DOCKET NOs: C34561, C34562, C34563
DATE: August 8, 2001

COURT OF APPEAL FOR ONTARIO

CATZMAN, DOHERTY AND SIMMONS JJ.A.

IN THE MATTER OF the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31	)	**DOCKET: C34561**
B E T W E E N:	)	
SOLICITOR GENERAL and MINISTER OF CORRECTIONAL SERVICES Appellant/Applicant	)	Sara Blake and Priscilla Platt for the appellant Solicitor General and Minister of Correctional Services
- and -	)	Don Bourgeois for John Doe, Requester
TOM MITCHINSON, Assistant Information and Privacy Commissioner of Ontario, and JOHN DOE, Requester Respondents	)	William S. Challis and John Higgins for the respondent Tom Mitchinson Assistant Commissioner
IN THE MATTER OF the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31	)	**DOCKET: C34562**
B E T W E E N:	)	
SOLICITOR GENERAL and MINISTER OF CORRECTIONAL SERVICES Appellant/Applicant Respondent	)	
- and -	)	
TOM MITCHINSON, Assistant Information and Privacy Commissioner of Ontario, and JANE DOE, Requester Appellant	)	

B E T W E E N:	)	
	)	**DOCKET: C34563**
THE ATTORNEY GENERAL FOR ONTARIO	)	
Appellant/Applicant	)	
- and -	)	
TOM MITCHINSON, Assistant Information and Privacy Commissioner of Ontario, and JOHN DOE, Requester	)	
Respondents	)	**Heard: February 7, 2001**

On appeal from the order of the Divisional Court (Justices E. Patrick Hartt, Michael R. Meehan and Lawrence C. Kozak) dated March 20, 2000.

SIMMONS J.A.:

[1] These three appeals, which were heard together, arise from three unrelated requests by individuals ("requesters") for access to information in the possession of Ontario government ministries. In each case, the responsible government official denied access to the records on the basis that the records fell within s. 65(6) of the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 (the "*Act*") and were not therefore subject to the Act. In each case, the Assistant Privacy Commissioner sitting on appeal from that decision held that the records did not fall within s. 65(6) and were therefore subject to the *Act*. The respective ministries challenged each ruling by way of judicial review application. The Divisional Court heard the applications together and, applying a reasonableness standard of review, dismissed the applications. This court granted leave to appeal. I would allow the appeals. In my view, the Assistant Privacy Commissioner's rulings are reviewable on a correctness standard. On the correct interpretation of s. 65(6), the *Act* does not apply to the records sought by the requesters.

[2] The *Act* provides rights of access to records in the custody or control of Ontario government "institutions". It also protects the privacy of personal information contained in such records. When a person requests access to records in the custody or control of an institution, the 'head' of the institution is responsible for determining whether the records should be disclosed in accordance with the principles set out in the *Act*.

[3] Although in the custody or control of an Ontario government institution, records relating to "[p]roceedings or anticipated proceedings before a court, tribunal or other entity relating to labour

relations or to the employment of a person by the institution" are excluded from the *Act* by s. 65(6)1. Similarly, records relating to "[m]eetings, consultations, discussions, or communications about labour relations or employment-related matters in which the institution has an interest" are excluded from the *Act* by s. 65(6)3 even though in the possession of a government institution.

[4] In each of these three appeals, the head of the relevant institution determined the records in issue were excluded from the *Act* by s. 65(6)3. In one instance, the head determined the records were also excluded by s. 65(6)1.

[5] On appeal, the Assistant Privacy Commissioner determined that the words "in which the institution has an interest" as found in s. 65(6)3 of the *Act* refer to "a legal interest", in the sense of "having the capacity to affect the legal rights or obligations of the institution". He also found there were no employment-related issues pending or reasonably foreseeable in relation to the records forming the subject matter of any of the three requests. He accordingly ruled that the respective ministries no longer have an interest in the records requested and that the records are not therefore excluded from the *Act* by s. 65(6)3. In the case also involving s. 65(6)1, the Assistant Privacy Commissioner determined the exclusion provided by that subsection did not apply because there were no existing proceedings or anticipated proceedings before a court, tribunal or other entity. He ordered the respective ministries to deliver a decision concerning disclosure in accordance with the principles set out in the *Act*.

