

The Labour Relations and
Employment Exclusion



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INTRODUCTION

Ontario's access and privacy laws give individuals the right to access records held by public sector organizations unless:

- the records are exempt from the right of access
- the request is frivolous or vexatious
- the records are excluded from the laws
- another law contains an overriding confidentiality provision

Some records are excluded from the *Freedom of Information and Protection of Privacy Act* and the *Municipal Freedom of Information and Protection of Privacy Act*, because they relate to labour relations or employment matters.

This guide helps institutions and the public understand the labour relations and employment exclusion¹. Note that definitions for some of the terms and phrases used in Parts 1 and 2 of this guide appear in Part 3.

PART 1 – THE EXCLUSION

WHAT IS AN EXCLUSION, AND WHAT HAPPENS IF AN EXCLUSION APPLIES TO A RECORD?

When a record is excluded, many of the rights and obligations set out in Ontario's access and privacy laws do not apply to that record². The result is that individuals do not have the right to access the record and the privacy protections in the law do not apply, even where the records contain the requester's personal information.

In most cases, organizations will have the discretion to release records to a requester, even if the records are excluded (Order **PO-2639**). However, it is important to consider if there are limitations set out in other laws or agreements.

In deciding whether to disclose excluded records, an organization should consider the public interest, the need for government transparency, and the organization's open government policies.

Once a record is subject to the labour relations and employment exclusion, it remains excluded indefinitely. If the requirements of the exclusion were met at the time the record was collected or created, it does not matter how much time has passed or whether circumstances have changed (Order **MO-1560-R**).³

Example: In Order **PO-2038**, an individual asked for information about a former police officer's disciplinary proceeding. The police denied access to the record on the basis that it related to labour relations and employment matters. The IPC agreed with the police, stating that although the proceedings had ended and the officer was no longer employed with the police, the records were still excluded.

WHEN DOES THE EXCLUSION APPLY TO A RECORD?

The exclusion applies to records collected, prepared, maintained or used by or on behalf of an institution **in relation to** any of the following:⁴

1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or the employment of a person by the institution [s. 65(6)1/52(3)1]
2. Negotiations or anticipated negotiations relating to labour relations or the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding [s. 65(6)2/52(3)2]
3. Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest [s. 65(6)3/52(3)3]

HOW DOES AN INSTITUTION DETERMINE WHETHER THE EXCLUSION APPLIES?

The institution should determine whether the labour relations or employment exclusion applies by reviewing the responsive records. It will likely be insufficient to base this determination solely on, for example, the record's title or the description in the request.

Before claiming the exclusion, the institution must be satisfied that at least one of the following three-part tests applies.

PROCEEDINGS OR ANTICIPATED PROCEEDINGS

1. The record was collected, prepared, maintained or used by an institution or on its behalf
2. This collection, preparation, maintenance or usage was in relation to proceedings or anticipated proceedings before a court, tribunal or other entity
3. These proceedings or anticipated proceedings relate to labour relations or the employment of a person by the institution

Example: In Order **MO-2428**, a requester sought copies of 911 calls made by a police officer, that led to charges of discreditable conduct against the officer. The IPC found that s. 52(3)1 of *MFIPPA* applied to the record because each part of the three-part test was satisfied. **First**, the record of the call was collected, prepared, maintained and used by the police, since it was seized for the purpose of an internal investigation into the conduct of the officer. **Second**, the record was used in the subsequent disciplinary proceedings against the officer under the *Police Services Act*. **Third**, the proceedings related to the employment of the officer who made the 911 calls.

NEGOTIATIONS OR ANTICIPATED NEGOTIATIONS

1. The records were collected, prepared, maintained or used by an institution or on its behalf
2. This collection, preparation, maintenance or usage was in relation to negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution
3. These negotiations or anticipated negotiations took place or were to take place between the institution and a person, bargaining agent or party to a proceeding or anticipated proceeding

Example: The record at issue in Order **PO-2520** was a contract entered into by a college of applied arts and technology and a numbered company, which was described in the agreement as an “external supplier.” The IPC found that s. 65(6)2 of *FIPPA* applied to the record because each part of the three-part test was satisfied. **First**, the record was collected, prepared, maintained or used by the college or on its behalf, since the record was in the custody of the college and shown to a union representative during a successful attempt to settle a grievance. **Second**, the record was used in relation to labour relations negotiations, was provided to the union during settlement negotiations, and was relevant to the subject matter of the grievance. **Third**, the negotiations were between the college and a bargaining agent, namely the union.

