Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4204

Appeal PA18-00713

Office of the Independent Police Review Director

October 29, 2021

Summary: The appellant, a police officer, appealed the decision of the Office of the Independent Police Review Director to deny him access to complaint investigation records relating to his conduct in the course of his duties as a police officer with the York Regional Police. To deny access, the OIPRD relied on the exclusions at sections 65(6)1 and 65(6)3 (labour relations or employment records) of the *Freedom of Information and Protection of Privacy Act*.

The adjudicator finds that neither section 65(6)1 nor section 65(6)3 excludes the records from the application of the *Act* because the OIPRD has not satisfied the requirements for the application of either exclusion to the records at issue. She also finds that the section 65(6)1 and 65(6)3 exclusions do not apply because the OIPRD is not the police officer's employer and it does not have the requisite interest in employment-related matters with respect to the records. The adjudicator orders the OIPRD to issue a new access decision to the appellant for the records.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, sections 65(6)1 and 65(6)3.

Orders and Investigation Reports Considered: Orders M-931, M-1130, M-1166, MO-1744, MO-2428, MO-4029, P-1223, P-1345, P-1560, PO-2105-F, PO-2106, PO-3075 and PO-3681.

Cases Considered: *Ontario (Solicitor General) v. Mitchinson*, 2001 CanLII 8582 (ON CA); *Reynolds v. Binstock*, 2006 CanLII 36624 (ON SCDC); *Ontario (Correctional Services) v. Goodis*, 2008 CanLII 2603 (ON SCDC); *Ontario (Attorney General) v. Information and Privacy Commissioner*, 2009 CanLII 9740 (ON SCDC); *Ministry of Community and Social Services v.*

Doe, 2014 ONSC 239 (Div.Ct.), [2014] O.J. No. 236 (Div.Ct.); *Carleton University v. Information and Privacy Commissioner of Ontario and John Doe, requester*, 2018 ONSC 3696 (CanLII); and *Brockville (City) v. Information and Privacy Commissioner, Ontario*, 2020 ONSC 4413 (CanLII).

OVERVIEW:

[1] This order considers and rejects the claim of the employment records exclusion by an institution that is not the employer and that lacks the requisite interest in employment-related matters with respect to the records.

[2] The appellant, a police officer, submitted a request to the Office of the Independent Police Review Director (the OIPRD) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

> All information contained in all records held by the OIPRD, whether electronic or otherwise, that relate to, concern or touch upon my employment, conduct, duties or any other matter related to my status as a police officer with York Regional Police.

[3] The OIPRD issued an access decision stating that the *Act* does not apply to the requested records due to the exclusion at section 65(6) (labour relations or employment records). The OIPRD's decision contained no other information and did not cite reliance on any exemptions from the right of access as alternatives to its exclusion claim.

[4] The appellant was not satisfied with the OIPRD's decision and appealed it to the Information and Privacy Commissioner of Ontario (the IPC). The IPC attempted to mediate the appeal. A mediated resolution was not possible and the appeal proceeded to the adjudication stage of the appeal process.

[5] I conducted an inquiry into the OIPRD's claim that the section 65(6) exclusion applies to the records at issue. During my inquiry, the OIPRD and the appellant submitted representations on section 65(6) of the *Act.* The OIPRD also provided me with a copy of the records at issue and an index. I then notified the York Regional Police (the police) as an affected party that may have an interest in the records at issue. I invited the police to submit representations and they did. I shared the police's representations with the appellant, who provided a brief reply. Finally, I invited the OIPRD, the appellant and the police to submit representations on three specific court decisions that addressed the application of the exclusion and that I follow in this order. The OIPRD and the appellant provided representations on the three court decisions, but the police did not.

[6] In this order, I find that the records do not qualify for exclusion under section 65(6)1 or 65(6)3, as claimed by the OIPRD, and I order the OIPRD to issue a new access decision to the appellant in respect of them.

RECORDS:

[7] The 127 records at issue consist of the complete investigation files of the OIPRD concerning five complaints made against the appellant by members of the public. The records total approximately 1,150 pages and they include: copies of complaint letters, materials and other communications from members of the public to the OIPRD; OIPRD-generated records such as correspondence, complaint analysis forms, investigation logs, decision letters, investigation reports and witness statements; and police correspondence, occurrence reports and other documents.

DISCUSSION:

Are the records excluded from the application of the *Act* under section 65(6)?

[8] The sole issue in this order is whether the records are excluded from the application of the *Act* under section 65(6). In its representations, the OIPRD confirms that it relies on sections 65(6)1 and 65(6)3, which state:

> (6) 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.

[9] If either of paragraphs 1 or 3 of 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*. There is no suggestion that any of the exceptions in section 65(7) of the *Act* applies in this appeal and I find that none does.

The parties' general representations on section 65(6)

[10] The OIPRD provides information on its mandate, duties and powers under its governing legislation, the *Police Services Act* (the PSA). It explains that it is an arm's-length agency of the Ministry of the Attorney General that is charged with making decisions that are independent of the police, the government and the public. It states it is an independent oversight agency mandated with enforcing and regulating compliance with Part V of the PSA—titled Complaints and Disciplinary Proceedings—and ensuring an effective public complaints system under the PSA, which, in turn, ensures public confidence in policing.

[11] The OIPRD argues that the public complaints process under the PSA presumptively involves labour relations and employment matters with respect to police officers, and OIPRD records "relate to, concern, or touch upon an officer's employment which has the potential to impact his or her status as an officer." It also argues that, despite the PSA's demonstrating the legislature's intent to create an independent and transparent process for public complaints about police misconduct, the OIPRD's complaint process operates within a labour relations and employment scheme.

