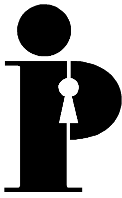

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER M-936

Appeal M_9700006

Metropolitan Toronto Police Services Board

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NATURE OF THE APPEAL:

The Metropolitan Toronto Police Services Board (the Police) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to the dockets listing the names of the police officers charged under the Police Services Act (the PSA) for the period of 1986 to 1996. These dockets, posted daily outside the Trials Office in Police Headquarters, record the name, rank, badge number and alleged offence(s) relating to police officers scheduled to appear that day before the police discipline tribunal. The request was made by two journalists.

The Police denied access to the records, claiming that they fall within the parameters of section 52(3) of the Act, and therefore outside the scope of the Act

The journalists appealed the decision of the Police.

This office sent a Notice of Inquiry to the journalists and the Police seeking representations on the jurisdictional issue raised by sections 52(3) and (4) of the Act. Representations were received from the Police and counsel on behalf of the journalists. For ease of reference, I will refer to counsel as the "appellant" in this order.

After having read the submissions of the parties, I concluded that there were additional matters on which I required representations from the Police and the appellant prior to issuing my decision. Accordingly, I sent a Supplementary Notice of Inquiry to the Police and the appellant. Both parties provided additional submissions in response to the supplementary notice.

DISCUSSION:

PRELIMINARY MATTERS

Adequacy of the Decision Letter

The appellant submits that the decision letter of the Police was inadequate in that it failed to provide any reasons for denying access to the requested information. He states that the decision merely refers to sections of the Act and that it is insufficient "... to allow our client to make informed decisions and meaningful representations in this appeal".

Section 22(1)(b) of the Act sets out the requirements of the contents of a notice of refusal to give access to a record. This section reads:

> Notice of refusal to give access to a record or part under section 19 shall set out,
>
> (b) where there is such a record,
>
> (i) the specific provision of this Act under which access is refused,
>
> (ii) the reason the provision applies to the record,

(iii) the name and position of the person responsible for making the decision, and

(iv) that the person who made the request may appeal to the Commissioner for a review of the decision.

The decision letter issued by the Police advised that the records requested "no longer fall within the auspices of the Act". The letter went on to note that the records met the definition in subsections 52(3)1 and 52(3)3 of the Act and stated that "... These sections apply because ..." followed by a paragraph setting out the language of these sections.

In my view, the purpose of the inclusion of the above information in a notice of refusal is to put the requester in a position to make a reasonably informed decision on whether to seek a review of the head's decision (Orders 158, P-235 and P-324). Although these orders dealt with cases in which exemptions were at issue, I feel that their rationale is equally applicable in cases, such as the present, where the institution's decision relates to a jurisdictional issue.

In this case, I agree with the appellant that the decision letter of the Police should have provided him with **reasons** for the denial of access. A restatement of the language of the legislation is not sufficient to satisfy the requirement in section 29(1)(b)(ii) of the Act. It does not provide an explanation of why the exemptions claimed by the Police apply to the record. Section 29(1)(b)(i) already requires that the notice contain the provision of the Act under which access is refused.

Notwithstanding the inadequacy of the decision letter, the appellant has exercised his right of appeal and provided extensive representations which I have referred to in my disposition of all issues relating to the information in this order. In these circumstances, there would be no useful purpose served in requiring the Police to provide a new decision letter to the appellant.

Dockets Already Publicly Available

The appellant submits that the dockets are or were at one time publicly available. He states that they were created to identify the particular disciplinary hearing taking place and, as such, are posted on the wall beside the hearing room. He states that they have never been kept confidential and that his clients have always been kept apprised of upcoming matters. To illustrate the public availability of the records, the appellant has included a photograph of one such docket as part of his submissions.

On this basis, the appellant submits that:

> The Act clearly contemplates that, notwithstanding the personal or otherwise protected nature of the information sought, the information must be disclosed where that information forms the basis of a record that was publicly available. Section 37 provides that Part III of the Act, which is the protection of individual privacy, "does not apply to personal information that is maintained for the purpose of creating a record that is available to the general public".