MEETINGS, CONSULTATIONS, DISCUSSIONS OR COMMUNICATIONS

1. The records were collected, prepared, maintained or used by or on behalf of an institution
2. This collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications
3. These meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest

Example: The records sought by the requester in Order **PO-2614** included those related to the resolution of sexual harassment complaints filed with the university. The records consisted of several one-page records, each reflecting the mediated resolution of the sexual harassment issue concerning the university employee and another person. The IPC found that s. 65(6)3 of *FIPPA* applied to the records because the three-part test was satisfied. **First**, the university’s sexual harassment office collected and maintained the records, which reflected the mediated resolutions of sexual harassment complaints. **Second**, the university’s sexual harassment office prepared, collected, and maintained the records following mediation meetings or discussions. **Third**, the records reflected the outcome of meetings or discussions about employment-related matters concerning the university’s employees in which the university had an interest.

When determining whether a record is excluded from Ontario’s access and privacy laws under the labour relations and employment exclusion, the institution must look at the record as a whole rather than its individual paragraphs, sentences or words (Order **PO-3572**).

Example: In Order **PO-3642**, the institution withheld part of a record (specifically meeting minutes) relating to the progress in the development of a new government facility. The meeting minutes included a discussion on the facility’s location and construction, which was disclosed to the requester. However, the institution severed some of the information because it concerned workforce labour relations at the facility. The IPC explained that an exclusion cannot apply to part of a record and, when examined as a whole, the record was found not to be about labour relations.

PART 2 – EXCEPTIONS TO THE EXCLUSIONS

In some situations, access and privacy laws may still apply to a record even though it may meet the requirements for the exclusion. The labour relations and employment exclusion does not apply to:

1. An *agreement* between an institution and a trade union [s. 65(7)1/52(4)1]
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 employment matters [s. 65(7)2/52(4)2]
3. An *agreement* between an institution and one or more employees resulting from negotiations about employment matters between the institution and the employee or employees [s. 65(7)3/52(4)3]
4. An *expense account* submitted by an employee of an institution to seek reimbursement for expenses incurred by the employee [s. 65(7)4/52(4)4]

The exceptions to the exclusion apply only to the actual agreements themselves. They do not apply to records created as a result of the agreements (**Order MO-1470**).

AGREEMENT BETWEEN AN INSTITUTION AND A TRADE UNION

This refers to a collective agreement negotiated between an employer and a trade union. The term “trade union” has been interpreted broadly to include organizations such as those that represent professionals.

Example: The Court of Appeal decided that the term “labour relations” applied to negotiations between an organization representing doctors (the Ontario Medical Association) and the provincial government.⁵ Following this approach, in Order **PO-2497**, the IPC took a broad interpretation of the term “trade union” and found that, in the context of collective bargaining with the Ministry of Health and Long-Term Care, the OMA was a trade union.

AGREEMENT THAT ENDS A PROCEEDING BEFORE A COURT, TRIBUNAL, OR OTHER ENTITY

This refers to an agreement that concludes a proceeding, like a civil lawsuit.

Example: In Order **P-1361**, a former employee of the Liquor Control Board of Ontario was the subject of an investigation that resulted in criminal charges. He was not convicted but suspended from his job and later dismissed. He then filed a civil suit against his former employer, which was later settled. The former employee made an access request for all records relating to his civil and criminal cases involving the LCBO. The LCBO argued that the records were outside the law's scope due to the labour relations and employment exclusion. The IPC found that some of the records were covered by the access law because they related to an agreement between the requester and the LCBO that ended the civil proceedings before the court. The IPC ordered the LCBO to issue a new decision (with any exemptions that may apply).

AGREEMENT RESULTING FROM NEGOTIATIONS ABOUT EMPLOYMENT-RELATED MATTERS

This refers to an agreement arrived at following negotiations. It **does not** include drafts of final agreements that never come into effect, as these drafts would only represent a step in the negotiation process (Order **MO-1622**).

Agreements that fall within this definition include:

- severance agreements (Order **MO-1711**)
- negotiated termination agreements (Orders **MO-1970** and **MO-1941**)
- employment contracts (Order **MO-3044**)

Example: In Order **MO-1676**, the IPC found that information regarding the settlement received by the former chief of police upon the termination of his employment fell within the exception and was therefore covered by the access law. The record, a document titled "Minutes of Settlement and Release," reflected the conclusion of negotiations of a severance agreement with the former chief.