[6] In a brief endorsement, the Divisional Court determined the standard of review of the Assistant Privacy Commissioner's decisions is reasonableness, but in any event, confirmed his interpretation of s. 65(6) of the *Act* if the appropriate standard of review is correctness.

[7] Applying a correctness standard of review, in my view, the Assistant Privacy Commissioner erred in his interpretation of s. 65(6) in two respects, first, by restricting the meaning of "interest" to "legal interest" in s. 65(6)3, and second, by introducing an erroneous time element into both s. 65(6)1 and s. 65(6)3.

Background

[8] The factual circumstances surrounding the three requests for disclosure and a brief summary of the decision of the Assistant Privacy Commissioner in relation to each request are set out below.

Request to Ministry of the Solicitor General and Correctional Services for Information Relating to the Take-Over of Municipal Policing Duties by the O.P.P. -- PO-1658

[9] The requester sought disclosure of the following information:

- What ranks have been assigned by the O.P.P. to former Chiefs of Police of police services disbanded in favour of O.P.P. policing, during the period 1988 to the present time?

- What is the highest educational level held by former Chiefs of Police at the time of joining the O.P.P.?

[10] The Ministry provided the requester with certain information about the rank determination process. It also advised him that "the rank Determination Board has concluded that Chiefs of Police be appointed at the ranks of Constable, Sergeant, Staff Sergeant, and Inspector." It denied access to additional information on the basis that the specific information requested was excluded from the *Act* pursuant to s. 65(6)3.

[11] The requester appealed the Ministry's decision to the Privacy Commissioner. The requester clarified that he was not seeking information about individual former municipal Chiefs of Police. Rather, he wanted to know the number of former Chiefs assigned to each rank at the time of joining the O.P.P., and the numbers who had achieved particular levels of formal education at that time.

[12] The Assistant Privacy Commissioner reviewed the provisions of ss. 65(6) and 65(7) of the *Act*. Those sections provide as follows:

> 65(6) Subject to subsection (7), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> 1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
>
> 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.
>
> 3. Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.
>
> 65(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.

[13] He determined that "[t]he interpretation of sections 65(6) and (7) is a preliminary issue which goes to the application of the *Act* to the requested records." He found those subsections "record-specific and fact-specific" in that a record would remain within "the Commissioner's jurisdiction" if it fell within one of the exceptions listed in s. 65(7), even though it initially fell within s. 65(6). He found the requested records met the first two criteria set out in s. 65(6)3 in that i) they were collected, prepared, maintained or used by the Ministry or on its behalf and ii) the collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications. He found the records also clearly related to an employment-related matter. He considered the real issue was whether it was an employment related matter in which the Ministry "has an interest".

[14] On that issue, he said the following:

> Previous orders of this office have held that an interest is more than mere curiosity or concern. An "interest" for the purposes of section 65(6)3 must be a legal interest in the sense that the matter in which the Police have an interest must have the capacity to affect the legal rights or obligations of the Police (Orders P-1242 and M-1147).
>
> Several recent and relevant orders have considered the question of whether a 'legal interest' existed for the purposes of section 65(6)3 or its equivalent in the *Municipal Freedom of Information and Protection of Privacy Act*. . . . The conclusion of this line of orders has essentially been that for a 'legal interest' to exist, an institution must establish an interest that has the capacity to affect its legal rights or obligations, and that there must be a reasonable prospect that this interest will be engaged. The passage of time, inactivity by the parties, loss of forum or conclusion of a matter have all been considered in arriving at a determination of whether an institution has a legal interest in the records.
> . . .
>
> I accept that the Ministry has a legal obligation to properly discharge its responsibilities under the *Police Services Act*. However . . . the mere existence of legal responsibilities under a statute is insufficient