Section 37 appears in the provincial Freedom of Information and Protection of Privacy Act (the provincial Act). It is the equivalent of section 27 of the Act, which is the applicable legislation in this appeal. Section 27 deals with the non-application of **Part II** of the Act, the section dealing with the collection and retention of personal information in the absence of an access request. This appeal relates to **Parts I** and **III** of the Act which deal with access requests and appeals.

Former Assistant Commissioner Tom Mitchinson dealt with an analogous issue in Order P-1255. That appeal involved a request by a ministry employee for access to human resource, investigation and grievance files concerning himself. The ministry denied access to all of the responsive records claiming that they fell within the parameters of section 65(6) of the provincial Act (section 52(3) of the Act), and therefore, outside the scope of the provincial Act.

Many of the responsive records originated with the requester or were supplied to him by the ministry when they were created. Others were public documents such as decisions of the Grievance Settlement Board. All of the records in the occupational health and safety file were already available to the requester through other disclosure mechanisms.

The former Assistant Commissioner considered whether there was "... any relevance to the fact that many of the records at issue in this appeal were authored by the appellant, previously provided to the appellant in other contexts, or are public documents readily available to the appellant and others."

He stated:

> In my view, on a plain reading of the words, there is nothing in sections 65(6) or (7) to support the view that records whose contents are already known to an appellant would be exceptions to the exclusions introduced by these new provisions. However, it is necessary to explore whether there are any principles of statutory interpretation which might produce such a result.

The former Assistant Commissioner then considered Orders M-444 and P-1014 in which Inquiry Officer John Higgins concluded that it would be an absurd result to apply the presumption against nondisclosure to personal information authored by or provided to an institution by a requester or to the personal information of other individuals which would clearly have been known to a requester.

He concluded:

> It might appear that a similar approach could be applied, in appropriate circumstances, when considering sections 65(6) and (7) of the Act. However, in my view, there is a significant difference in context which dictates the opposite result when considering these sections. In Orders M-444 and P-1014, there was no question that the Inquiry Officer was dealing with records which **were** subject to the Act. In that situation, the Act presumes a right of access unless an exemption applies, or the request is frivolous or vexatious, as set out in sections 10(1) and 47(1). Within that statutory context, non-disclosure of the particular

> information Inquiry Officer Higgins was considering would, indeed, have been absurd and contrary to the legislature's apparent intention, looking at the Act as a whole.
>
> I feel that the situation is different where non-disclosure results from an exclusion of records from the whole statutory access and privacy scheme. In my view, when a record is, on its face, outside the Act because of the application of section 65(6), there is no "presumptive" right of access against which to measure a result of non-disclosure and declare it absurd or unreasonable.

I agree with this conclusion and find that it is equally applicable to the facts in this appeal. That is, where, as in this case, an institution claims that records fall outside the scope of the Act and thus outside the jurisdiction of this office, the fact that a document may have been publicly available is not an exception to the exclusions set out in section 52(3).

Furthermore, as noted above, section 27, relied on by the appellant, deals with the non-application of **Part II** of the Act, the section dealing with the collection and retention of personal information. This request was made under **Part I** of the Act and the appeal is being conducted under **Part III**.