[12] The OIPRD takes the position that the records arose in an employment context and are excluded from the scope of the *Act* under section 65(6) because they relate to the appellant's employment, conduct, duties and status as a police officer with the police. It argues that the exclusion applies "according to the nature of the record" and applies regardless of whether the access request goes to the Chief of Police or the OIPRD. It further argues that if section 65(6) applied at the time the records were collected, prepared, maintained or used, it does not cease to apply later. In support of this argument, the OIPRD relies on *Ontario (Solicitor General) v Mitchinson*.[1] (*Mitchinson*)

[13] In his representations, the appellant stresses that he seeks access to records relating to himself, and not to anyone else, and he relies on the purpose of the *Act*, as set out at section 1(1)(b), that individuals have a right of access to personal information about themselves. He argues that I should interpret section 65(6) in the context of an individual's right to access their own personal information and other sections of the *Act*, including the principle that exemptions from the right of access should be limited and narrowly construed. The appellant submits that section 65(6) recognizes that records of employment-related matters often include highly confidential personal information about an individual and should be shielded from public view; however, this section should be balanced with the right of an individual to access his own employment-related information.

[14] In their representations, the police state that they agree with, adopt and rely on the representations of the OIPRD. The police assert that it is clear from the OIPRD's and the appellant's representations that the records at issue were collected, prepared, maintained or used by the OIPRD in connection with the OIPRD's responsibilities under Part V of the PSA. In response to the appellant's submission that he should have a right of access to his personal information, the police submit that the application of section 65(6) is based on the nature of the records and not on the identity of the requester.

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[1] 2001 CanLII 8582 (ON CA). I use the CanLII citation in this order instead of the citation provided by the OIPRD, *Ontario (Solicitor General) v (Assistant Information and Privacy Commissioner)* (2001), 55 OR (3d) 355 (CA) leave to appeal refused [2001] SCCA No 507.

Section 65(6)1: court or tribunal proceedings

[15] In order for me to find that section 65(6)1 applies to the records, the OIPRD must establish that:

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

2. this collection, preparation, maintenance or use 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.

Requirement 1: collected, prepared, maintained or used

[16] The OIPRD states that it collected, prepared, maintained or used the records at issue "in carrying out its statutory and administrative responsibilities under the PSA" in relation to the screening, investigation or review of public complaints. The appellant's representations do not address this requirement. Having reviewed the records, I find that they were collected, prepared, maintained or used by the OIPRD in satisfaction of the first requirement of section 65(6)1.

Requirement 2: proceedings before a court or tribunal

[17] The OIPRD submits that the records were collected, prepared and maintained for the purposes of anticipated disciplinary proceedings under Part V of the PSA. The OIPRD explains that it collected most of the records at issue and provided them to the police for investigation, which may have led to the Chief of Police initiating disciplinary proceedings or ordering various penalties. It explains that five of the 127 records at issue relate to a complaint that was screened out and did not proceed to an investigation, and it argues that this fact does not change the employment nature of these five records. It explains that even when it screens out a complaint, the Chief of Police can use the records from that complaint for current and future employment issues. The OIPRD states that because the records were collected for the Chief of Police to examine the appellant's actions in the execution of his professional duties, they qualify for exclusion irrespective of whether a disciplinary hearing was ultimately held.

[18] The OIPRD explains that it referred the remaining four complaints to the police for investigation and one of these referred complaints closed when the complainant withdrew it. It states that the remaining three referred complaints were investigated by the police and found to be unsubstantiated, and the complainants then requested that the OIPRD review the police's investigation of these complaints. The OIPRD explains that it reviewed the three complaint investigations, confirming the decision of the Chief of Police in two of them and finding that there were reasonable grounds to believe that misconduct of a less serious nature had been committed in the third complaint. Unlike

misconduct deemed 'serious' by the OIPRD, 'less serious' misconduct does not have to proceed to a formal hearing and can be informally resolved by the Chief of Police without a hearing. This was the outcome of the third complaint. The OIPRD confirms that it does not manage discipline or discipline hearings, which are conducted by hearings officers appointed by the Chief of Police.

[19] The appellant's representations do not address this requirement.

[20] The police submit that the records all relate to complaints made by members of the public against the appellant in his capacity as a police officer, and that they all relate to Part V of the PSA and are labour relations and employment records. The police explain that Part V of the PSA and the PSA's Regulations provide the procedure for the investigation and resolution of complaints about police officers and their discipline through an informal or hearing process. The police state that four of the complaints were referred by the OIPRD to them and were investigated by their Professional Standards Bureau in accordance with their responsibilities under Part V of the PSA.

[21] The police argue that the records at issue are excluded from the *Act* since they relate to disciplinary proceedings or anticipated disciplinary proceedings under Part V of the PSA. They submit that previous IPC orders have consistently found that the *Act* and the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA*) do not apply to records related to Part V of the PSA. In support of this submission, the police rely on Orders MO-4029, MO-2428, MO-1744, MO-1166 and M-1130. They state that in all of these orders, records related to investigations by the police service under Part V of the PSA were found to be excluded from the application of *MFIPPA* under section 52(3)1 of *MFIPPA*.[2] The police also cite Order PO-3075, which, they submit, upheld the Ministry of Community Safety and Correctional Services' denial of access, under section 65(6)3 of the *Act*, to records that related to complaints filed against police officers and were held by various agencies, including the Ontario Civilian Commission on Police Services and the Ontario Provincial Police.

