find that Video 1 is excluded from the application of the *Act* under section 65(5.2).

[31] Because of this finding it is not necessary for me to determine whether the exclusion at section 65(6), or any of the exemptions at section 14(1) and/or 21(1) apply to Video 1.

### **B. Does the exclusion for records relating to labour relations and employment information at section 65(6) apply to exclude Video 3 from the scope of the Act?**

[32] Sections 65(6)(1) and (3) state:

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<sup>5</sup> Orders PO-3260 and MO-3294-I.

<sup>6</sup> As noted above, this would include any appeal period or other proceeding in respect of the prosecution.

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.

...

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

[33] If any of the paragraphs at 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*.

[34] For the collection, preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in paragraph 1, 2 or 3 of this section, it must be reasonable to conclude that there is "some connection" between them.<sup>7</sup>

[35] 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.<sup>8</sup>

[36] The term "employment of a person" refers to the relationship between an employer and an employee. 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.<sup>9</sup>

[37] If section 65(6) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date.<sup>10</sup>

[38] 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>11</sup>

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<sup>7</sup> Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

<sup>8</sup> *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.); see also Order PO-2157.

<sup>9</sup> Order PO-2157.

<sup>10</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.

<sup>11</sup> *Ontario (Ministry of Correctional Services) v. Goodis*, cited above.

***Section 65(6)1: court or tribunal proceedings***

[39] For section 65(6)1 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 proceedings or anticipated proceedings before a court, tribunal or other entity; and
3. these proceedings or anticipated proceedings relate to labour relations or to the employment of a person by the institution.

[40] In its representations with respect to the application of this exclusion, the ministry addresses both Video 1 and Video 3. It makes detailed submissions with respect to its application to Video 1 and then states that:

...[It] adopt(s) the same position for Video [3] as [it] did for Video [1] with the exception of the following factual considerations:

The ministry submits that it was going to use Video [3] for anticipated labour-relations proceedings. The ministry submits that at the time the request was filed, Video [3] was intended for a hearing before the Grievance Settlement Board which would have occurred, except that the employee subsequently had his employment terminated for an event unrelated to the event that was at issue at the proceeding. The ministry submits that on the basis of these factual considerations, the proceeding was 'anticipated.'

*Part 1: collected, prepared, maintained or used*

[41] As indicated above, the ministry submits that it intended to use Video 3 for an anticipated hearing before the Grievance Settlement Board. It submits that if the ministry was not going to use the video, the recording would have been automatically overridden, as is the case with other video footage taken in correctional institutions which is not required for proceedings.

[42] Based on the ministry's submissions, I accept that Video 3 was collected and maintained by the ministry for future use, specifically for a hearing before the Grievance Settlement Board. Therefore, I accept that part 1 of the section 65(6)1 test has been met.

*Part 2: proceedings before a court or tribunal*

[43] As indicated above, the ministry submits that it collected and maintained Video 3 for the purpose of it being used for an anticipated hearing before the Grievance Settlement Board, which would have occurred had the employee not subsequently been terminated for an event unrelated to the one that was to be at issue in the hearing.



[44] The ministry submits that the Grievance Settlement Board is established under section 46 of the *Crown Employees Collective Bargaining Act, 1993*, as amended. It submits that the Grievance Settlement board holds "proceedings" and that it constitutes a "tribunal" for the purpose of the second part of the test.

[45] The word "proceedings" has been defined in orders issued by this office as a dispute or complaint resolution process conducted by a court, tribunal or other entity which has the power, by law, binding agreement or mutual consent, to decide the matters at issue.<sup>12</sup> For proceedings to be "anticipated", they must be more than a vague or theoretical possibility. There must be a reasonable prospect of such proceedings at the time the record was collected, prepared, maintained or used.<sup>13</sup>

[46] This office has also defined "tribunal" as a body that has a statutory mandate to adjudicate and resolve conflicts between parties and render a decision that affects the parties' legal rights or obligations.<sup>14</sup>

[47] Based on the ministry's representations and this office's interpretation of the terms "anticipated," "proceedings" and "tribunal," I accept that the ministry collected and maintained Video 3 to be used in relation to anticipated proceedings before a tribunal, namely, the Grievance Settlement Board. Accordingly, I find that part 2 of the section 65(6)1 test has been met.

### *Part 3: labour relations or employment*

[48] The proceedings to which the paragraph appears to refer are proceedings related to employment or labour relations per se – that is, to litigation relating to terms and conditions of employment, such as disciplinary action against an employee or grievance proceedings. In other words, it excludes records relating to matters in which the institution has an interest as an employer.

[49] The ministry submits that Video 3 was to be used for labour-relations proceedings involving one of its employees and that these proceedings were to occur before the Grievance Settlement Board in relation a disciplinary action that the ministry no longer needs to take as the employee subsequently had his employment terminated for another event.

[50] Based on my review of the ministry's representations, as well as my review of Video 3, I accept that the proceedings that the ministry anticipated using Video 3 for, relate to labour relations matters involving one of its employees. Accordingly, I find that part 3 of the section 65(6)1 test has been established.

[51] As I have found that all three parts of the test for section 65(6)1 have been established, I find that section 65(6)1 applies to exclude Video 3 from the scope of the *Act*.

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<sup>12</sup> Orders P-1223 and PO-2105-F.

<sup>13</sup> Orders P-1223 and PO-2105-F.

<sup>14</sup> Order M-815.

**ORDER:**

I uphold the ministry's decision and dismiss the appeal.

Original Signed By: \_\_\_\_\_  
Catherine Corban  
Adjudicator

\_\_\_\_\_ November 22, 2017