In Order M-96, former Assistant Commissioner Mitchinson considered the relationship between Parts II and III of the Act in the context of an appeal. In that case, the Ontario Secondary School Teachers' Federation (the Federation) had submitted a request under the Act to a school board for access to the home telephone numbers of its members. Both the Board and the Federation agreed that the requested information was the personal information of the members. One of the arguments made by the Federation was that the home phone numbers should be disclosed pursuant to sections 32(c) and (e) of the Act. These sections read as follows:

> An institution shall not disclose personal information in its custody or under its control except.
>
> (c) for the purpose for which it was obtained or compiled or for a consistent purpose;
>
> (e) for the purpose of complying with an Act of the Legislature or an Act of Parliament, an agreement or arrangement under such an Act or a treaty;

The former Assistant Commissioner stated:

> Section 32 is contained in Part II of the Act. This Part establishes a set of rules governing the collection, retention, use and disclosure of personal information by institutions in the course of administering their public responsibilities. Section 32 prohibits disclosure of personal information except in certain circumstances; it does not create a right of access. The Federation's request to the Board was made under Part I of the Act, and this appeal concerns the Board's decision to deny access. In my view, the considerations contained in Part II of the Act, and

> specifically the factors listed in section 32, are not relevant to an access request made under Part I.

This approach was followed in Orders P-679, P-940 and P-1014. On this basis, even if I were to entertain other provisions of the Act in assessing my jurisdiction under section 52(3), I would not consider the application of section 27 as it is not relevant to an access request under Part I of the Act.

I find that section 27 of the Act has no application to my determination of whether the records fall within section 52(3) of the Act.

JURISDICTION

The only matter remaining at issue in this appeal is whether the records fall within the scope of sections 53(3) and (4) of the Act. Prior to considering the application of these sections of the Act, I propose to examine the context in which the dockets are created, namely hearings conducted pursuant to the PSA.

Section 60(1) of Part V of the PSA provides the statutory authority for the holding of a disciplinary hearing to determine whether a police officer is guilty of misconduct. Section 69 establishes who may act for the chief of police as his delegate in the conduct of the proceedings. Section 60(3) addresses the recording and transcription of oral evidence given at the hearing. Section 61 sets out the available penalties upon a finding of misconduct, including dismissal, suspension, demotion and forfeiture of pay or time.

However, the PSA and the regulations made thereunder are silent as to the **manner** in which such hearings are to be conducted. Rather, it is the provisions of the Statutory Powers Procedure Act (the SPPA) which set out the minimum rules for the proceedings of certain tribunals. Both the Police and the appellant submit that section 3(1) of the SPPA outlines the legal authority for the application of the SPPA to police disciplinary hearings. This section states:

> Subject to subsection (2), this Act applies to a proceeding by a tribunal in the exercise of a statutory power of decision conferred by or under an Act of the Legislature, where the tribunal is required by or under such Act or otherwise by law to hold or to afford the parties to the proceeding an opportunity for a hearing before making a decision.

None of the exceptions set out in subsection 3(2) of the SPPA apply to those hearings authorized by section 60(1) of the PSA. Accordingly, I agree with the Police and the appellant that hearings before the police discipline tribunal into police misconduct are governed by the provisions of the SPPA.

Section 9(1) of the SPPA deals with the issue of whether a hearing should be open to the public as follows:

> An oral hearing shall be open to the public except where the tribunal is of the opinion that,

(a) matters involving security may be disclosed; or

(b) intimate financial or personal matters or other matters may be disclosed at the hearing of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure thereof in the interests of any person affected or in the public interest outweighs the desirability of adhering to the principle that the hearing be open to the public,

in which case the tribunal may hold the hearing in the absence of the public.

Both the Police and the appellant agree that section 9(1) applies to a hearing authorized by section 60(1) of the PSA. The Police have indicated that "... The Police Services Board was very specific in a decision several years ago that such a docket be prepared and posted on a daily basis **as a means to keep the public informed".** [my emphasis] Although it is true that the SPPA (and, in fact the PSA as well) does not require that a docket be prepared, the Police acknowledge that the docket sheets make the hearings more accessible to the public. This, in turn, further fulfills the public hearings requirement of section 9(1) of the SPPA.

I will now consider the application of sections 52(3)1, 52(3)3 and 4 to the dockets. These provisions read as follows:

(3) Subject to subsection (4), 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.

...

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

(4) 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.

The interpretation of sections 52(3) and (4) is a preliminary issue which goes to the Commissioner's jurisdiction to continue an inquiry.