> to establish the third requirement of section 65(6)3. There is no evidence before me to suggest that there is any ongoing dispute or other employment-related matter involving the Ministry and the appellant, or any other person for that matter, that has the capacity to affect the Ministry's legal rights or obligations. The appellant is no longer an employee of the O.P.P., and I have been provided with no evidence of any unresolved grievances from his time of employment. There are also no apparent grounds for complaint under the human rights Code, and I have been provided with no evidence of any other statutory or common law basis for redress available to the appellant.
>
> Accordingly, I find that, in the circumstances of this appeal, there is no employment-related matter pending or reasonably foreseeable which has the capacity to affect the legal rights or obligations of the Ministry, and I find that the Ministry has not demonstrated that it has sufficient legal interest in the records to bring them within the ambit of section 65(6)3.

[15] In the result, the Assistant Privacy Commissioner ordered the Ministry to issue a decision letter to the requester concerning his request.

Request to Ministry of the Solicitor General and Correctional Services for a Copy of a Public Complaint File Relating to a Complaint made by the Requester and her Husband to the Police Complaints Commission -- PO-1618

[16] In 1992, the requester's husband alleged he had been assaulted. He subsequently complained that O.P.P. officers assigned to the matter failed to thoroughly investigate the incident. When the O.P.P. determined his complaint about the officers was not substantiated, the requester's husband asked for a review by the Police Complaints Commissioner. The requester later asked for a copy of the Police Complaints Commission file. The Ministry denied the request on the basis that the records were excluded from the *Act* by ss. 65(6)1 and 3.[1]

[17] The Assistant Privacy Commissioner analyzed s. 65(6)3 in essentially the same fashion as outlined above. He concluded that the O.P.P. had an obligation under the *Police Services Act*, R.S.O. 1990, c. P.15 to investigate the complaint against the police officer[s] and that "this constituted a legal interest in an employment-related matter at the time of the investigation". However, he found that as six years had passed and he had not been provided with any evidence to suggest "there is an outstanding interest in the investigation that has the capacity to affect the O.P.P.'s legal rights or obligations . . . there is no matter pending or reasonably foreseeable which has the capacity to affect the Ministry's legal rights or obligations." He also found the records were not excluded by s. 65(6)1 of the *Act* as there were no existing proceedings or anticipated proceedings before a court tribunal

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[1] A complainant is separately entitled to a copy of the investigation report, the decision and the reasons for decision of the Police Complaints Commission by virtue of ss. 87 and 90(5) of the *Police Services Act*, R.S.O. 1990, c. P.15.

or other entity. He ordered the Ministry to deliver a decision letter to the requester concerning her request.

Request to Ministry of the Attorney General for a Copy of all Records Relating to a Job Competition for the Position of Legal Counsel, Ministry of Consumer and Commercial Relations Legal Services Branch -- PO-1627

[18] The requester was an unsuccessful candidate for a position posted on the Association of Law Officers of the Crown Job Transfer List, namely, legal counsel with the Legal Services Branch of the Ministry of Consumer and Commercial Relations. He requested access to a copy of all records relating to the job competition that was conducted under the *Public Service Act*, R.S.O. 1990, c. P.47, including copies of the job description, of the questions used at his interview, of the model answers, of the answers he provided as recorded by the panel and of the draft model factum and legal opinion. The Ministry denied the request on the basis that the records fell outside the *Act* by virtue of s. 65(6)3. It subsequently clarified that a job description, model factum and model answers were not prepared for the competition.

[19] Again, the Assistant Privacy Commissioner analyzed s. 65(6)3 in the same fashion as outlined above. He accepted that the Ministry's responsibilities as an employer to adhere to the *Ontario Human Rights Code*, R.S.O. 1990, c. H.19 during the recruitment process "constituted a legal interest in an employment-related matter at the time of the job competition". However, he found that the "recruitment process has been completed, and the appellant has provided convincing arguments that there are no outstanding interests in this job competition process that have the capacity to affect the Ministry's legal rights or obligations". He said, "there is no employment-related matter pending or reasonably foreseeable which has the capacity to affect the Ministry's legal rights or obligations . . .". He found that the Ministry had not demonstrated a "sufficient legal interest in the records to bring them within the ambit of s. 65(6)3". Again, he ordered the Ministry to deliver a decision letter to the request er concerning his request.