Analysis and finding

[22] I begin my analysis by noting that neither the OIPRD nor the police address the records individually or specifically according to the different types of materials that comprise the records at issue. Instead, the OIPRD and the police address the records collectively and assert that any of them may have led to the Chief of Police initiating disciplinary proceedings against the appellant. The application of the exclusion in section 65(6) is record-specific and fact-specific. The lack of detailed representations on the specific records at issue within the factual context of this appeal, or, on the specific types of records before me, is a significant reason for my finding that the OIPRD and

[2] Section 52(3) of *MFIPPA* is the equivalent of section 65(6) of the *Act*.

the police have not satisfied the second requirement of the test for the application of the exclusion.

[23] Another reason for my finding is that the OIPRD's and the police's representations do not establish that the collection, preparation, maintenance or use of the OIPRD's records at issue was in relation to proceedings or anticipated proceedings before a court, tribunal or other entity in satisfaction of the second requirement for the application of section 65(6)1. Although the OIPRD claims that it collected, prepared and maintained the records at issue for the purposes of anticipated disciplinary proceedings, it does not identify the specific anticipated proceedings in relation to which it collected, prepared or maintained the records. It states that disciplinary proceedings were a possibility, but it acknowledges in its representations that only the matters it determines through its investigation to be 'serious' misconduct must go to a disciplinary hearing, while 'less serious' matters may be resolved by the Chief of Police through informal resolution or a disposition without a hearing. None of the complaints at issue were determined by the OIPRD to be 'serious'. As acknowledged by the OIPRD, the only complaint of the five at issue that proceeded to a disciplinary hearing was of a 'less serious' nature and was informally resolved by the Chief of Police without a hearing. However, the OIPRD does not provide detailed representations on the records at issue that relate to the one complaint that was referred to discipline, as required to establish that these records were collected, prepared and maintained for the disciplinary proceeding.

[24] Previous IPC orders have found that an "anticipated proceeding" means a proceeding that is more than just a vague or theoretical possibility—there must be a reasonable prospect of such a proceeding at the time the record was prepared, maintained or used in order for it to qualify as an "anticipated proceeding."[3] I adopt this definition of "anticipated proceeding." Applying the definition to this appeal, I am not persuaded that the records were collected, prepared or maintained for an anticipated proceeding.

[25] The OIPRD's representations do not demonstrate that there was a reasonable prospect of a disciplinary hearing before a court, tribunal or other entity at the time of the collection, preparation or maintenance of all of the records at issue, as is required to satisfy the second requirement of section 65(6)1. They also do not confirm that the records were collected, prepared or maintained in relation to a proceeding before a court, tribunal or other entity. Rather, the OIPRD's representations establish that there was a possibility of a disciplinary hearing, which was one of a number of possible outcomes as it is in any OIPRD investigation of a public complaint. They also confirm that the only complaint that was referred to the police for a disciplinary hearing was

[3] Order P-1223 and PO-2105-F.

referred after the OIPRD conducted its review of the police's decision that the complaint was unfounded, and was then resolved informally by the Chief of Police, without a disciplinary hearing. I am not convinced that the *possibility* of a disciplinary proceeding is sufficient to satisfy the requirement that the collection, preparation, maintenance or use of the records in this appeal was in relation to proceedings or anticipated proceedings before a court, tribunal or other entity.

[26] I am also not persuaded by the police's argument that the second requirement of the test is met because the investigations they undertake, when complaints are referred to them by the OIPRD, are "proceedings." This argument and the orders the police rely on to support it do not address or apply to the records before me. Orders MO-4029, MO-2428, MO-1744, MO-1166 and M-1130, addressed investigation records held by police services and actual or anticipated proceedings, and found the various police services' investigation records to be excluded from the application of *MFIPPA* under the employment exclusion found at section 52(3)1 of *MFIPPA*. Order PO-3075 also involved different circumstances and records than those before me. That order held that records of a Professional Standards Bureau investigation and of a review of the Professional Standards Bureau's decision by the Ontario Civilian Commission on Police Standards were excluded under section 65(6)1 of the *Act*. Unlike these orders cited by the police, the records before me are not the police's investigation records; they are the OIPRD's investigation records.

[27] In addition to not being persuaded by the OIPRD's and the police's representations for the reasons cited above, having reviewed the records themselves, I do not see any information in them establishing that they were collected, prepared, maintained or used in relation to a proceeding or anticipated proceeding. As a result, I find that the second requirement of section 65(6)1 is not satisfied.

Requirement 3: labour relations or employment

[28] Even though the exclusion in section 65(6)1 cannot apply because I have found that the second requirement has not been satisfied, I will address the third requirement for completeness. The third part of the section 65(6)1 test requires that the proceedings or anticipated proceedings relate to labour relations or the employment of a person "by the institution." The appellant's representations do not address this requirement.

[29] The OIPRD submits that the records, which it sent to the police for the police to use, relate to the appellant's employment with the police, and it relies on Orders P-1345 and P-1560 to argue that section 65(6)1 can apply even when the institution that collected, prepared, maintained or used the records is not the employer.

[30] The OIPRD also argues that the circumstances of this appeal differ from those in Order PO-3681, which held that section 65(6)1 did not apply to investigation records created by the Ontario Civilian Police Commission (OCPC) under section 25(1) of the

PSA because they were not related to employment matters. The OIPRD asserts that Order PO-3681 can be distinguished because the records in that order were used solely by the OCPC and did not involve the requester's employer. The OIPRD submits that, in contrast to Order PO-3681, the records in this appeal were all collected and prepared by it specifically for the use of the appellant's employer, the Chief of Police. It also submits that unlike the OCPC, it is statutorily obligated to exchange, with the Chief of Police, employment-related records regarding the involvement of an officer in the public complaints process. It concludes by asserting that the records should be excluded "as employment-related matters" in accordance with the reasoning in Orders PO-3681 and P-1345 because they were "sent by the institution to the employer and used by the employer."