EXPENSE ACCOUNT

An expense claim made by staff for reimbursement for expenses incurred as part of their employment, and any records used to support the claim, are not excluded from access and privacy laws.

Example: In Order **MO-1493**, the IPC found that portions of the following records were expense accounts: three travel expense forms, two cardholder statements, a series of receipts, two cellphone statements, travel expense statements, and a petty cash request form and related invoice. The employee submitted these records to seek reimbursement for expenses incurred as part of their work and they were not excluded from the access law.

PART 3 – DEFINITIONS OF TERMS AND PHRASES

This part of the guide explains how the IPC defines some terms and phrases.

WHAT DOES “IN RELATION TO” MEAN?

“In relation to” means that there is some connection between the record and the labour relations or employment matter (Order **MO-2589**).⁶

Example: Some of the records at issue in Order PO-2095 related to an investigation of a police service by the Special Investigations Unit into the circumstances surrounding a heart attack suffered by the requester while in police custody. Several police officers, whose information was included in the SIU records, objected to the records being disclosed, claiming that the records related to employment matters (for instance, the information in the records could be used to find an officer guilty of professional misconduct). The IPC concluded that the SIU collected, prepared, maintained or used the records exclusively in relation to its investigation into possible criminal offences, and not in relation to employment matters.

WHAT ARE LABOUR RELATIONS AND EMPLOYMENT MATTERS?

The term “labour relations” refers to matters arising out of a collective bargaining relationship between an institution and its employees, **or out of a similar relationship**. The meaning of labour relations can extend to relations and conditions of work beyond those relating to collective bargaining, and is not restricted to employee-employer relationships. For instance, labour relations include the relationship between the Ontario Medical Association, which negotiates Ontario Health Insurance Plan payments on behalf of doctors, and the Ministry of Health.

Labour relations matters include:

- a grievance under a collective agreement (Order **M-832**)
- the relationship between the government and physicians represented under the *Health Care Accessibility Act*

“Employment-related matters” are human resources or staff relations matters involving the relationship between an employer and its non-unionized employees (Order **PO-2157**). This may also include volunteers if the relationship has “the trappings” of an employment relationship, such as time commitments, control over job activities, performance expectations and recruitment processes (Order **MO-3010**).

Employment-related matters include:

- job competitions (Order **M-830**)
- an employee’s dismissal (Order **MO-1654-I**)
- a “voluntary exit program” (Order **M-1074**)

- a review of “workload and working relationships” (Order **PO-2057**)
- employee compensation packages (Order **MO-1735**)

Example: The IPC has said (Orders **P-1627**, **PO-1760**, and **MO-2452**) that the complete hiring process is considered to be an employment-related matter, and records concerning recruitment, screening and interviewing are therefore excluded from access laws.

Example: In Order **MO-3470**, a requester sought access to records relating to a social worker’s job position and compensation evaluations from a school board. The IPC found that compensation of employees was a vital component of the employer-employee relationship between the school board and its social workers, and concluded that the records related to employment matters and were excluded.

Employment-related matters are separate and distinct from matters related to employees’ actions. For instance, the laws do not exclude records about lawsuits against an institution simply because they are based on the actions of its employees (Orders **PO-1772** and **PO-3302**).⁷

Example: In Order **MO-1716**, the existence of a civil suit against specific police officers did not bring the information at issue into the arena of labour relations or employment-related matters. The information sought was the amount of money that the police service agreed to pay a private individual to settle the legal dispute between them. The IPC found that this communication was made in relation to a civil suit and did not arise in a labour relations or employment-related context.

If an organization applies an overly broad interpretation of the term “employment-related matter,” virtually all records within its custody or control could be considered employment-related (Order **MO-2226**).

Most records pertaining to staff training, like training manuals, are not labour relations or employment matters because they do not deal with a particular individual or union, but are generic in nature (Order **PO-2913**).

Example: In Order **MO-1954**, the IPC found that records prepared by the Corporate Security Department of the Toronto Transit Commission to assist in the training of its special constables were not about labour relations or employment-related matters. The IPC stated that while the records addressed, in a general way, how the special constables are to carry out their duties, they were only loosely related to employment-related matters.

Generally, labour relations or employment matters do not include an organizational or operational review (Order **PO-3029-I**).

Example: In Order **M-941**, the record at issue was a report about an organizational review of a department that included: summaries of management areas of concern, employees' concerns, departmental goals and local resident survey results. The IPC found that this report related to the "efficiency and effectiveness" of the department, and not to a labour relations or employment matter.

