



Information and Privacy
Commissioner/Ontario

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

RECONSIDERATION ORDER PO-2102-R

**Appeals PA-000046-2, PA-000046-1, PA-000047-1,
PA-000048-1 & PA-000049-1**

Order PO-1905

Ministry of Correctional Services



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NATURE OF THE RECONSIDERATION:

This order sets out my decision on the reconsideration of Orders PO-1905 and PO-1999, following recent rulings of the Court of Appeal for Ontario and the Supreme Court of Canada. The background to the appeal is set out below.

The Request

The Ministry of Correctional Services (now the Ministry of Public Safety and Security) (the Ministry) received a four-part request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) from a representative of the media (the appellant). The appellant sought access to records relating to complaints, investigations and allegations of misconduct by named and unnamed individuals during the period 1975 to October 1999.

The First Decisions and Appeals

The Ministry located records responsive to the requests and denied access to them on the basis of section 65(6) of the *Act*, which states that the *Act* does not apply to certain employment-related records.

The appellant appealed the decisions of the Ministry and this office opened Appeals PA-000046-1, PA-000047-1, PA-000048-1 and PA-000049-1 (the first appeals).

The First Order

On May 10, 2001, Senior Adjudicator David Goodis issued Order PO-1905, in which he found that section 65(6) does not apply, and thus the records are subject to the access provisions of the *Act*. The Senior Adjudicator therefore ordered the Ministry to provide the appellant with a decision letter under the *Act* with respect to the records.

Later, the Ministry applied to the Divisional Court for judicial review of Order PO-1905.

The Second Decision and Appeal

Although it had filed an application for judicial review of Order PO-1905, the Ministry issued a decision in compliance with the order refusing access to the responsive records on the basis of the exemptions at sections 13, 19 and 21 of the *Act*.

The appellant appealed the Ministry's decision and, upon receipt of this appeal, this office opened Appeal PA-000046-2 (the second appeal).

The Second Order

On March 13, 2002, I issued Order PO-1999 in which I upheld the Ministry's decision to deny access to the majority of the records at issue in the appeal and ordered the Ministry to disclose the remaining records, in whole or in part, to the appellant. Specifically, order provision 1 reads as follows:

1. I order the Ministry to disclose to the appellant those portions of Records 13-17 of Record Group B and Records 105, 111 and 149-155 of Record Group C which are **not** highlighted, along with Records 104 (and its duplicate at 341), 106 (which is duplicated at 344), 107-110 (duplicated in part at 345 and 346), 112 and 113 from Record Group C, in their entirety.

However, by order provision 3, I stayed order provision 1 pending the disposition by the Supreme Court of Canada of the IPC's leave to appeal application of the decision of the Court of Appeal with respect to the judicial review of Orders PO-1618, PO-1627 and PO-1658 [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*] (2001), 55 O.R. (3d) 355]. The records remain undisclosed.

The Court of Appeal's decision in *Ontario (Solicitor General)*

In *Ontario (Solicitor General)*, the Court of Appeal found that this office's interpretation of section 65(6) was incorrect. The court stated the following with respect to the "time sensitive" element under this section:

In my view, the time sensitive element of subsection [65(6)] is contained in its preamble. The *Act* "does not apply" to particular records if the criteria set out in any of sub clauses 1 to 3 are present when the relevant action described in the preamble takes place, *i.e.* when the records are collected, prepared, maintained or used. Once effectively excluded from the operation of the *Act*, the records remain excluded. The subsection makes no provision for the *Act* to become applicable at some later point in time in the event the criteria set out in any of sub clauses 1 to 3 cease to apply.

In addition, the court found that this office's interpretation of section 65(6)3 was incorrect, and stated the following with respect to the words "in which the institution has an interest" in that section:

In arriving at the conclusion that the words "in which the institution has an interest" in s. 65(6)3 must be referring to "a legal interest" in the sense of having the capacity to affect an institution's "legal rights or obligations", the Assistant Privacy Commissioner stated that various authorities support the proposition that an interest must refer to more than mere curiosity or concern. I have no difficulty with the latter proposition. It does not however lead to the inevitable conclusion that "interest" means "legal interest" as defined by the Assistant Privacy Commissioner.