[31] In support of their position regarding the application of section 65(6)1 of the *Act* to the records at issue, the police repeat their reliance on Orders MO-4029, MO-2428, MO-1744, MO-1166 and MO-1130, which, they argue, found that records related to Part V of the PSA were excluded from the *Act* under section 65(6)1. The police also repeat their assertion that the IPC has consistently upheld the application of the exclusion to records related to Part V of the PSA.

Representations on three specific court decisions

[32] After receiving representations from the OIPRD, the appellant and the police, I invited them to provide additional representations on three court decisions: *Mitchinson*,[4] *Reynolds v. Binstock*,[5] and *Ontario (Correctional Services) v. Goodis*.[6] Specifically, I asked the parties to review these three decisions, which confirmed that the exclusion in section 65(6) excludes records relating to matters in which the institution has an interest as an employer. I also invited them to advise me of their position on what impact, if any, these three decisions have on the findings in Orders P-1560 and PO-2106, and whether Orders P-1560 and PO-2106 are still good law.

[33] The OIPRD and the appellant provided representations on the three court decisions, but the police did not.

The OIPRD's representations

[34] In its representations, the OIPRD argues that the court decisions do not overturn the principles set out in Orders P-1560 and PO-2106 because the orders dealt specifically with institutions that relied on the section 65(6) exclusion despite not being the employer, while the court decisions dealt primarily with employers seeking to use

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[4] Cited above, at footnote 1.
[5] 2006 CanLII 36624 (ON SCDC). (*Reynolds*)
[6] 2008 CanLII 2603 (ON SCDC). (*Goodis*)

the section 65(6) exclusion. The OIPRD further argues that Orders P-1560 and PO-2106 stand for the principle that section 65(6) can apply even when the institution that collected, prepared, maintained or used the records does not have an interest as the employer. The OIPRD states that these orders provide a basis for its decision that the records at issue should be excluded under section 65(6), notwithstanding that the OIPRD is not the appellant's employer.

[35] The OIPRD submits that Order P-1560 stands for the proposition that a provincial institution can rely on section 65(6) in cases where the employment-related records were either submitted to the provincial institution by the municipal institution employer, or were sent by the provincial institution to the municipal institution employer and used by that employer. It explains that Order P-1560 upheld the application of the exclusion to records that were exchanged between the municipal institution employer and the provincial institution, the Ontario Labour Relations Board. Applying the reasoning from Order P-1560, the OIPRD asserts that because it collected, prepared, maintained and used the records at issue and shared them with the Chief of Police (the officer's employer) and the police service (a municipal institution) it should be able to rely on section 65(6) to protect the employment-related records in its possession.

[36] Regarding Order PO-2106, the OIPRD asserts that it supports the proposition that documents should continue to be protected even after they have been transferred from one institution to another. It states that Order PO-2106 upheld the application of section 65(6) to records regarding retired Ontario Provincial Police officers that had been transferred to Archives Ontario. It adds that, Order PO-2106 noted that the fact that one institution (the OPP) originally prepared and collected the records, while another institution (Archives Ontario) maintained them, did not defeat the operation of section 65(6), which applied to exclude the records from the application of the *Act*.

[37] Turning to the three court decisions, the OIPRD states that they did not involve the interpretation of an "institution" for the purposes of section 65(6), an issue that was squarely before the IPC in Order P-1560. It further states that, none of the court decisions involved an assessment of whether an institution could rely on the section 65(6) exclusion even though that institution did not have an interest as an employer but merely received records from the employer, an issue that was central to the appeal before the IPC in Order PO-2106.

[38] The OIPRD submits that *Mitchinson*, which considered three appeals from three unrelated access requests, did not comment on whether the second appeal correctly found that the police complaints file created by the Police Complaints Commission (PCC) was employment-related even though the PCC was not the officer's employer. The OIPRD claims that the situation in the second appeal is similar to the situation in Order P-1560— a request was made for a police complaint file that touched on two institutions, the OPP and the PCC, and the IPC agreed that the investigation of a complaint of police misconduct was an employment-related matter. The OIPRD argues that one can reasonably infer that some of the PCC records included records exchanged

between the PCC and the OPP, similar to the facts in Order P-1560 and in this appeal, where the OIPRD is in possession of records that it exchanged with the police.

[39] In *Goodis*, the OIPRD submits that the court considered whether section 65(6) should be broadened to include records relating to a lawsuit against the institution for vicarious liability. The OIPRD argues that the court in *Goodis* accepted that the file documenting the investigation of the complaint was employment-related and noted, at paragraph 29, that this was not surprising because of the potential for disciplinary action against a police officer. The OIPRD relies on this statement from *Goodis* to argue that, the records in this appeal should also be considered employment-related because there has been disciplinary action against the appellant in one of the complaints and there had been the potential for disciplinary action against the appellant in the other four complaints.

[40] The OIPRD argues that, *Reynolds* and *Goodis* involved employer institutions, unlike the case in Order PO-2106, where the recipient of the access request was not the employer for the purposes of section 65(6). It submits that, because the factual context differed in *Reynolds* and *Goodis*, Order PO-2106 is still good law. Finally, the OIPRD acknowledges that both *Reynolds* and *Goodis* stressed the key factor of an employer-employee relationship in their interpretation of section 65(6). It submits, however, that because they did not consider whether records in the possession of a provincial institution could be of interest to a municipal workforce or institution, thus being captured by section 65(6), these cases cannot be said to have changed the law with respect to Order P-1560.