Other Relevant Provisions of the *Act*

[20] The purposes of the *Act* are set out in s. 1 which provides:

> 1. The purposes of this Act are,
>
> (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.

[21] The general right of access to records "in the custody or under the control of an institution" is set out in s. 10 of the *Act*. Sections 12 to 22 of the Act provide both mandatory and discretionary exemptions from disclosure. Section 23 provides for an override of certain exemptions "where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption". Section 65 contains a miscellaneous list of records that are excluded from the *Act*. Without exception, the exclusions are framed as records to which the "*Act* does not apply".

Divisional Court Decision

[22] The Divisional Court delivered reasons applicable to all three applications by endorsement in the application relating to the request for disclosure of the Police Complaints Commission file. The relevant portions of that endorsement are as follows:

> 4. Counsel for both the Ministry and the Commission agreed that an employment-related matter was involved.
>
> 5. Counsel for the Ministry argued that the amendment of which subsection 65(6) and (7) were a part was passed for the purpose of putting the government into the same position as a private employer with relation to employment-related records. We, are of the opinion, that so classifying the amendment is to state the proposition too broadly. Subsection (3) says "employment-related records in which the institution has an interest". [The Ministry] argues that all employment-related records are not subject to the *Act* and that ownership means "ownership or management interest"; and that in using the words "in which the institution has an interest", the legislature was excluding employment records of employees of private employers which might for some reason be in the possession of a government institution, for example, the Ministry of Labour. We do not see any merit in this explanation for the use of the phrase in subs. 3.
>
> 6. The Commissioner interpreted the words "in which the institution had an interest" in a legally oriented sense.
>
> 7. The Commissioner held that the records in question related to an employment matter in which the institution had an interest -- but that six years had passed and there was currently no outstanding interest in the investigation that had the capacity to affect the institution's legal rights or obligations and therefore the records did not fit within the scope of s. 65(6)3 and were subject to the *Act*.

> 8. Re Standard of Review -- It is argued on behalf of the Ministry that in interpreting s. 65(6) in particular, the Commissioner was adding to his jurisdiction and therefore under the Court of Appeal decision in *Walmsley*[2] the standard of review is correctness. In our view, the records in question were in the control of the Ministry and that the Commissioner, in interpreting his home statute, and in adopting a pragmatic and functional approach was entitled to deference and a standard of reasonableness applies. Even if we were wrong in this, and the standard is correctness, we would dismiss the application. No costs.

Analysis

Standard of Review

[23] The Ministries contend the appropriate standard of review is correctness while the Privacy Commissioner contends that the appropriate standard of review is reasonableness.

[24] Rather than focusing on classifying issues as jurisdictional or otherwise, the Supreme Court of Canada has adopted a "pragmatic and functional approach" to determining the appropriate standard of review of the decisions of administrative tribunals. In *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 at pp. 1004-05, Bastarache J. set out the general principles governing this approach and also confirmed the emergence of "reasonableness" as a third recognized standard, in addition to the traditional standards of "correctness" and "patent unreasonableness", within the spectrum of standards of review:

> The central inquiry in determining the standard of review exercisable by a court of law is the legislative intent of the statute creating the tribunal whose decision is being reviewed. More specifically, the reviewing court must ask: "*[W]as the question which the provision raises one that was intended by the legislators to be left to the exclusive jurisdiction of the Board?*"... [emphasis added].
>
> Since *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, this Court has determined that the task of statutory interpretation requires a weighing of several different factors, none of which are alone dispositive, and each of which provides an indication falling on a spectrum of the proper level of deference to be shown the decision in question. This has been dubbed the "pragmatic and functional" approach. This more nuanced approach in determining legislative intent is also reflected in the range of possible standards of review. Traditionally, the "correctness" standard and the "patent unreasonableness" standard were the only two approaches available

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[2] *Walmsley v. Ontario (Attorney General)* (1997), 34 O.R. (3d) 611 (Ont. C.A.).

