CITATION: Ministry of Community and Social Services v. Doe, 2014 ONSC 239
DIVISIONAL COURT FILE NO.: 553/10
DATE: 20140224

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

SACHS, WILTON-SIEGEL and NOLAN JJ.

BETWEEN:	
MINISTRY OF COMMUNITY AND SOCIAL SERVICES Applicant	*Lise Favreau* and *Tom Schreiter*, for the Applicant
– and –	
JOHN DOE, Requester, Affected Party, ONTARIO PUBLIC SERVICE EMPLOYEES UNION, and INFORMATION AND PRIVACY COMMISSIONER Respondents	*William Challis* and *David Goodis*, for the Respondent, Information and Privacy Commissioner *David R. Wright* and *Jane Letton*, for the Respondent, Ontario Public Service Employees Union, for the
	HEARD at Toronto: December 17, 2013

H. Sachs J.:

REASONS FOR JUDGMENT

Introduction

[1] This is an application to judicially review the October 7, 2010 order ("the IPC Order") of the Information and Privacy Commission of Ontario ("IPC") that required the Ministry of Community and Social Services ("the Ministry") to disclose the full names of employees of the Family Responsibility Office ("FRO") contained in the file of a John Doe. According to the Ministry, the IPC Order conflicts with the order of the Grievance Settlement Board ("GSB Order") that has been in effect since November 7, 2000.

[2] The GSB Order was made on consent following a mediation of 82 individual grievances filed by FRO employees who were concerned about their safety because of their employment at FRO. The GSB Order provides that FRO adopt a policy whereby employees are only required to provide their first name and a unique identification number to the public in telephone communications and in non-court documents. FRO has followed this policy and practice since 2000.

[3] On this application the Ministry's position is that the IPC did not have the jurisdiction to order the disclosure of FRO employees' full names because this information is excluded from disclosure pursuant to s. 65(6)3 of the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 ("the Act"). Section 65(6)3 provides that the "Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to ... meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest."

[4] In the alternative, the Ministry argues that the IPC erred in finding that the discretionary exemptions in ss. 14(1)(e) and 20 of the Act do not apply. These exemptions provide that the head of an institution may refuse to disclose a record because of health and safety concerns.

[5] Finally, the Ministry asserts that if this court refuses to set aside the IPC Order, this court will be left with valid decisions of two statutory tribunals that are in direct operational conflict. According to the Ministry, this requires the court to review the decisions and establish their relative precedence. Given that the GSB Order is about the health and safety of FRO employees, that order should prevail over the IPC Order.

[6] The Ontario Public Service Employees Union ("OPSEU"), a party affected by this decision, supports the Ministry's position. Letters were sent to the FRO employees who were affected by the IPC Order. Some employees contacted counsel, but advised that they did not wish to seek separate standing in the application. John Doe, the person who requested the records at issue, did not appear at the application for judicial review.

[7] In its factum, OPSEU argued that the full names of FRO employees are "personal information" within the meaning of s. 2(1) of the Act and that disclosure of this information would constitute an unjustified invasion of personal privacy. At the hearing of the application OPSEU indicated it was no longer pursuing this argument.

[8] For the reasons that follow, I would dismiss the application.

Factual Background

[9] The FRO employees affected by this application are all members of OPSEU. In 2000 OPSEU filed 82 grievances alleging that the grievors' rights to health and safety were violated by the Ministry's full name policy at the time.

[10] According to OPSEU, the work of FRO enforcement officers requires them to regularly interact with volatile clients. These clients have subjected staff to harassment, abuse, and threats and may pose a real danger to those enforcement officers and their families.

[11] The grievances gave rise to the GSB Order, which was a consent order. In the twelve or so years since the GSB Order became effective, FRO employees can choose to identify themselves to the public by first name and identification number only in all telephone communications and in non-court documents.