The appellant's representations

[41] The appellant submits that *Mitchinson*, *Reynolds*, and *Goodis* have a direct impact on Orders P-1560 and PO-2106, and that they are relevant and binding authorities in this appeal. The appellant states that these three decisions address the statutory interpretation and narrow scope of sections 65(6)1 and 65(6)3, which limit the sections' application to records involving an institution's own workforce. The appellant argues that the three decisions apply in this appeal and support his right of access to the records at issue.

[42] In the alternative, the appellant argues that if Order P-1560 is still good law, it would apply to establish that the OIPRD may rely on the exclusion to deny access only to the records that it exchanged with the police and not to any of the records at issue that the OIPRD exchanged with other parties.

The records do not qualify for exclusion under section 65(6)1

[43] The third requirement of the test for section 65(6)1 stipulates that any proceeding or anticipated proceeding relate to "the employment of a person by the institution." The OIPRD is not the employer in this appeal. Thus, on its face, the

language of section 65(6)1 confirms that the OIPRD investigation records at issue do not qualify for exclusion from the *Act* under section 65(6)1. I address the other factors, beyond the clear statutory language of the exclusion, that are relevant to the interpretation of section 65(6)1, below.

[44] The arguments and orders relied on by the police and the OIPRD in their representations are not convincing and do not apply to the circumstances in this appeal. The police's reliance on Orders MO-4029, MO-2428, MO-1744, MO-1166 and MO-1130, to argue that records related to disciplinary proceedings under Part V of the PSA have been found to be excluded from the application of the *Act* under section 65(6)1 or its municipal counterpart, is not persuasive. In all five of those orders, the institution that received the access request was the police as employer, not the OIPRD. Accordingly, I distinguish those five orders from the present appeal based on this important factual distinction, the implications of which I discuss in detail below.

[45] Of the orders the OIPRD relies on, only Order PO-3681, which did not uphold the application of the exclusion, is factually similar to this appeal. I distinguish Orders P-1345 and P-1560 on their facts because they both involved actual proceedings. In both those orders, the institution that received the access request was the Ontario Labour Relations Board, which conducted the proceeding. In addition, in both orders, the records found to be excluded under section 65(6)1 were only those that were exchanged between the Board and the employers for the purposes of the proceeding; they were not all of the records at issue as the OIPRD's representations suggest. As discussed above, there is no existing or anticipated proceeding in this appeal that relates to labour relations or to the employment of the appellant by the OIPRD. The OIPRD does not employ the appellant or have an employment-like relationship with him.

[46] Moreover, Orders P-1345 and P-1560 were issued before the three important and binding court decisions that addressed the application of section 65(6), including paragraphs 1 and 3 of the exclusion, and that I invited the parties to address: the Court of Appeal's *Mitchinson* decision, and the Divisional Court's decisions in *Reynolds* and *Goodis*. Although these three decisions did not explicitly examine the question of whether the labour relations or employment-related matters exclusion could apply only to records concerning the respondent institution's own workforce or employee, I am satisfied that they can be relied on as authorities in this appeal. I also acknowledge the OIPRD's submission that these decisions did not involve the interpretation of an "institution" for the purposes of section 65(6). Nonetheless, these decisions speak to the purpose of the exclusion and, given that the courts considered the exclusion and supported a narrow interpretation of it, I find that these three decisions support, by implication, that the "institution" has to be the employer. Based on the excerpts of these decisions that I note below, I am satisfied that the section 65(6)1 exclusion does not apply in this appeal because the OIPRD does not have the requisite employment-related interest in the records at issue for the application of the exclusion.

[47] In *Mitchinson*, the Court of Appeal considered and interpreted sections 65(6)1 and 65(6)3 and stated, in paragraph 35:

> As already noted, s. 65 of the Act contains a miscellaneous list of records to which the Act does not apply. Subsection 6 deals exclusively with labour relations and employment-related matters. Subsection 7 provides certain exceptions to the exclusions set out in subsection 6. Examined in the general context of subsection 6, the words "in which the institution has an interest" appear on their face to relate simply to matters involving the institution's own workforce. Subclause 1 deals with records relating to "proceedings or anticipated proceedings . . . relating to labour relations or to the employment of a person by the institution" (emphasis added). [. . .] Subclause 3 deals with records relating to a miscellaneous category of events "about labour relations or employment-related matters in which the institution has an interest". Having regard to the purpose for which the section was enacted [See Note 11 at end of document] and the wording of the subsection as a whole, **the words "in which the institution has an interest" in subclause 3 operate simply to restrict the categories of excluded records to those records relating to the institutions' own workforce where the focus has shifted from "employment of a person" to "employment-related matters"**.[7]

[48] The Court of Appeal's consideration of the purpose for which the section 65(6) exclusion was enacted and its interpretation of section 65(6)3 in the passage above guide my interpretation of section 65(6)1. In particular, I note the Court's statement that the records excluded under section 65(6)3 are those records relating to the institution's own workforce where the focus has shifted from "employment of a person"—which is the wording of section 65(6)1—to "employment related-matters." With this statement, the Court links the interpretation of sections 65(6)1 and 65(6)3; it indicates that the Court considers both sections 65(6)1 and 65(6)3 to be restricted to records relating to an institution's own workforce. I apply this interpretation here.

[49] Additional support for my conclusion that section 65(6)1 applies only to records relating to the institution's own workforce is found in the *Reynolds* decision. The Divisional Court in *Reynolds* relied on the Court of Appeal's reasoning in *Mitchinson*, reproducing the bold, underlined portion above in paragraph 59 of the *Reynolds* decision. At paragraph 60 of *Reynolds*, the Divisional Court adopted the approach of the Court of Appeal when it considered the municipal equivalent, section 52(3) of *MFIPPA*, and stated:

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[7] The underlined and bolded portions of this quote are key passages that I emphasize in this order.