Section 52(3) is record-specific and fact-specific. If this section applies to a specific record, in the circumstances of a particular appeal, and none of the exceptions in section 52(4) are present, then the record is excluded from the scope of the Act and not subject to the Commissioner's jurisdiction.

The Police submit that both sections 52(3)1 and 3 apply to exclude the dockets from the scope of the Act.

In order for a record to fall within the scope of paragraph 1 of section 52(3) of the Act, the institution (in this case the Police), must establish that:

1. the record was collected, prepared, maintained or used by the Police or on its behalf; **and**

2. this collection, preparation, maintenance or usage was in relation to proceedings or anticipated proceedings before a court, tribunal or other entity; **and**

3. these proceedings or anticipated proceedings relate to labour relations or to the employment of a person by the Police.

[Order P-1223]

In order to fall within the scope of paragraph 3 of section 52(3), the Police must establish that:

1. the record was collected, prepared, maintained or used by the Police on their behalf; **and**

2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; **and**

3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the Police have an interest.

[Order P-1242]

The Police submit that the docket sheets are prepared on a daily basis by the secretary in the Trials Office and posted outside the hearing room of the police discipline tribunal. They also submit that the docket is used to inform interested parties which discipline hearings will be heard in which room on a particular day. The Police further state that this preparation and usage is directly in relation to the proceedings in that the dockets are created for the purpose of advising the public of the particulars of the matters scheduled to be heard. Finally, relying on the findings of former Assistant Commissioner Tom Mitchinson in Order M-835, the Police submit that disciplinary hearings under the PSA before the police discipline tribunal constitute proceedings before an other entity.

Finally, with respect to whether these proceedings "relate to the employment of a person by the institution", the Police again rely on the findings of the former Assistant Commissioner in Order M-835 in which he found that Part V proceedings under the PSA relate to the employment of police officers by the institution. This finding was followed in Order M-840 as well, and on the reconsideration of this order in Order M-899.

In the Supplementary Notice of Inquiry, the parties were asked to comment on the application, if any, of Orders P-1345 and P-1346 to the dockets. These orders involved requests to the Ontario Labour Relations Board (the OLRB) for access to Board hearing files. The Board responded to the requests by claiming that, by virtue of section 65(6) of the provincial Freedom of Information and Protection of Privacy Act (the equivalent of section 52(3) of the Act), the hearing files were not accessible under the provincial legislation.

Inquiry Officer Donald Hale commented on this assertion, as follows:

> In the proceedings before the Board which resulted in the creation of the requested records, the employer was Hydro and not the Board. The only involvement of the Board in this matter was in its role as adjudicator.
>
> Section 65(6)1 refers to the collection, preparation, maintenance or use of records by or on behalf of an institution in proceedings before a court, tribunal or other entity. In my view, this does not extend to situations where the records relate to proceedings where the institution's involvement is in the role of adjudicator. Rather, in order to qualify as a collection, preparation, maintenance or use **by or on behalf of** the Board as an institution, in relation to the proceedings, it would have to be an entity subject to the processes of the adjudication body (itself), such as a party to the proceedings or a witness called to produce evidence which is relevant to the proceedings. By necessary implication, the institution's role in such proceedings must be in its capacity as an employer or former employer in order to bring the records within the scope of section 65(6)1.
>
> This interpretation is supported by references throughout section 65(6) to proceedings and negotiations relating to the "employment of a person by the institution", and in section 65(6)3, to "labour relations or employment-related

> matters in which the institution has an interest". In my view, an institution such as the Board, acting as an impartial adjudicator would not "have an interest" in a labour relations or employment-related matter before it, in the sense intended by section 65(6)3. Such an interest would be inconsistent with impartial adjudication.
>
> Therefore, in my view, the records were not collected, prepared, maintained or used by or on behalf of the Board in relation to the proceedings before itself in the sense intended by section 65(6)1. I find that the application of this section, on the basis of the Board's role in the proceedings before it, has not been established. I also note that, because the Board does not "have an interest" in the proceedings in the sense intended by section 65(6)3, this section also does not apply.

