

# INTERPRETATION BULLETIN

## Labour Relations or Employment Records

This interpretation bulletin outlines the labour relations or employment records exclusions, as set out in **section 65(6)** of the *Freedom of Information and Privacy Protection Act* (FIPPA) and **section 52(3)** of the *Municipal Freedom of Information and Privacy Act* (MFIPPA). It defines the key terms of the exclusions and addresses exceptions to the exclusions.

Where referenced, the sections of *FIPPA* are listed first followed by the corresponding sections of *MFIPPA*.

### Section 65(6) of FIPPA, states, in part:<sup>1</sup>

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.
2. Negotiations or anticipated negotiations relating to labour relations or to 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.

<sup>1</sup> Subclauses 4 and 5 are not related to labour relations and employment records and so not included in this Interpretation Bulletin.



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

**Section 65(7) of FIPPA states that the act applies to these 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.

**Sections 52(3) and 52(4) of MFIPPA are virtually identical.**

When section 65(6) of FIPPA and section 52(3) of MFIPPA are claimed, and none of the exceptions in section 65(7) of FIPPA and 52(4) of MFIPPA apply, records are deemed to be excluded from the application of the acts, although the institution may still choose to disclose them.<sup>2</sup>

These are discussed in the exceptions section of this Interpretation Bulletin.

## What is the purpose of the exclusions?

Sections 65(6) of FIPPA and 52(3) of MFIPPA exclude access to certain records held by an institution that relate to labour relations or employment matters. More specifically, the intention is to protect the interests of institutions by removing the public right of access to records relating to institutions' relations with their own workforces.<sup>3</sup>

The exclusions should not be interpreted as a means to shield government business from public accountability. If the government has legitimate confidentiality interests, these may be protected under exemptions in the act, without being excluded from the act altogether.<sup>4</sup>

<sup>2</sup> Order **PO-2639**.

<sup>3</sup> **Ontario (Ministry of Correctional Services) v. Goodis** (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.).

<sup>4</sup> **Ontario (Community and Social Services) v. Doe**, 2014 ONSC 239 (Div Ct.), **leave to appeal dismissed** 2015 ONCA 107 (CanLII). See also **Brockville (City) v.**

## What types of records are covered by the exclusions?

Records excluded by sections 65(6) of FIPPA and 52(3) of MFIPPA relate to matters where the institution acts as employer, and where terms and conditions of employment or human resources questions are at issue.<sup>5</sup> Section 65(6) of FIPPA and section 52(3) of MFIPPA are record-specific and fact-specific, requiring consideration of the records at issue in context.<sup>6</sup>

If the exclusion applied at the time the record was collected, prepared, maintained or used, the record remains excluded from the act unless there has been a change in purpose or conditions.<sup>7</sup> A record that is originally created for a non-excluded purpose but later used or maintained for an excluded purpose, can subsequently become excluded.<sup>8</sup>

## Records collected, prepared, maintained or used

The records in question must have been collected, prepared, maintained or used by an institution or by a person or body on behalf of an institution. The institution claiming the exclusion must be the same institution that has the interest in the records as employer.<sup>9</sup> However, the fact that one institution originally prepared and collected the record, and another institution later maintained it does not alone prevent the exclusion from applying.<sup>10</sup> Either or both institutions may claim the exclusion.

For the collection, preparation, maintenance or use of a record to be in relation to one of the subjects in clauses 1-3 of sections 65(6) FIPPA or 52(3) of MFIPPA, there must be some connection between the records in question and the exclusion being claimed that is more than merely occasional or general.<sup>11</sup> Further, the record must be about labour relations, employment of a person or employment-related matters.

The term labour relations has been interpreted as referring to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to similar relationships.<sup>12</sup> It can extend to conditions of work beyond those relating to collective bargaining. The term employment of a person refers to the relationship between an employer and an employee. The term employment-related matters refers to human resources or staff relations issues arising from the

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*Information and Privacy Commissioner, Ontario*, 2020 ONSC 4413 (Div Ct.). Orders **PO-4428** and **MO-4566**.

5 **Goodis**, cited above.

6 Order **P-1242**.

7 *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.

8 Order **PO-3572**.

9 See Orders **PO-4204** and **PO-4368**.

10 Order **PO-2106**.

11 Order **PO-2157**.

12 Order **PO-2157**.

relationship between an employer and employees that do not arise out of a collective bargaining relationship.<sup>13</sup>

A record would not be excluded from the scope of the act merely because it could potentially be connected to an employment-related concern, is touched upon in a collective agreement, or could become the subject of a grievance. Such an interpretation would subvert the principle of openness and accountability the act is designed to foster.<sup>14</sup>

For example, accounting documents that detail an institution's expenditures on legal and other services in collective bargaining negotiations were found not to meet the test of some connection; to conclude otherwise would undermine a core focus of freedom of information legislation which is to ensure accountability for public expenditures.<sup>15</sup>

Where there are multiple purposes for a record's collection, preparation, maintenance or use, the question is whether the excluded purpose is the predominant or primary purpose.<sup>16</sup> Taken as a whole, the records must relate to that excluded purpose.<sup>17</sup>

## Proceedings or anticipated proceedings

For section 65(6)1 of FIPPA or section 52(3)1 of MFIPPA to apply, the institution must establish that the records in question are in relation to 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.