As already noted, section 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. Sub clause 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]. Sub clause 2 deals with records relating to "negotiations or anticipated negotiations relating to labour relations or to the employment of a person **by the institution**" [emphasis added]. Sub clause 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, and the wording of the subsection as a whole, the words "in which the institution has an interest" in sub clause 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". To import the word "legal" into the sub clause when it does not appear, introduces a concept there is no indication the legislature intended.

The Supreme Court of Canada's Decision

This office brought an application for leave to appeal the Court of Appeal's decision in *Ontario (Solicitor General)* to the Supreme Court of Canada. On June 13, 2002, the Supreme Court denied leave. As a result, the judgment of the Court of Appeal stands.

In light of the foregoing, the IPC initiated this reconsideration in order to adjudicate the issues extant in these appeals in accordance with the principles enunciated by the Court of Appeal in *Ontario (Solicitor General)*. I requested that the Ministry and the appellant provide me with representations on whether the reconsideration ought to proceed and if so, what the outcome of that reconsideration should be. In response to my letter, I received submissions from both parties.

DISCUSSION:

Introduction

The IPC's reconsideration procedures are set out in section 18 of the *Code of Procedure*. In particular, section 18.01 of the *Code* states:

The IPC may reconsider an order or other decision where it is established that there is:

- (a) a fundamental defect in the adjudication process;
- (b) some other jurisdictional defect in the decision; or
- (c) a clerical error, accidental error or omission or other similar error in the decision.

In my letter seeking representations, I asked the parties to consider whether there was a jurisdictional defect in Order PO-1905 within the meaning of section 18.01(b) of the *Code*.

The Parties' Representations

The Ministry submits:

. . . [T]he finding of Senior Adjudicator Goodis that sections 65(6)1 and 65(6) 3 did not apply to the requested records appears to be based in part on the application of the “time sensitive” approach that was rejected by the Court of Appeal in *Ontario (Solicitor General)*. The Court has confirmed that the exclusions are not time-limited and that once a record is excluded, it remains excluded. The records at issue have been prepared, collected, maintained and used in regard to proceedings and anticipated proceedings relating to the employment of Ministry staff.

Additionally, the Ministry notes that the finding of Senior Adjudicator Goodis that section 65(6)3 did not apply was in part based upon the failure of the Ministry to establish a “legal interest” in the requested records. The Court of Appeal in *Ontario (Solicitor General)* has confirmed that the meaning of the word “interest” in section 65(6)3 is not limited to “legal interest”. As an employer, the Ministry has an interest in records that concern the matter of whether or not Ministry staff have carried out their responsibilities under the *Ministry of Correctional Services Act* in an appropriate manner.

In view of the foregoing, the Ministry respectfully agrees with Adjudicator Hale’s preliminary conclusion that there is a jurisdictional defect in Order PO-1905 within the meaning of section 18.01(b) of the *Code*.

The appellant submits that the Senior Adjudicator erred in interpreting and applying section 65(6)1 and 3, in light of *Ontario (Solicitor General)*. However, the appellant’s ultimate submission is that neither paragraph 1 nor 3 of section 65(6) applies to the requested records.

Should Order PO-1905 be Reconsidered?

In Order PO-1999, I found that all of the records were exempt, with the exception of Group B Records 13-17 and Group C Records 104-113, 149-155, 341 and 344-346 (either in whole or in part). As a result, even if I were to find that the Senior Adjudicator erred by finding these exempt records not to fall within the scope of section 65(6), no useful purpose would be served by reconsidering Order PO-1905 in this regard, since I could not order their disclosure in any event.

As a result, I need only determine whether or not Order PO-1905 should be reconsidered with respect to Group B Records 13-17 and Group C Records 104-113, 149-155, 341 and 344-346.