In their supplementary representations, the Police acknowledge that, as a result of the powers provided by the PSA, they play a dual role in the police disciplinary process - as both adjudicator and employer. They submit that these are not separate functions, but in the event that I should find that they are, they take the position that the docket sheets "are prepared on behalf of the employer and not as part of the tribunal function".

The Police further submit that:

> Although the docket is prepared by the secretary in the Trials Office, it is not done so in her capacity as secretary to the decision-maker but as an employee of this institution. It is merely her knowledge of the daily schedule and administrative information available to her which facilitates the creation of the "docket" on behalf of the employer, as confirmed with the present decision-maker in the Trials Office. At no time does the PSA or the SPPA obligate a decision-maker to prepare and post a docket sheet or any other similar document.

In his supplementary representations, the appellant has taken the position that the dockets are prepared on behalf of the police discipline tribunal in its role as adjudicator and not in its capacity as employer.

The appellant submits that the records fall outside the scope of section 52(3)1 because they are expressly prepared for the purpose of the hearing and it would not be reasonable to assume that such a record would be prepared in the absence of a hearing. With respect to the application of section 52(3)3, the appellant relies on the findings of Inquiry Officer Hale in Orders P-1345 and P-1346, quoted above, that the police discipline tribunal does not have an interest in the dockets in the sense intended by section 52(3)3, as such an interest "... would be inconsistent with impartial adjudication".

It is clear that the circumstances of this case differ from those in Orders P-1345 and P-1346 in that in those cases, the only involvement of the OLRB in the matter was in its role as adjudicator. In the present case, the Police have a dual role as both employer and adjudicator.
I disagree with the position of the Police that these functions are not separate. First of all, it is clear that the authority and, indeed the duty, to conduct the hearing comes from the PSA itself, but the manner in which the hearings are conducted stems from the SPPA. The source of the

open hearings concept stems from the provisions of the SPPA and, as the Police have noted, the preparation and posting of the dockets facilitates this function.

Moreover, the dockets are unlike the records at issue in Orders M-835 and M-840 which were found to fall within section 52(3)1 of the Act. Those records were disciplinary records consisting of such documents as letters, reports, memoranda, statements and transcripts which contained information related to the substance of the employment-related matter concerning the officer in question. In those orders it is clear that the records were prepared etc., by the Police in their function, and indeed, based on their statutory obligations, as an employer.

Thus, I find that in the context of police discipline hearings, the Police have a dual, but separate function. Furthermore, I find that the docket sheets were prepared as part of their tribunal function only. In my view, the fact that the dockets are prepared by the Trials Office secretary as an employee of the Police, rather than in her capacity as secretary to the decision-maker is not determinative. In my opinion, in the circumstances of this appeal, it is the function of the Police which is being exercised when the documents are prepared or used which is the relevant consideration. The dockets would not have been prepared or used by the Police were it not for the fact that they wished to apprise the public of the matters being heard by the police discipline tribunal.

Therefore, in my view, the dockets were not prepared or used by or on behalf of the Police in relation to the proceedings before the police discipline tribunal in the sense intended by section 52(3)1. I find that the application of this section, on the basis of the function of the Police in the creation of the records, has not been established.

With respect to section 52(3)3, I find that the Police, as employer, do not "have an interest" in the dockets in the sense intended by this section, as such an interest would be inconsistent with impartial adjudication.

Because of these findings, I need not consider the application of section 52(3)4 of the Act.

ORDER:

1. I order the Police to issue a decision letter to the appellant regarding access to the requested records, treating the date of this order as the date of the request.

2. I order the Police to provide me with a copy of the decision letter referred to in Provision 1 by sending it to my attention c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario M5S 2V1.

Original signed by: May 9, 1997
Anita Fineberg
Inquiry Officer