> to a reviewing court. But in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, a "reasonableness simpliciter" standard was applied as the most accurate reflection of the competence intended to be conferred on the tribunal by the legislator. Indeed, the Court there described the range of standards available as a "spectrum" with a "more exacting end" and a "more deferential end" (para. 30).
>
> Although the language and approach of the "preliminary", "collateral" or "jurisdictional" question has been replaced by this pragmatic and functional approach, the focus of the inquiry is still on the particular, individual provision being invoked and interpreted by the tribunal. Some provisions within the same Act may require greater curial deference than others, depending on the factors which will be described in more detail below. To this extent, it is still appropriate and helpful to speak of "jurisdictional questions" which must be answered correctly by the tribunal in order to be answered *intra vires*. But it should be understood that a question which "goes to jurisdiction" is simply descriptive of a provision for which the proper standard of review is correctness, based upon the outcome of the pragmatic and functional analysis. In other words, "jurisdictional error" is simply an error on an issue with respect to which, according to the outcome of the pragmatic and functional analysis, the tribunal must make a correct interpretation and to which no deference will be shown.

[25] He then reviewed the factors to be considered in the course of the analysis and a variety of considerations applicable to each.[3] Those factors, and the considerations applicable to them that are relevant for the purposes of this appeal, may be conveniently summarized as follows:

i. presence or absence of a privative clause -- the presence of a full privative clause is a strong indication in favour of deference; the absence of a privative clause may or may not imply a higher standard of review, depending on other factors present;

ii. expertise -- consideration of three matters is required: the nature of the expertise of the tribunal, a comparison of the expertise of the tribunal to that of the court (relative expertise), and a consideration of the specific decision in issue in relation to that expertise;

iii. purpose of the act as a whole, and the provision in particular -- a lower standard of review may be indicated where the act and the provision in

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[3] See pp. 1005-1011

particular require consideration of "polycentric issues" requiring balancing of a wide range of interacting interests and considerations; and

iv. the nature of the problem: a question of law or fact -- questions of fact generally signal deference whereas "a serious question of general importance" more likely implies a higher standard of review.

[26] The Privacy Commissioner submits the Supreme Court of Canada has thus signaled that reviewing courts must proceed cautiously when assessing the jurisdiction of administrative tribunals. Though charged with the important task of ensuring tribunals do not exceed their legislated mandate, courts must be careful not to limit a tribunal's functions in a manner not intended by the legislature. The provisions of a tribunal's enabling statute do not always admit of one "correct" meaning. In order to promote the public policy reflected in the statute, logically, such provisions should be left with the tribunal for an interpretation informed by its specialist perspective.[4]

[27] The Privacy Commissioner says the records now excluded by s. 65(6)[5] are ones over which she formerly exercised decision-making authority. The interpretation of s. 65(6), like the interpretation of the exemption provisions,[6] engages the Privacy Commissioner in a "context sensitive", "record by record", determination aimed at reflecting the legislature's choice between the competing values of access and confidentiality. She relies on the fact that courts have consistently held that the standard of review of her decisions relating to the interpretation of rights of access and exemptions under the *Act* is reasonableness. Balancing the objectives set out in the *Act* lies at the heart of her specialized expertise. She asserts the legislature cannot be presumed to have intended she should now have lesser expertise or be accorded lesser deference. The applicable standard of review of her interpretation of s. 65(6) should therefore be reasonableness.

[28] In my view, an application of the *Pushpanathan* factors to the circumstances of this case indicates that the appropriate standard of review is correctness.

[29] Relative expertise is no doubt a highly significant factor in the determination of the appropriate standard of review. This court recognized the expertise of the Privacy Commissioner in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 164 D.L.R. (4th) 129 (Ont. C.A.) as follows:

> [T]he commissioner is required to develop and apply expertise in the management of many kinds of government information, thereby acquiring a unique range of expertise not shared by the courts. The

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[4] Relying on *National Corn Growers Assn. v. Canada (Canadian Import Tribunal)* (1990), 74 D.L.R. (4th) 449 per Wilson J. at pp. 456-63 (S.C.C.).