> It seems probable that the intention of the amendment was to protect the interests of institutions by removing public rights of access to certain records relating to their relations with their own workforce. (emphasis added)

[50] The Divisional Court's statement above, that section 52(3) of *MFIPPA* addresses records relating to institutions' relations with their own workforce, supports my interpretation that the words "employment of a person by the institution" in section 65(6)1 restricts the application of section 65(6)1 to records relating to an institution's own employees.

[51] Furthermore, at paragraph 64 of *Reynolds*, the Divisional Court added, "It must be an employment-related matter in which the City has an interest, not the person interviewed." The Court confirmed that for the exclusion in section 52(3) of *MFIPPA* to apply in that case, the employer institution—the city—had to have the employment-related interest in the records. At paragraph 67 the Court found that, as the appellant's employer, the city had the necessary interest in the employment-related matters that were the subject of the meetings and consultations at which the records were collected or prepared.

[52] In *Goodis*, the Divisional Court echoed the reasoning of the Court of Appeal in *Mitchinson* regarding section 65(6)1 of the *Act*. At paragraphs 22 and 23 of its decision in *Goodis*, the Divisional Court stated:

> In my view, the language used in s.65(6) does not reach so far as the Ministry argues. Subclause 1 of s.65(6) deals with records collected, prepared, maintained or used by the institution in proceedings or anticipated proceedings "relating to labour relations or to the employment of a person by the institution". 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. It does not exclude records where the Ministry is sued by a third party in relation to actions taken by government employees.
>
> Moreover, the words of subclause 3 of 65(6) make it clear that the records collected, prepared, maintained or used by the Ministry in relation to meetings, consultations or communications are excluded only if those meetings, consultations, discussions or communications are about labour relations or "employment-related" matters in which the institution has an interest. Employment-related matters are separate and distinct from matters related to employees' actions. (emphasis added)

[53] I also note the Divisional Court's statement at paragraph 29 in *Goodis* in which it commented on the Court of Appeal's decision in *Mitchinson*. The OIPRD relies on paragraph 29 of *Goodis* in its representations, but refers only to the first sentence of paragraph 29, ignoring the important second and third sentences, which are relevant in the circumstances of this appeal. Paragraph 29 of *Goodis* reads:

> Thus, there was no dispute in that case that the file documenting the investigation of the complaint was employment-related — not surprisingly because of the potential for disciplinary action against a police officer. However, the case does not stand for the proposition that all records pertaining to employee conduct are excluded from the Act, even if they are in files pertaining to civil litigation or complaints brought by a third party. Whether or not a particular record is "employment-related" will turn on an examination of the particular document. (emphasis added)

[54] The above statements from the Court of Appeal in *Mitchinson*, and the Divisional Court in *Reynolds* and in *Goodis*—that the exclusion requires the institution to have an employment-related interest in the records for it to apply—are more persuasive than the reasoning in Orders P-1345 and P-1560 relied on by the OIPRD and the police. These statements are also more persuasive and applicable to this appeal than the OIPRD's argument regarding Order PO-2106. Moreover, these decisions are binding on me in this appeal.

[55] In Order PO-2106, the employer institution (the ministry) transferred its employment-related records to Archives Ontario, which maintained the records on behalf of the ministry and received the access request. Order PO-2106 is factually dissimilar to this appeal and I distinguish it on this basis. The records at issue here are not employment-related records that were transferred to the OIPRD by the employer institution; they are records that the OIPRD compiled while investigating public complaints about the appellant. The OIPRD is not an archive for discipline, nor does it maintain the records on behalf of the police; rather, it collects, prepares, maintains and uses the records for its complaint oversight and investigation purposes as it is mandated to do under the PSA. The OIPRD is also statutorily mandated to act independently from the police. The OIPRD is not the employer institution and it does not have an employment-related interest in the records. The OIPRD's assertion of the police's employment interest under section 65(6) as its own interest, or, on the police's behalf, is inconsistent with its statutory mandate of independent oversight of public complaints about the police.

[56] Regarding the OIPRD's statutory mandate, I also note the Divisional Court's

decision in *Ministry of Community and Social Services v Doe*[8] where the Court distinguished the operational role the institution plays in discharging its institutional mandate from its role as employer. At paragraph 39 of that decision, the Court stated:

> Accordingly, a purposive reading of the Act dictates that if the records in question arise in the context of a provincial institution's operational mandate, such as pursuing enforcement measures against individuals, rather than in the context of the institution discharging its mandate qua employer, the s. 65(6)3 exclusion does not apply. Excluding records that are created by government institutions in the course of discharging public responsibilities does not necessarily advance the legislature's objective of ensuring the confidentiality of labour relations information. However, it could have the effect of shielding government officials from public accountability, an effect that is contrary to the purpose of the Act. The government's legitimate confidentiality interests in records created for the purposes of discharging a government institution's specific mandate may be protected under exemptions in the Act, but not under s. 65(6).

[57] The Divisional Court recently quoted the above passage with approval at paragraph 36 of its decision in *Brockville (City) v. Information and Privacy Commissioner, Ontario*.[9] Applying the Divisional Court's reasoning in these two cases, and recognizing that the OIPRD has no mandate as an employer in the circumstances of this appeal, the words of the Divisional Court make it clear that the exclusion in section 65(6) does not apply to the records at issue, which arose in the context of the OIPRD's operational mandate.