Example: The record at issue in Order **P-1369** was a review of a Crown corporation by an Ontario ministry, which the ministry indicated it would use in negotiations or anticipated negotiations with employees of the corporation. The IPC found that the relationship between the contents of the record and negotiations was too remote to find that it was "in relation to" the negotiations. The IPC concluded that the report was not excluded, stating that the record was a "broadly based organizational review that only touched occasionally, and in an extremely general way, on staffing and salary issues."

However, a review may contain portions that relate to organizational or operational issues, and still meet the requirements of the exclusion, if there is some connection between the record as a whole and a labour relations or employment matter (Order **PO-3684**).

Example: In Order **MO-3496**, a request was made for a record prepared by a contracted third party relating to an organizational review of the municipality. The report's purpose "... was to determine the most effective organization structure and staffing as well as to address any improvement requirements for service delivery by the Municipality Departments." The IPC decided that the bulk of the report considered the organizational structure of the municipality in terms of staffing and employment positions as well as staffing issues, the working environment and compensation. The IPC concluded that the record, as a whole, was connected to labour relations or employment matters and was therefore excluded.

WHAT IS A "PROCEEDING OR ANTICIPATED PROCEEDING"?

A proceeding is a dispute resolution process conducted by a court, tribunal or other entity which has the power to decide the matters at issue (Order **P-1223**). Complaints heard by the Ontario Labour Relations Board or the Workplace Safety and Insurance Appeals Tribunal are examples of proceedings that relate to labour relations and employment matters.

For a proceeding to be "anticipated," it must be more than just a vague or theoretical possibility. There must be a reasonable prospect of such proceedings at the time the record was collected, prepared, maintained or used. What constitutes an "anticipated" proceeding will largely be a question of fact, which must be considered in the circumstances of a particular case (Order **P-1223**).

Example. In Order **MO-3503**, an individual requested access to records of a specific file arising from a complaint he made against a police officer. The records at issue were generated as a result of the complaint, which could have led to a disciplinary hearing under the *Police Services Act*. Such disciplinary hearings relate to a person’s employment. As such, the IPC found that the records related to an anticipated proceeding and therefore were excluded from the act.

WHAT IS A “COURT, TRIBUNAL OR OTHER ENTITY”?

A “court” means a judicial body presided over by a judge.

A “tribunal” is an administrative body that has a legal mandate to adjudicate and resolve conflicts between parties and render decisions that affect legal rights or obligations.

“Other entity” refers to a body or person that presides over a proceeding that is of the same class as those before a court or tribunal. The body or person must have the authority to conduct “proceedings,” and the power (obtained by law, binding agreement or mutual consent) to decide the matters at issue (Order **M-815**).

The following are some examples of proceedings before a court, tribunal or other entity:

- grievance arbitration (Order **M-815**)
- Crown employee grievance hearings (Orders **P-1243** and **PO-3784**)
- wrongful dismissal suits (Order **MO-1640**)
- disciplinary hearings under the *Police Services Act* (Order **MO-1560-R**)
- workers’ compensation proceedings (Order **M-815**)
- arbitration proceedings under a collective agreement (Order **M-1034**)
- proceedings before an arbitrator under the *Canada Labour Code* (Order **MO-2507**)

WHAT DOES IT MEAN TO HAVE “AN INTEREST” IN LABOUR RELATIONS OR EMPLOYMENT-RELATED MATTERS?

The phrase “in which the institution has an interest” means more than a mere curiosity or concern, and refers to matters involving the institution’s own workforce. It is not limited to legal interest, nor is it time-limited.⁸ The institution’s interest also extends to records that relate to former employees of the institution (Order **PO-2212**).

Example: In Order **PO-2234**, a ministry was found to have an interest in records relating to benefits provided to a retired employee. The fact that the employee was no longer employed with the ministry did not affect the institution’s interest.

Example: An institution acting as an impartial adjudicator did not have an interest in the labour relations or employment matter brought before it, since such an interest would be inconsistent with impartial adjudication (Order **PO-2499**).

WHAT ARE “NEGOTIATIONS OR ANTICIPATED NEGOTIATIONS”?

Negotiations are generally discussions aimed at reaching an agreement to settle a matter of mutual concern or to resolve a conflict. If a negotiation is anticipated, there must be a reasonable prospect at the time the record was collected, prepared, maintained or used that a negotiation was to take place. A record does not need to be created for the purpose of a negotiation, as long as it was used in relation to the negotiation (Order **PO-2520**).