[5] S. 65(6) was added to the *Act* by a package of amendments made in 1995.

[6] For example, s. 17(1) provides a mandatory exemption for "third party" information, including "labour relations information", where disclosure could reasonably be expected to cause commercial or competitive harm.

> wide range of the commissioner's mandate is beyond areas typically associated with the court's expertise. . . . the commission is a specialized agency which administers a comprehensive statute regulating the release and retention of government information. In the administration of that regime, the commissioner is called upon not only to find facts and decide questions of law, but also to exercise an understanding of the body of specialized expertise that is beginning to develop around systems for access to government information and the protection of personal data. The statute calls for a delicate balance between the need to provide access to government records and the right to the protection of personal privacy. Sensitivity and expertise on the part of the commissioner is all the more required if the twin purposes of the legislation are to be met.[7]

[30] While acknowledging the relative expertise of the Privacy Commissioner in matters requiring it, in my view the very wording of s. 65(6) indicates her expertise is not engaged in its interpretation. By using the words "this Act does not apply", the legislature has distinguished exclusions from exemptions, and has declared that the "delicate balanc[ing] between the need to provide access to government records and the right to protection of personal privacy", which engages the expertise of the Privacy Commissioner, plays no role in relation to the enumerated records. Accordingly, relative to the court, the Privacy Commissioner possesses no particular expertise that is significant to the interpretation of the section. In my view, this wording also signifies the legislature's intention that the Privacy Commissioner not have a determinative say in the interpretation of the section. Had it viewed the matter otherwise, it would not have excluded the enumerated records from the operation of the *Act*.

[31] In short, when applied to the particular circumstances presented, I consider the *Pushpanathan* factors favour correctness as the appropriate standard of review. This conclusion appears to be consistent with the decision of this court in *Walmsley, supra*. There, Goudge J.A. found s. 10(1) of the *Act* to be jurisdiction-limiting, in the sense that records not "in the custody or under the control of" an institution are not subject to the *Act* and are therefore beyond the jurisdiction of the Privacy Commissioner. Using a functional and pragmatic approach, he determined the appropriate standard of review of a decision interpreting s. 10(1) to be correctness, based on that finding, the absence of a privative clause, and the conclusion that no particular expertise was required for the interpretation of the operative words of the section. Particularly in the latter respect, s. 10(1) and s. 65(6) share a common characteristic.

Was the Assistant Commissioner's Interpretation of ss. 65(6)1 and 3 of the *Act* Correct?

[32] In my view, the Assistant Commissioner erred in his interpretation of s. 65(6) in two respects: first, by restricting the meaning of "interest" to "legal interest" in s. 65(6)3; and second, by introducing a time element into the section, when none exists. He introduced a time element into

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[7] Quoting Campbell J. in *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 at pp. 782-783.

subclause 1[8] by requiring that any proceedings "be current, anticipated, or in the reasonably proximate past" and into subclause 3[9] by requiring that an institution "establish an interest that has the capacity to affect its legal rights . . . and that there . . . be a reasonable prospect that this interest be engaged".

[33] I will repeat the relevant provisions for ease of reference:

> 65(6) Subject to subsection (7), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> 1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
>
> 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.
>
> 3. Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.
>
> 65(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

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[8] PO-1658 at p. 10.

[9] PO-1618 at p. 4.

> reimbursement for expenses incurred by the employee in his or her employment.

[34] 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.[10] 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.

[35] As already noted, s. 65 of the *Act* contains a miscellaneous list of records to which the *Act* does not apply. Subsection 6 deals exclusively with labour relations and employment-related matters. Subsection 7 provides certain exceptions to the exclusions set out in subsection 6. Examined in the general context of subsection 6, the words "in which the institution has an interest" appear on their face to relate simply to matters involving the institution's own workforce. Subclause 1 deals with records relating to "proceedings or anticipated proceedings . . . relating to labour relations or to the employment of a person *by the institution*" [emphasis added]. Subclause 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]. Subclause 3 deals with records relating to a miscellaneous category of events "about labour relations or employment-related matters in which the institution has an interest". Having regard to the purpose for which the section was enacted[11], and the wording of the subsection as a whole, the words "in which the institution has an interest" in subclause 3 operate simply to restrict the categories of excluded records to those records relating to the institutions' own workforce where the focus has shifted from "employment of a person" to "employment-related matters". To import the word "legal" into the subclause when it does not appear, introduces a concept there is no indication the legislature intended.