On further review of Group C Records 149-155, I have determined that the *Act* clearly does not apply to them, for reasons other than the application of section 65(6) of the *Act*. In the circumstances, I am unable to provide any additional detail as to why this is the case, due to confidentiality concerns.

As a result only Group B Records 13-17 and Group C Records 104-113, 149-155, 341 and 344-346 C remain at issue with respect to the reconsideration.

The key portions of Order PO-1905 reads as follows:

In short, the fact that the records may have been collected, maintained, used and/or disclosed in relation to current and anticipated litigation in which the Ministry may be held vicariously liable for actions of its employees is not alone sufficient to qualify the records as arising in an employment or labour relations context. As the Assistant Commissioner indicated in Order PO-1772, if I were to find otherwise, then whenever a third party decides to commence a law suit and hold the Ministry vicariously liable for its employees' actions, all relevant records would automatically be excluded from the scope of the *Act*. I agree with the Assistant Commissioner that this could not have been the intent of the Legislature in enacting section 65(6).

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Many of the records at issue relate to matters dating back several years as between the employees and the Ministry as employer, involving internal and external complaints and subsequent investigations. While at one time these records might have been considered to be about employment-related matters in which the Ministry has an interest, it is clear that these matters, between employer and employee, have long since been completed or abandoned, and there is no reasonable prospect of them being revived. Therefore, paragraph 3 of section 65(6) cannot apply.

The balance of the records, while more current, were created or compiled in the context of continuing and anticipated proceedings between the Ministry and individuals who allege that they were harmed by Ministry employees. Applying the reasoning in Order PO-1772, the meetings, consultations and/or discussions concerning the current and anticipated proceedings to which the records relate do not arise in an employment or labour relations context and, therefore, the Ministry has failed to establish the requisite legal interest under section 65(6)3.

The records remaining at issue fall into the latter category of records described by the Senior Adjudicator and, therefore, they were found not to be excluded because the meetings, consultations and/or discussions concerning the current and anticipated proceedings to which they relate do not arise in an employment or labour relations context. The reasons for this finding are set out in more detail in Order PO-1905.

I agree with the decision of the Senior Adjudicator where he determined that the remaining records "were created and compiled in the context of continuing and anticipated proceedings between the Ministry and individuals who allege that they were harmed by Ministry employees" and that these records "do not arise in an employment or labour relations context." This issue was not before the Court of Appeal in *Ontario (Solicitor General)*, and the judgment in that case, in my view, has no impact on this reasoning. Therefore, I find that the Senior Adjudicator did

not commit a jurisdictional error within the meaning of section 18.01(b) of the *Code*, or any other error listed under section 18.01.

While the Senior Adjudicator's findings in Order PO-1905 with respect to other records may have been in error, these records are no longer at issue, as they were found to be exempt in Order PO-1999. Accordingly, as noted above, no useful purpose would be served by reconsidering Order PO-1905 in this regard.

Conclusion

I find no basis for reconsidering Order PO-1905. However, as I indicated above, the *Act* does not apply to Group C Records 149-155, and I will amend provision 1 of Order PO-1999 to reflect this fact. Since the Ministry's application for judicial review of Order PO-1905 is still in existence, I will continue the stay of order provision 1 of Order PO-1999 pending the outcome of the application.

ORDER:

1. I hereby amend provision 1 of Order PO-1999 to read as follows:
 1. I order the Ministry to disclose to the appellant those portions of Records 13-17 of Record Group B and Records 105 and 111 of Record Group C which are **not** highlighted, along with Records 104 (and its duplicate at 341), 106 (which is duplicated at 344), 107-110 (duplicated in part at 345 and 346), 112 and 113 from Record Group C, in their entirety.
2. I hereby stay revised provision 1 of Order PO-1999 pending the outcome of the Ministry's application for judicial review of Order PO-1905.

Original signed by:

Donald Hale
Adjudicator

January 20, 2003