[12] From 2002 to 2006 there were 24 documented threats to FRO staff by FRO clients: one in 2002; two in 2003; eight in 2004; three in 2005; and ten in 2006. Some of these threats were directed at FRO staff generally and consisted of threatening to "bring a fucking bomb down

there," threatening to "drive my truck through your building," threatening "something that will make the news," and threatening to "shoot people at FRO." Other threats were directed at individual FRO staff members, one of which was a specific threat to bomb a FRO employee's apartment.

[13] According to OPSEU, there were 12 further documented threats to FRO staff between 2006 and August 2011. Some FRO clients have used the information about the identity of enforcement officers to obtain their home addresses and phone numbers and to contact them or their family members at home.

[14] In March 2007, John Doe, a support payor, made a request to the Ministry under the Act to access all his records in his FRO file. FRO is part of the Ministry. The Ministry granted access to many of the records, but refused to disclose some records, including any portions of the records that disclosed the full names of FRO employees.

[15] John Doe (the "Requester") appealed the Ministry's decision to deny access to the records that were withheld to the Office of the IPC. Mediation did not resolve the appeal and it moved to the adjudication stage.

[16] The IPC held an inquiry during which the Requester, the Ministry, and OPSEU were given the opportunity to make representations. The IPC Order directed the disclosure of a number of records that were not the subject of this application for judicial review. The Ministry seeks to review only the portion of the IPC Order that mandated the disclosure of the full names of FRO employees.

Standard of Review

[17] There is no issue about the standard of review applicable to the IPC's decision concerning whether the exemptions set out at ss. 14(1)(e) and 20 of the Act apply. All the parties accept that the standard is reasonableness.

[18] The Ministry and OPSEU assert that the standard of review applicable to the question of whether the records are excluded from the application of the Act by virtue of s. 65(6)3 is one of correctness. They do so on the basis of a number of decisions, including the Ontario Court of Appeal's decision in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), at paras. 28-31, leave to appeal to S.C.C. refused, [2001] S.C.C.A. No. 509. Relying on *Solicitor General,* the Divisional Court applied the standard of correctness in *Ministry of Correctional Services v. Goodis* (2008), 89 O.R. (3d) 457 (Div. Ct.), at para. 19.

[19] In *Solicitor General*, the Court of Appeal found that questions involving the application of an exclusion under s. 65(6) of the Act were subject to review on a standard of correctness. It did so on the basis that such questions, unlike questions involving the application of exemptions, do not engage the specialized expertise of the IPC: see *Solicitor General,* at para. 30.

[20] *Solicitor General* was decided before *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, and *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654. As a result of *Dunsmuir* and *Alberta Teachers*, it is clear that when a tribunal is interpreting its home statute the correctness standard will not

apply unless the question is a constitutional question, a question of law that is of central importance to the legal system as a whole and outside of the adjudicator's expertise, a question regarding the jurisdictional lines between two or more competing specialized tribunals, or a "true" question of jurisdiction.

[21] In this case the Ministry and OPSEU submit that whether the Act applies is a true question of jurisdiction and whether the IPC can make an order in the face of the GSB Order is a question regarding the jurisdictional lines between two competing specialized tribunals.

[22] I disagree. *Alberta Teachers*, at paras. 33-34, establishes that true questions of jurisdiction involving the interpretation of a home statute are rare; so rare that as of 2011 the Supreme Court of Canada had not seen a true question of jurisdiction since *Dunsmuir*. As part of its mandate, the IPC is called upon to interpret s. 65(6) on a regular basis. Furthermore, interpreting this section in this case does not involve determining the jurisdictional lines between two competing specialized tribunals. The exercise is the one defined by the statute i.e. deciding whether the record was "collected, prepared, maintained or used by or on behalf of the institution in relation to … meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest."

[23] For these reasons I find that the standard of review applicable to the issue involving s. 65(6)3 of the Act is reasonableness.

Did the IPC unreasonably conclude that FRO employees' full names are not excluded from the Act by virtue of s. 65(6)3?