[58] I also agree with the appellant that the exclusions in the *Act* are to be read narrowly. As recently confirmed by the Divisional Court,[10] "exceptions to disclosure…are therefore to be narrowly construed" since the "[l]egislature did not intend to create an exclusion from the application of the Act whose reach would be broader than necessary to accomplish" the objectives in section 1 of the *Act*. The Divisional Court echoed this reasoning in *Brockville*, where it noted "the desirability of narrow construction of exceptions to disclosure" with approval in upholding the adjudicator's decision to decline to apply the labour relations exclusion.[11] Interpreting section 65(6) as requiring an employment-related interest on the part of the institution claiming its application to records in its custody or control is consistent with a narrow reading of that section.

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[8] [2014] O.J. No. 236 (Div.Ct.); 2014 ONSC 239 (Div.Ct.).
[9] 2020 ONSC 4413 (CanLII).
[10] *Carleton University v Information and Privacy Commissioner of Ontario and John Doe, requester*, 2018 ONSC 3696 (CanLII), paragraph 29.
[11] *Brockville*, footnote 9 above, at paragraph 38.

[59] Applying the Courts' reasoning to the facts of this appeal, I find that the last requirement of section 65(6)1 is not met because the OIPRD does not have an interest in the records as the appellant's employer and the records do not relate to the "employment of a person" by the OIPRD. Having found that requirements 2 and 3 of the test under section 65(6)1 have not been met, I find that this exclusion does not apply to the records.

Section 65(6)3: employment-related matters in which the institution has an interest

[60] The OIPRD also claims that the records are excluded under section 65(6)3 of the *Act*. For section 65(6)3 to apply, the OIPRD must establish that:

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

2. this collection, preparation, maintenance or use 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.

[61] Because I find below that the OIPRD has not established the third requirement of section 65(6)3 and, therefore, section 65(6)3 cannot apply, I will address only the third requirement. As I mentioned above and as I discuss below, the third requirement is not met for the same reason that it is not met in relation to section 65(6)1: the OIPRD is not the appellant's employer and is not equivalent to an employer with the requisite interest as an employer.

The OIPRD's and the police's representations

[62] Arguing that the third requirement is established in this appeal, the OIPRD relies on Order PO-2933 to submit that the creator of a record does not have to be in a labour relations or employment relationship with the institution for the exclusion to apply. It also submits that Order MO-3249 held that records prepared in response to complaints made to the OIPRD were employment-related and therefore excluded from the *Act*. Accordingly, the OIPRD submits that all of the records, which were collected, prepared, maintained or used in relation to meetings or communications about complaints under the PSA, were about "employment-related matters" for the purpose of satisfying the requirements of the exclusion.

[63] The OIPRD also relies on PO-3075 and M-931. It submits that Order PO-3075 found that records relating to the Professional Standards Bureau investigation of the conduct of specific OPP officers were employment-related for the purposes of section 65(6)3 "because of the potential for disciplinary action against those officers." The OIPRD argues that the records at issue in this appeal engage potential disciplinary

action against an officer and would be directly related to, or relied upon in, disciplinary proceedings and could ultimately form part of the appellant's employment file. Relying on Order M-931, the OIPRD also argues that it has an interest in the records at issue "which directly engage several statutory obligations that the OIPRD is required to fulfill" regarding the management and oversight of the public complaints systems, and the notification of the Chief of Police at various stages of its process. It submits that Order M-931 confirmed that a police chief's interest in records relating to allegations of police misconduct constitutes an employment-related interest for the purpose of section 65(6)3 of the *Act*.

[64] The police state that there appears to be consensus that the records relate to Part V of the PSA and are about labour relations and employment matters. The police assert that the OIPRD has correctly applied the three-part test to find the records excluded since they relate to disciplinary proceedings or anticipated disciplinary proceedings. The police assert that previous IPC orders have consistently found that neither the *Act* nor *MFIPPA* applies to Part V of the PSA-related records by operation of either section 65(6) of the *Act* or section 52(3) of *MFIPPA*. In support of its assertion, the police refer me to Orders MO-4029, PO-3075, MO-2428, MO-1744, MO-1166 and M-1130.

The appellant's representations

[65] In his reply representations, the appellant asserts that his position represents a principled and purposive approach to interpreting the *Act* and, if the *Act* is intended to foster openness and accountability, the exclusion should be read very narrowly. The appellant confirms that he only seeks access to his personal information in the records at issue, and he does not seek access to the personal information of any other individuals that may exist in the records. Accordingly, the appellant adds that the records can be severed to remove the personal information of other individuals. Finally, the appellant argues that all of the orders and cases relied on by the police can be distinguished from this appeal because, they involved requests for access to the personal information of individuals other than the requesters (Orders M-1130, MO-1166, PO-3075 and *Mitchinson*), the requests for access were made directly to the employer (MO-1744, MO-4029), or the records related to a matter that proceeded under the disciplinary provisions of the PSA (MO-2428).

The records do not qualify for exclusion under section 65(6)3

[66] The purpose of section 65(6)3 of the *Act* is to exclude from the application of the *Act* records about labour relations or employment-related matters in which the institution has an interest as employer. This is confirmed in the applicable and binding decisions of *Mitchinson*, *Reynolds* and *Goodis* and their reasoning respecting when section 65(6)3 of the *Act* applies. As is evident from the excerpts I quote at paragraphs 47 to 53 above, the Courts have repeatedly affirmed that the reference to "employment-related matters" in section 65(6)3 excludes from the application of the *Act*

records relating to an institution's own workforce. Applying the Courts' reasoning to the facts of this appeal, the records at issue would have to relate to the OIPRD's workforce for them to qualify for exclusion; they do not.