Records related to negotiations include:

- contents of an employee’s personnel file relating to the periodic renewals of their status as a temporary employee (Order **M-861**)
- emails and notes relating to negotiations between the government and a collective bargaining agent over staffing requirements to provide essential services and emergency services during a strike (Order **P-1384**)
- separation agreements between a school board and two board employees (Order **M-978**)
- negotiations between a college and a union (Order **PO-2520**)

PART 4 – WHAT CAN A REQUESTER DO IF THEY BELIEVE RECORDS ARE NOT EXCLUDED? WHAT HAPPENS WHEN THE IPC RECEIVES AN APPEAL?

A requester can file an appeal with the IPC within 30 days of receiving the organization’s decision that the records are excluded. To begin the appeal process, the requester:

- must send the IPC a completed **appeal form** or a letter describing the situation
- should give the IPC a copy of the institution’s decision letter and a copy of the original request
- must include the appeal fee

The IPC’s registrar will review the appeal letter or form to determine how to process the file.

There are three stages of an appeal: **intake**, **mediation**, and **adjudication**. Below is a general description of each stage.

Intake: the IPC screens the appeal and decides whether it can be informally resolved. The appeal can be dismissed at this stage if the records are clearly excluded. To determine this, the IPC may require the institution to answer preliminary questions and support its argument that the records are excluded. The institution may be asked to provide the IPC with copies or samples of the records or create an index that sufficiently describes the records.

Mediation: if the appeal is not resolved or dismissed at the intake stage, it may then proceed to the mediation stage. A mediator attempts to help the parties reach a settlement. If a settlement cannot be reached, the appeal proceeds to the adjudication stage.

Adjudication: at this stage, the adjudicator may conduct an inquiry disposing of all the remaining issues in the appeal. If the adjudicator finds that the exclusion does not apply to the record, they may order the institution to issue an access decision. This does not necessarily mean that the institution will be required to disclose the record, but it must make a final decision on granting or denying access to a record and, where applicable, claim discretionary or mandatory exemptions.

If the institution has claimed exemptions and the record is not excluded, the adjudicator will decide whether the exemptions apply. If the exemptions do not apply, the adjudicator may order disclosure of the record.

Additional details about the appeal process can be found in the IPC fact sheet, *The Appeal Process and Ontario's Information and Privacy Commissioner*, at www.ipc.on.ca.

PART 5 – BEST PRACTICES FOR PUBLIC SECTOR ORGANIZATIONS

When receiving a request for records that may be subject to the labour relations and employment exclusion, institutions should first consider releasing records, even though they might be excluded. For example, where an employee is requesting access to their own records, the institution should think about whether these are the types of records employees should have access to, regardless of the technical application of the exclusion.

Institutions should claim any exemptions in addition to their claim that the labour relations and employment exclusion applies. Doing this will avoid multiple appeal proceedings if the requester chooses to appeal the decision to withhold the record.

Additionally, it is important to note that while the institution may not be required to provide the responsive records to the IPC at the intake stage, the institution should be prepared to produce the records if the appeal moves forward to mediation or adjudication.

ENDNOTES

- 1 Where sections of the acts are cited in this guidance, the section number in *FIPPA* will be listed first, followed by the section number of the equivalent provision in *MFIPPA*. For example, s. 65(6)/52(3).
- 2 Some obligations remain for the institution. For instance, institutions are required to respond to the request and participate in any appeals that may result, including potentially providing records to the registrar. The Ontario Court of Appeal confirmed that the appeal process applies to records claimed to be excluded. See *Ontario (Ministry of Health) v. Big Canoe*, [1995] O.J. No. 1277.
- 3 See *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 509.
- 4 Sections 65(6)4 and 5 of *FIPPA* came into force on January 1, 2012. As a result of these amendments, *FIPPA* does not apply to records collected, prepared, maintained or used by or on behalf of an institution that relate to the appointment or placement of individuals by a church or religious organization within an institution, or within the church or religious organization, nor does *FIPPA* apply to hospital appointments, the appointments or privileges of persons who have hospital privileges, or anything that forms part of their personnel file. These amendments act in a similar way as the exclusions under s. 65(6)1-3.
- 5 See *Ontario (Minister of Health and Long-Term Care) v. Mitchinson*, 2003 CanLII 16894 (ON CA).
- 6 See *Ontario (Attorney General) v. Toronto Star*, 2010 ONSC 991.
- 7 Also see *Ontario (Correctional Services) v. Goodis*, 2008 CanLII 2603 (ON SCDC).
- 8 See note 3 above.

The Labour Relations and Employment Exclusion



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