[24] The key finding of the IPC on this issue was stated as follows at page 15 of its decision:

> In this case, the records at issue were prepared by FRO staff as part of the normal business of the office. They were collected, prepared, maintained or used by the ministry in relation to meetings, consultations, discussions or communications that were "about" enforcing a support order in accordance with FRO processes. These meetings, consultations, discussions or communications were *not* "about" labour relations or employment-related matters. The institution and the union have entered into a consent award with respect to the disclosure of FRO employees' full names, but this does not transform the records into those excluded by section 65(6)3.

[25] The Ministry acknowledges that the records were created to enforce a support order, but claims that given the GSB Order and the FRO policy endorsed by the GSB Order, the names of the employees and management's use of documents containing the names of employees are related to communications about labour relations matters in which the Ministry has a strong and compelling interest. According to the Ministry, the "communication" of an employee's name on a record is "about" a labour relations matter because both the GSB Order and the collective agreement require the employer to take measures to protect the identity of FRO employees.

[26] The Ministry also submits that the legal implications of the request make it clear that disclosing FRO employee names is an employment-related or labour relations matter. The disclosure of these names would likely result in more occupational health and safety grievances by OPSEU. OPSEU could assert non-compliance with the GSB Order and seek to file the order in the Superior Court of Justice under section 48(19) of the *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A, for the purposes of enforcement.

[27] In *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, Iacobucci J. set out the current approach to statutory interpretation citing Elmer Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at 87:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[28] In my view, the Ministry's arguments require a distortion of the plain language of the exclusion in s. 65(6)3 of the Act. That section reads as follows:

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

[29] To qualify for the exclusion, the record must be **about** labour relations or employment-related matters. The dictionary definition of the word "about" requires that the record do more than have some connection to or some relationship with a labour relations matter. "About" means "on the subject of" or "concerning": see *Concise Oxford English Dictionary*, 11th ed., 2004, *s.v.* "about". This means that to qualify for the exclusion the subject matter of the record must be a labour relations or employment-related matter.

[30] Adopting the Ministry's broad interpretation of "about" would mean that a routine operational record or portion of a record connected with the core mandate of a government institution could be excluded from the scope of the Act because such a record could potentially be connected to an employment-related concern, is touched upon in a collective agreement, or could become the subject of a grievance. This interpretation would subvert the principle of openness and public accountability that the Act is designed to foster.

[31] In this regard it is important to keep in mind the purposes of the Act set out at section 1 as follows:

> (a) to provide a right of access to information under the control of institutions in accordance with the principles that,

> (i) information should be available to the public,
>
> (ii) necessary exemptions from the right of access should be limited and specific, and
>
> (iii) decisions on the disclosure of government information should be reviewed independently of government; and
>
> (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

[32] This concern about undermining the purpose of the Act drove the Court of Appeal's reasoning in its interpretation of the word "advice" in another section of the Act in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)* (2005), 34 Admin L.R. (4th) 12 (C.A.), leave to appeal to S.C.C. refused, [2005] S.C.C.A. No. 563. In that case the government argued for a broader interpretation of the word "advice." The Court of Appeal rejected the government's submission and commented as follows, at para. 28:

> [T]he meaning of "advice" urged by the Ministry would not be consonant with [the Act's] statement of purpose. The public's right to information would be severely diminished because much communication within government institutions would fall within the broad meaning of "advice"...

[33] In *Goodis*, the government argued, among other things, that all records relating to allegations of misconduct against government employees in the course of employment were excluded from disclosure because they dealt with "employment-related matters" under clause 3 of s. 65(6) of the Act. The Divisional Court rejected this interpretation. The court found that the government's interpretation was not in accordance with the language of s. 65(6) when read in context and in light of its legislative history and the purpose of the Act: see *Goodis*, at paras. 20, 23.

[34] In rejecting the Crown's argument that s. 65(6)3 could be used to exclude records that detailed employees' actions, the court in *Goodis*, at para. 24, made the point that the scope of s. 65(6) is clearer when one looks at the relationship between it and s. 65(7), which states as follows:

> (7) This Act applies to the following records:
>
> 1. An agreement between an institution and a trade union.
>
> 2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.