[67] While the OIPRD argues that it has the indicia of an employer—since it is statutorily mandated to investigate complaints about police officer conduct, and exchange information and share its investigation results with the officer's employer—I am not persuaded that this is the case. Previous IPC orders have found that some institutions bear the hallmarks of being an employer in a manner that is sufficient to bring them within an equivalent relationship with respect to the application of the exclusion. For example, I recently found, in Order MO-3968, that an institution was equivalent to an employer for the purposes of section 65(6)3 because of the significant and numerous conditions of employment that institution controlled, despite the fact that it was not the employer. Those conditions of employment included sole responsibility for appointing applicants for employment and sole authority to demote, suspend, dismiss, train and exempt from training successful applicants who became employed. The OIPRD does not have such employer-like powers that would lead me to conclude that it is equivalent to the police as the employer of the appellant. It simply has sole authority to manage complaints made by members of the public about the conduct of police officers in accordance with Part V of the PSA.

[68] Moreover, as the OIPRD confirms in its representations, it is independent of the police. It is an arms-length oversight agency of the Ministry of the Attorney General that oversees all public complaints about police in Ontario and enforces and regulates compliance with Part V of the PSA. The OIPRD does not manage discipline or conduct disciplinary hearings. The authority to manage discipline and conduct disciplinary hearings rests with the employer of the officer complained of, the Chief of Police. The OIPRD does not have an interest in any employment-related matters in the records at issue because it is not the appellant's employer.

[69] Turning to the orders relied on by the police and the OIPRD, I note that, unlike this appeal, the institutions that claimed the employment records exclusion in Orders PO-2933, PO-3075, M-931, M-1130, MO-1166, MO-1744, MO-2428, MO-3249 and MO-4029, were the employers who had the requisite employment-related interest in the records at issue in those appeals. Accordingly, those orders are factually dissimilar to this appeal and I distinguish them on this basis.

[70] I do not find Order P-1560 persuasive in light of the Courts' subsequent decisions in *Mitchinson*, *Reynolds* and *Goodis*. While the OIPRD argues that the records in this appeal are excluded in the hands of the police and, therefore, should also be excluded in the OIPRD's hands, this argument disregards the words of the exclusion. This

argument is also incompatible with the OIPRD's statutory mandate of independent oversight of public complaints about the police.

[71] I also note, again,[12] that the application of an exclusion is record-specific and fact-specific. In respect of section 65(6)3 and the requirement that the records be "about labour relations or employment-related matters," the OIPRD and the police have not provided sufficient representations to establish that the hundreds of pages specific records at issue are about "employment-related matters." This lack of detailed representations on the specific records at issue within the factual context of this appeal, or, on the specific types of records before me, is another reason that supports my finding that the OIPRD and the police have not satisfied the test for the application of the section 65(6)3 exclusion. Regarding the OIPRD's assertion that the records are excluded in the hand of the police, neither the police nor the OIPRD has established that any of the records at issue would be excluded in the hands of the police.

[72] Finally, based on my review of the records, I find that, on their face, they do not satisfy the last requirement of section 65(6)3 for exclusion since they are OIPRD documents that are not sufficiently or obviously related to employment-related matters. I find that the last requirement of section 65(6)3 is not met because the records at issue are not about labour relations or employment-related matters in which OIPRD has an interest as an employer.

Conclusion

[73] Having found that the records are not excluded from the application of the *Act* under either section 65(6)1 or 65(6)3, I will order the OIPRD to issue an access decision to the appellant in respect of them. The *Act* applies to the records and the appellant is entitled to exercise his right of access under the *Act.*

Final matters

[74] The OIPRD concludes its representations by asserting that it is inappropriate for police officers to seek access to records relating to their employment through the *Act*. It claims that officers, who are not members of the public under the PSA, should use the "separate and recognized process for which access to these records can and should be granted to the officer, through the employer." The OIPRD argues that its mandate, the PSA and the complaints process demonstrate that "the legislature intended to protect the confidentiality of records" that could "affect the current or future conduct of an institution in the employment and labour relations context." It further argues that it would be counter-intuitive to the spirit and purpose of section 65(6) of the *Act* to permit access to the records at issue in this appeal.

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[12] See my analysis at paragraph 22.

[75] I disagree with the OIPRD's suggestion. The OIPRD is an institution under the *Act* and the appellant, regardless of his employment as a police officer, is a member of the public free to exercise his right of access under the *Act*. Indeed, section 47(1) specifically sets out an individual's right of access to their own personal information held by an institution.

[76] Also odd is the OIPRD's suggestion that it would be counter-intuitive and contrary to section 65(6) of the *Act* to permit access to the records at issue. A finding that the records are not excluded from the application of the *Act* does not result in the records being ordered disclosed. The OIPRD, as the institution that received the appellant's request and that is tasked with making an access decision under the *Act* in this appeal, must review the records to determine whether they are subject to any exemptions from the right of access provided in section 47(1) of the *Act*. The OIPRD must consider the interests of any third party, such as the police, in deciding what exemptions it may or must claim. This requires the OIPRD to consider the many mandatory and discretionary exemptions under the *Act*, including the personal privacy exemption, which the appellant has already alluded to in his representations where he confirms that he does not seek access to the personal information of anyone other than himself.

[77] Finally, I note that although the appellant stressed his status as the person to whom the records relate, which can be an important fact when an institution claims exemptions, this has not factored into my analysis of whether the exclusion applies.

ORDER:

1. I do not uphold the OIPRD's decision to deny access to the records under the exclusions in either of sections 65(6)1 and 65(6)3 of the *Act*.

2. I order the OIPRD to issue an access decision to the appellant, in respect of all 127 records at issue, treating the date of this Order as the date of the request for the purposes of the procedural requirements of the *Act.*

Original Signed by: October 29, 2021

Stella Ball
Adjudicator