[36] As for the time element introduced into subsection 6, I note that in dealing with the request for access to the Police Complaints Commission file, the Assistant Privacy Commissioner acknowledged the stated purpose of the package of amendments by which s. 65(6) was added to the *Act* in 1995 and articulated a purposive approach to the interpretation of the section:

> I am also not persuaded by the Ministry's argument that because the wording in the section does not expressly say so, there can be no time limitations associated with section 65(6). In my view, section 65(6) must be understood in context, taking into consideration both the

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[10] PO-1618 at p. 4; see also PO-1242 at pp. 7-10 where the Assistant Privacy Commissioner analogized the issue to "the requirement in civil procedure that in order to be added as a party to a proceeding a party must "have an interest" in the subject matter of the proceeding".

[11] As part of "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": Bill 7, 1st Session, 36th Legislature, 1995; "[a]lso, we propose to amend the *Freedom of Information and Protection of Privacy Act* ... to ensure the confidentiality of labour relations information": Hon. David Johnson (Chair of Management Board of Cabinet), *Official Report of Debates*, October 4, 1995.

> stated intent and goal of the Labour Relations and Employment Statute Law Amendment Act (Bill 7) -- to restore balance and stability to labour relations and to promote economic prosperity; and overall purposes of the *Act* -- to provide a right of access to information under the control of institutions and to protect the privacy of and provide access to personal information under the control of institutions and to protect the privacy of and provide access to personal information held by institutions. When proceedings are current, anticipated, or in the reasonably proximate past, in my view, there is a reasonable expectation that a premature disclosure of the type of records described in section 65(6)1 could lead to an imbalance in labou r relations between the government and its employees. However, when proceedings have been completed, are no longer anticipated, or are not in the reasonably proximate past, disclosure of these same records could not possibly have an impact on any labour relations issues directly related to these records, and different considerations should apply.[12]

[37] As already noted, the records described in s. 65(6) are expressly excluded from the *Act*. Though the *Act* as a whole provides a context for understanding the words of a specific section, the purposes section of an *Act* does not mandate introduction of language into a statutory provision that is otherwise clear.[13]

[38] In my view, the time sensitive element of subsection 6 is contained in its preamble. The *Act* "does not apply" to particular records if the criteria set out in any of subclauses 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 subclauses 1 to 3 cease to apply.

[39] This interpretation also makes practical sense for the purposes of administration of the *Act*. Institutions are required by s. 39(2) of the *Act* to give notice to affected individuals "[w]here personal information is collected on behalf of the institution". Retention and disposal of personal information is to be dealt with as prescribed by regulation. In the absence of clear language, one would not expect that institutions are required to continually review their records on an ongoing basis to assess the applicability of the *Act*.

[40] In my view, therefore, the Assistant Privacy Commissioner was wrong to limit the scope of the exclusions in the way that he did.

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[12] PO-1618 at p. 10.

[13] Ruth Sullivan, *Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994), at p. 267.

Conclusion

[41] For the reasons given, I would allow the appeals and quash the decisions of the Assistant Commissioner. Insofar as PO-1618 is concerned, I would quash the decision of the Assistant Commissioner only as it relates to part 2 of the request, being the only portion of the request in issue on this appeal.

[42] In my view, it is not for this court on an application for judicial review to make any form of declaration as to whether the records are, or are not, excluded from the *Act*. The effect of quashing the decisions of the Assistant Privacy Commissioner will simply be that the decisions of the heads of the respective Ministries will be restored.

[43] I would make no order as to costs.

SIMMONS J.A.
I agree — M. A. CATZMAN J.A.
I agree — DOHERTY J.A.

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