> 3. An agreement between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees.
>
> 4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment.

[35] Swinton J., writing on behalf of the Court, went on to conclude the following, at para. 24:

> The fact that the Act applies to the documents in subclauses 1 through 3 of s. 65(7) suggests that the type of records excluded from the Act by s. 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.

[36] Swinton J. further stated, at para. 25, that this conclusion was "reinforced by the legislative history" of ss. 65(6) and (7). Section 65(6) was added to the Act by the Bill 7, *An Act to restore balance and stability to labour relations and to promote economic prosperity and to make consequential changes to statutes concerning labour relations*, 1st Sess., 36th Leg., Ontario, 1995. The explanatory note in respect of Bill 7 provided that the Act will not apply to "certain" records relating to labour relations and employment matters.

[37] On first reading of the Bill, the Honourable David Johnson, then Chair of the Management Board of Cabinet, stated that the proposed amendments to the Act were "to ensure the confidentiality of labour relations information": see Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, (4 October 1995) (Hon. Allan K. McLean). On proclamation of Bill 7, the Management Board of Cabinet responded with the following comments to the question of whether labour relations documents will be exempt from disclosure under the changes to the Act:

> Yes. This change brings us in line with the private sector. Previously, orders under the Act made some internal labour relations information available (e.g. grievance information, confidential information about labour relations strategy, and other sensitive information) which could impact negatively on relationships with bargaining agents. That meant that unions had access to some employer labour relations information while the employer had no similar access to union information: see Ontario, Management Board Secretariat, *Bill 7 Information Package*, *Employee Questions and Answers*, (10 November 1995).

[38] The Ontario Court of Appeal's decision in *Ontario (Minister of Health and Long Term Care) v. Mitchinson*, 2003 CanLII 16894 (Ont. C.A.), illustrates that the s. 65(6) exclusion is concerned with records about term or conditions of employment even in non-traditional collective bargaining settings. In *Mitchinson*, at paras. 1-2, the court, overturning the Divisional Court, held that s. 65(6)3 applied to exclude records generated by a joint committee of the Ministry of Health and Long Term Care and the Ontario Medical Association. The records

constituted "communications that take place in the discharge of [the committee's] mandate" to review the conditions of work and remuneration of physicians, despite the absence of relations between employer and employees on the facts of the case.

[39] 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).

[40] For these reasons, I find that the IPC's decision that FRO employees' full names are not excluded by s. 65(6)3 of the Act was reasonable.

Did the IPC unreasonably fail to apply the exemptions under ss. 14(1)(e) and/or 20 of the Act?

[41] Section 14(1)(e) is an exemption for records whose disclosure "could reasonably be expected to … endanger the life or physical safety of a law enforcement officer or any other person." Section 20 is an exemption for records whose disclosure "could reasonably be expected to seriously threaten the safety or health of an individual."

[42] In its decision the IPC accepted that the FRO employees whose full names would be disclosed were "law enforcement officers" within the meaning of s. 14(1)(e). It also accepted, at page 40 of its reasons, that to justify the refusal of disclosure "the institution must demonstrate that the reasons for resisting disclosure are not frivolous or exaggerated. However, while the expectation of harm must be reasonable, it need not be probable." Finally, the IPC found that while a person's subjective fear is a relevant factor to consider, it is not necessarily determinative.

[43] The IPC ordered disclosure of the employees' full names because it found no evidence that the Requester posed any threat whatsoever to the health or safety of the FRO employees in question. Further, while there was evidence of threats against FRO employees by other clients, there was no evidence that the FRO employees at issue in this application had "ever been subject to any kind of threat or endangerment." Finally, the IPC found, at page 44 of its decision, that the information contained in the records was "not the type of information that, by its nature alone, is 'potentially inflammatory.'"