The proceedings referred to in this clause are proceedings relating to the terms and conditions of employment, such as disciplinary action against an employee or grievance proceedings, for which the institution has an interest as an employer. Where an employee's actions or inactions give rise to, or *could* give rise to a proceeding or litigation, records would only be excluded if the proceeding or litigation is related to terms and conditions of employment.<sup>18</sup> For example, when an internal investigation was carried out with a view to possible civil, criminal and/or disciplinary action, the records were not found to have a reasonable prospect of proceedings related to the employment of a person.<sup>19</sup> General police records related to occurrences involving the requester and other individuals did not meet the criteria of in relation to proceedings or anticipated proceedings.<sup>20</sup>

13 Order [PO-2157](#).

14 [Ontario \(Community and Social Services\) v. Doe](#), 2014 ONSC 239 (Div Ct.).

15 Order [MO-3664](#), [Brockville \(City\) v. Information and Privacy Commissioner, Ontario](#), 2020 ONSC 4413 (Div Ct.).

16 Order [MO-3664](#).

17 Order [PO-3572](#).

18 [Ministry of Correctional Services](#), cited above.

19 Order [PO-1783](#).

20 Order [PO-2434](#).

There must be a reasonable potential of such proceedings at the time the record was collected, prepared, maintained or used.<sup>21</sup> For example, records about creating a discrimination and harassment free environment and making recommendations on human rights matters did not establish the required connection to proceedings or anticipated proceedings.<sup>22</sup>

The term court means a judicial body presided over by a judge. To be a tribunal or other entity, the body or person must similarly be one which can preside over a proceeding.<sup>23</sup> For example, this includes grievance arbitration,<sup>24</sup> wrongful dismissal suits,<sup>25</sup> disciplinary proceedings under the *Police Services Act*,<sup>26</sup> and hearings before the Grievance Settlement Board.<sup>27</sup>

The record, once excluded, remains excluded even if the tribunal proceedings are completed, or are no longer anticipated.<sup>28</sup>

## Negotiations or anticipated negotiations

For section 65(6)2 of FIPPA or section 52(3)2 of MFIPPA to apply, the institution must establish that the records in question were collected, prepared, maintained or used in relation to negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution. These negotiations or anticipated negotiations must have taken or will take place between the institution and a person, bargaining agent or party to a proceeding or anticipated proceeding. This includes records regarding the negotiation of terms and conditions of employment of a unionized employee.<sup>29</sup>

## Meetings, consultations, discussions or communications

For section 65(6)3 of FIPPA or section 52(3)3 of MFIPPA to apply, the institution must establish that the records in question are in relation to meetings, consultations, discussions or communications about labour relations or employment-related matters in which they have an interest.

This means more than a mere curiosity or concern and refers to matters involving the institution's own workforce.<sup>30</sup> The records are excluded only if the meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has

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21 Orders [P-1223](#) and [PO-2105-F](#).

22 Order [P-1547](#).

23 Order [M-815](#).

24 Orders [M-832](#) and [PO-1769](#).

25 Order [PO-4052](#).

26 Order [MO-1433-F](#).

27 Order [PO-2105-F](#).

28 Orders [MO-1576-F](#), [MO-1744](#) and [PO-2038](#). See also *Ontario (Solicitor General) v. Mitchinson*, 2001 CanLII 8582 (ON CA) (leave to appeal refused [2001] S.C.C.A. No. 509).

29 Orders [M-861](#), [PO-1648](#) and [MO-2337](#).

30 *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above.

an interest as an employer. For example, the meetings, consultations, discussions and communications that took place between the government and physicians, and the work of the Physician Services Committee that was discharging its mandate on their behalf, fell within labour relations.<sup>31</sup>

The phrase labour relations or employment-related matters has also been found to apply to:

- a job competition<sup>32</sup>
- an employee's dismissal<sup>33</sup>
- a worker's compensation claim<sup>34</sup>
- a voluntary exit program<sup>35</sup>
- a review of workload and working relationships.<sup>36</sup>

Matters related to the actions of employees where an institution does not have an interest as employer are outside the scope of this exclusion.<sup>37</sup> The exemption was found not to apply to:

- an organizational or operational review<sup>38</sup>
- litigation in which the institution may be found vicariously liable for the actions of its employee.<sup>39</sup>

## Sections 65(7) of FIPPA and 52(4) of MFIPPA exceptions

All the exceptions are specific types of records in the custody or control of an institution to which the act applies.

Subclauses 1-3 of sections 65(7) of FIPPA and 52(4) of MFIPPA relate to the actual agreements rather than to documents that might be part of those agreements, such as personal records<sup>40</sup> or a letter leading to an agreement.<sup>41</sup> Under subclause 3, performance agreements are not agreements resulting from negotiations.<sup>42</sup> Subclause 3 also did not apply to a contract between an institution and a numbered company as the company was not an employee but an independent contractor.<sup>43</sup>

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31 *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.).

32 Orders **M-830** and **PO-2123**.

33 Order **MO-1654-I**.

34 Order **P-1514**.

35 Order **M-1074**.

36 Order **PO-2057**.

37 *Goodis*, cited above.

38 Orders **M-941** and **P-1369**.

39 Orders **PO-1772**, **PO-1905** and *Goodis*, cited above.

40 Order **MO-1470**.

41 Order **MO-1941**.

42 Order **PO-2962**.

43 Order **PO-2520**.

Under subclause 4, an early retirement package consisting of a proposal and cover letter including calculation numbers was within scope of the exception.<sup>44</sup> Alternatively, cost sheets, invoices and receipts related to expenses owed to third parties do not fall under this exception.<sup>45</sup>

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44 Order **M-797**.

45 Order **MO-3314**.