[44] The Ministry argues that this conclusion was unreasonable because it failed to take into account the existence of the GSB Order, which in and of itself constituted an acknowledgment that the disclosure of the full names of FRO employees could pose a threat to the health and safety of those employees. The Ministry submits that the GSB Order was a legitimate response to the actual threats that had been made to FRO employees over the years. It argues that to require an actual threat by the Requester, or evidence that the employees at issue had been the subject of

previous threats, places too high an evidentiary burden on the Ministry. It says that all the Ministry has to demonstrate was that its reasons for resisting disclosure were "not frivolous or exaggerated." According to the Ministry, the GSB Order and the threats leading to that order is evidence that clearly met this threshold.

[45] Further, disclosing the full names of employees places the Ministry in the position of violating the terms of the GSB Order, which contains the following sentence:

> Anyone disclosing the name of another FRO bargaining unit employee will be required to use the person's 1st name and I.D. number only.

[46] To reinforce its submissions, the Ministry points to the offer it made to disclose the first name and identification number of the employees in question. According to the Ministry, any interest the Requester would have in knowing who dealt with him at FRO would be met by this compromise.

[47] As a starting point for analyzing this issue, it is important to recognize that the Requester made his request for access under the individual privacy provisions in Part III of the Act, more specifically, s. 47(1), which provides as follows:

> Every individual has a right of access to,
>
> (a) any personal information about the individual contained in a personal information bank in the custody or under the control of an institution; and
>
> (b) any other personal information about the individual in the custody or under the control of an institution with respect to which the individual is able to provide sufficiently specific information to render it reasonably retrievable by the institution.

[48] Requests for access under s. 47 are driven by the concern set out at s. 1(b) of the Act, namely, the protection of the "privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information." Contrast this with the requests for access that can be made by members of the public under s. 10 of the Act. Access requests under s. 10 rest on an acknowledgment that vibrant democracies are open democracies, where, absent specific exemptions and exclusions, the public is entitled to know what the government is doing.

[49] Accordingly, a requester under s. 47(1)(b) of the Act starts with the presumption that he or she is entitled to the information. In this case, the Ministry claimed the exemption in s. 49(a) of the Act, which permits the Ministry to refuse to disclose personal information to the person to whom the information relates where ss. 14 or 20, among other provisions, would apply to the disclosure. In this regard, two principles are important.

[50] First, an individual's need for the requested information is irrelevant unless explicitly specified in an exemption. As the legislative history makes clear, the Act does not impose a needs test that a requester must meet. The Commission on Freedom of Information and

Individual Privacy, established by the Government of Ontario in 1977, studied and prepared a report that served as a foundation for the Act. In its report, *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, Vol. 2 (Toronto: Queen's Printer, 1980), the Commission made the following comments regarding the nature of an individual's right to access government information, at 233:

> We think it unwise to restrict access to persons who can demonstrate a need for the information in question. ... To require individuals to demonstrate a need for information would erect a barrier to access resulting in unproductive disputes over the nature and value of a particular individual's interest in obtaining access to government information.

[51] Second, the IPC has also determined that disclosing records under s. 47, in contrast to disclosure under s. 10, cannot be considered "disclosure to the world." As put by the IPC in Reconsideration decision, Appeal PA-980251-1, Nov. 24, 2003 (unpublished), at page 5:

> [I]t cannot be said that disclosure to the requester under section 47 is effectively disclosure to the world, as it would be under section 10. Disclosure under section 47 is considered disclosure to that individual only and, clearly, in the event that a stranger sought the records at issue in this case under section 10, they would be subject to the mandatory section 21 personal privacy exemption, barring highly exceptional circumstances.

[52] Therefore, to the extent that the Ministry and OPSEU rely on arguments directed at the Requester's lack of need for the information at issue or the fear that disclosing the information to the Requester (who may not be a threat) would mean disclosing it to the rest of the world, those arguments run contrary to the statutory scheme of the Act. In particular, the scheme of the Act in respect of a request under s. 47(1)(b) requires demonstration that disclosure of the requested information to the particular requester would pose a risk to the health or safety of the identified individuals by the requester, rather than by the public at large, before the exemptions in ss. 14 or 20 can be relied upon. This result flows from the fact that disclosure to the requester is not presumed to be disclosure to the public.

[53] I agree with the Ministry that the GSB Order does constitute some evidence of health and safety concerns associated with disclosing FRO employees' full names to the public in the past. However, that does not mean the IPC unreasonably concluded there was no evidence that complying with **this** Requester's request to disclose the documents relating to **him** posed a health and safety threat to the employees whose names are on the records in his file.

[54] First of all, as the IPC noted, there was no evidence that this Requester had engaged in threatening or violent behaviour. Second, there was no evidence that any of the employees whose names were going to be disclosed had ever been the subject of any threats by the Requester or anyone else. Third, there was nothing potentially inflammatory in the records themselves. Fourth, as mentioned, the evidence that other employees had been threatened in the past is not relevant to a request under s. 47(1)(b), which requires a consideration of the risk presented by disclosure to the requester. Moreover, to the extent such evidence can be considered, it is

insufficient to allow someone to do anything more than speculate that disclosing this Requester's records would pose a health and safety risk to the employees whose full names were in those records.

[55] The Ministry and OPSEU rely on the decision in *Duncanson v. Toronto (Metropolitan) Police Services Board,* [1999] O.J. No. 2464 (S.Ct. – Div. Ct.) as support for their view that it is sufficient to demonstrate a generalized concept of risk to individuals and that it is not relevant to show a risk that is specific to the particular requester. However, that decision did not involve a request under s. 47(1)(b) and therefore did not address the issues, and the balancing of the relevant considerations, in the present proceeding. Moreover, the court in that decision did recognize that this is a matter that is dependent on the facts of each case so that demonstration of a generalized risk is not necessarily sufficient in all cases.

[56] The submission that the IPC acted unreasonably in refusing to accept that the GSB Order and the complaints that lead to that order constituted sufficient evidence, in and of itself, to meet the threshold for the ss. 14(1)(e) and 20 exemptions is also problematic. This issue depends upon the interpretation of the the GSB Order which essentially incorporated an agreement between the Ministry and OPSEU.

[57] The GSB Order was made in response to many grievances alleging a violation of the health and safety provisions of the collective agreement between the Crown and OPSEU. The preamble of the GSB Order states in part that "**without prejudice and precedent**, the aforementioned parties agree to the following as full and final settlement." (emphasis added). The qualifying words "without prejudice and precedent" certainly serve as a signal that the GSB Order was meant to be confined to the specific circumstances giving rise to that order.

[58] Under the GSB Order the employer agreed to implement a new policy regarding the use of full names at FRO. Under the policy, FRO employees have a choice as to how they identify themselves to members of the public when they are dealing with the public over the telephone or in written correspondence (other than court documents). They may continue to use their full names or they may identify themselves by first name and employee identification number.

[59] The policy makes no mention of what is to happen in the event of an access request under the Act. Paragraph 4 of the GSB Order contains the sentence that the Ministry relies on for its submission that disclosing employees' full names in response to a request under the Act would put it in breach of the GSB Order:

> The Employer will inform all staff who may give out the names of FRO employees in response to inquiries form (sic) the public of the terms of the new policy provided by this settlement. <u>Anyone disclosing the name of another FRO bargaining unit employee will be required to use the person's 1st name and I.D. number only.</u>
> [Emphasis added.]

[60] Taken in context, it is my view that the sentence the Ministry relies on is meant to apply to other staff who may be faced with inquiries from the public about the names of fellow staff

members. This is clear from the first sentence, which deals with the need to inform all **staff** about the new policy, and the use of the word "another" in the second sentence. By virtue of this word "anyone" should be read as meaning "anyone who is also a FRO bargaining unit employee." Accordingly, "anyone" does not extend to the Minister for this purpose. I also note that the policy does not deal with internal communications, including emails, or to documents for use in court proceedings.

[62] Therefore, there is no merit to the suggestion that complying with the IPC Order would put the Ministry in breach the GSB order. Employees still have the choice provided for in the GSB Order and that choice will continue to be respected by their fellow bargaining unit employees. The policy does not have a broader reach.

[63] This conclusion is reinforced by two other important considerations pertaining to the context in which the GSB Order was agreed to by the parties.

[64] First, there is no suggestion that, when the GSB Order was made, the provisions of the Act and the important public policy goals it is designed to promote were considered by any of the parties or the arbitrator who made the order. Therefore, no inference can be drawn that the GSB Order was intended to override the provisions of the Act.

[65] Second, deciding whether to apply an exemption to a particular request for disclosure under the Act requires an individual exercise of discretion by the head of an institution. This discretion cannot be fettered in advance: see e.g. *Maple Lodge Farms Ltd. v. Canada*, [1981] 1 F.C. 500, aff'd [1982] 2 S.C.R. 2; and *Happy Adventure Sea Products (1991) Ltd. v. Newfoundland and Labrador (Minister of Fisheries and Aquaculture)*, 2006 NLCA 61, 260 Nfld. & P.E.I.R. 344, at paras. 20, 23-27. Further, as the IPC pointed out at page 9 of its reasons in this case, the Minister cannot consent to an arrangement that would have the effect of contracting out of his or her obligations under the Act.

[66] The parties knew, or at the very least are deemed to know, of this very important principle of law. The GSB Order is, however, entirely silent with respect to such circumstances. Therefore, I think it is a necessary inference that the parties did not intend that the GSB Order would override the provisions of the Act, in particular, s. 47, dealing with an individual's right to access to personal information about the individual in the custody of or under the control of FRO.

[67] For these reasons, I find that the IPC's decision regarding the application of the exemptions set out at ss. 14(1)(e) and 20 of the Act was reasonable.

<u>Operational Conflict</u>

[68] In *British Columbia Telephone Co. v. Shaw Cable Systems (B.C.) Ltd.*, [1995] 2 S.C.R. 739, at para. 54, the Supreme Court of Canada established that where an operational conflict exists between the decisions of two administrative tribunals, it is the responsibility of the court to determine which of the two decisions should take precedence. In this case, the Ministry submits that there is an operational conflict between the IPC Order and the GSB Order.

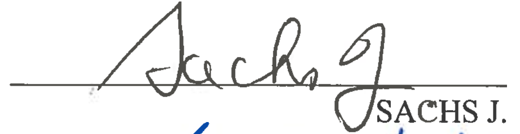
[69] An operational conflict occurs "where compliance with the decision of one tribunal necessitates violation of the other tribunal's decision.": see *Shaw Cable Systems*, at para. 47.

However, "[c]onflicts should not be sought out or artificially created by the courts as a justification for judicial interference. Instead, judicial interference should only be contemplated where it is impossible to comply with two administrative decisions in that they are in direct operational conflict.": see *Shaw Cable Systems*, at para. 53.

[69] In this case I have already addressed the question of whether compliance with the IPC Order requires a contravention of the GSB Order. For the reasons expressed above, I find that it does not. The IPC Order in no way interferes with the Ministry's ability to carry out the policy enshrined in the GSB Order. FRO employees still have the choice to either disclose their full names or use their first names and identification numbers when they deal directly with the public and other FRO employees must respect that choice. Given this interpretation of the GSB Order, there is no operational conflict between the IPC Order and the GSB Order.

Conclusion

[70] For these reasons, the application for judicial review is dismissed. Since no one sought costs, none are ordered.



SACHS J.

WILTON-SIEGEL J.

NOLAN J.

Released: FEB 24 2014

CITATION: Ministry of Community and Social Services v. Doe, 2014 ONSC 239
DIVISIONAL COURT FILE NO.: 553/10
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ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

SACHS, WILTON-SIEGEL and NOLAN JJ.

BETWEEN:

MINISTRY OF COMMUNITY AND SOCIAL SERVICES

Applicant

– and –

JOHN DOE, Requester, Affected Party, ONTARIO PUBLIC SERVICE EMPLOYEES UNION, and INFORMATION AND PRIVACY COMMISSIONER

Respondents

REASONS FOR JUDGMENT

Released: February 24, 2014