



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-1447

Appeal MA-010023-1

London Police Services Board



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NATURE OF THE APPEAL:

The London Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to copies of the statements provided to the Police by the appellant, a named police officer and other witnesses in relation to an incident which occurred on September 1, 2000. As a result of the incident, the appellant made a complaint to the Police about the conduct of a police officer. The Police located the responsive records and granted access only to the appellant's own statement. Access to the witnesses' and police officer's statements were denied pursuant to section 52(3) of the *Act*.

The appellant appealed the decision of the Police to deny access to these records. During the mediation of the appeal, the appellant narrowed the scope of his request to include only the four-page statement given by the police officer who was the subject of the appellant's complaint. As further mediation was not possible, the appeal was moved to the adjudication stage of the appeal process.

Initially, I decided to seek the representations of the Police on the application of section 52(3) to this record. The Police made representations which were shared, in their entirety, with the appellant, along with a copy of the Notice of Inquiry. The submissions of the Police refer to both sections 52(3)1 and 3. The appellant also made representations in response to the Notice.

DISCUSSION:

IS THE RECORD SUBJECT TO THE ACCESS PROVISIONS IN THE ACT?

The issue in this appeal is whether the records are excluded from the scope of the *Act* under sections 52(3) and (4).

These sections state:

- (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.
 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.
- (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.

Section 52(3) is record-specific and fact-specific. If this section applies to a specific record, in the circumstances of an appeal, and none of the exceptions listed in section 52(4) are present, then the *Act* does not apply to the records.

As noted above, the Police submit that, because of the operation of section 52(3)1 and 3, the record remaining at issue falls outside the scope of the *Act*. If section 52(3) applies to the records, and none of the exceptions found in section 52(4) applies, section 52(3) has the effect of excluding records from the scope of the *Act*.

Section 52(3) has no application outside the employment or labour relations context. Therefore, unless the Police establish that the anticipated proceedings for which the records are being maintained arise in an employment or labour relations context, the records do not relate to "labour relations or to the employment of a person by the institution", and section 52(3) does not apply

[Orders P-1545, P-1563, P-1564 and PO-1772].

Section 52(3)1

In order for the records to qualify under section 52(3)1, 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.

Requirements 1 and 2

I have examined the records and am satisfied that they were collected, prepared, maintained or used by the Police as part of an investigation, pursuant to the *Police Services Act* (the *PSA*), undertaken by the Police into the conduct of the officer who was the subject of the appellant's complaint.

In Order M-835, Assistant Commissioner Tom Mitchinson made the following findings:

- A disciplinary hearing conducted under section 60 of the *PSA* is a dispute or complaint resolution process conducted by a court, tribunal or other entity that has, by law, the power to decide disciplinary matters. As such these hearings are properly described as "proceedings" for the purpose of section 52(3)1.
- The Chief of Police or his delegate have the authority to conduct "proceedings," and the power, by law, to determine matters affecting legal rights and obligations, and is properly characterized as an "other entity" for the purposes of section 52(3)1.

I agree with the Assistant Commissioner's reasoning and adopt it for the purposes of this appeal. I therefore find that the collection, preparation, maintenance or usage of the records was in relation to anticipated proceedings under the *PSA* before an "other entity," the Chief of Police or his delegate. (Orders M-840, MO-1186, MO-1349). Accordingly, the first two requirements have been met.

Requirement 3

Orders of this office have concluded that proceedings under Part V of the *PSA* dealing with internal complaints against police officers "relate to the employment of a person by the institution" (Orders M-835, M-1347). I adopt this conclusion and find that the records relate to an internal Police investigation into the conduct of an officer employed by the Police.

Assistant Commissioner Mitchinson found in Order P-1618 that the requirements under section 65(6)1 [the provincial equivalent to section 52(3)1] are "time sensitive." He concluded that in order to meet these requirements, it must be established that the proceedings or anticipated proceedings referred to are current or are in the reasonably proximate past so as to have some continuing potential impact for any ongoing labour relations issues which may be directly related to the records. He went on to find:

In my view, section 65(6) must be understood in context, taking into consideration both the 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 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 labour 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.

The Police state that the investigation into the appellant's complaint by the delegate of the Police Chief was concluded on October 19, 2000. The appellant indicates that the investigation into his complaint by the Ontario Civilian Commission on Police Services (OCCPS) was concluded on January 23, 2001, some six months ago. I have not been provided with any evidence to demonstrate that any further action has been contemplated with respect to the appellant's complaint. Accordingly, I find that there are no "proceedings or anticipated proceedings before a court, tribunal or other entity" either existing or in the proximate past. The third requirement has therefore not been met and the record is not excluded under section 52(3)1.

Section 52(3)3

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 or 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.

Requirements One and Two of the Test

The Police submit that following the receipt of the appellant's complaint about the subject police officer, it initiated an investigation pursuant to Part V of the *PSA*. The records originally identified as responsive in this appeal, including the record remaining at issue, were then collected, prepared and maintained in connection with the investigation of the appellant's complaint by the delegate of the Chief of Police. In accordance with the findings above in my discussion of section 52(3)1, I find that the first two requirements of section 52(3)3 have also been satisfied.

Requirement Three of the Test

Section 52(3)3 requires that the meetings, discussions or communications must be "about labour relations or employment-related matters in which the institution has an interest."

Previous orders of this office have found that proceedings under Part V of the *PSA*, including an investigation of an internal complaint, relate to the employment of the police officer who was the subject of the investigation (Orders P-922, P-1583, PO-1796 and MO-1349). I agree with this reasoning and conclude that the record relates to an employment-related matter within the meaning of section 52(3)3.

The only remaining issue to be determined is whether this matter is one in which the Police "have an interest."

An interest is more than mere curiosity or concern. An "interest" for the purposes of section 52(3)3 must be a legal interest in the sense that the matter to be disclosed must have the capacity to affect the legal rights or obligations of the Police (Orders P-1242, M-1147). Other orders have concluded that for a "legal interest" to exist, 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 whether an institution has the requisite interest (Orders P-1575, P-1586, M-1128, P-1618, M-1161 and MO-1425).

The issue of whether the provisions of the *Act* require a "legal interest" to be ongoing for the exclusion in section 52(3)3 to apply was the subject of an application for judicial review to the Ontario Divisional Court. This court subsequently upheld the reasoning in the orders referred to above [*Ontario (Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)*, [2000] O.J. No. 1974 (Div. Ct), leave to appeal granted (June 29, 2000), Docs. M25698, M25699, M25700 (C.A.)]. Since no decision has yet been rendered by the Court of Appeal, I will follow the interpretation of the orders on this issue as they now stand.

The Police submit that:

Under Part V of the *Police Services Act*, records are prepared and maintained expressly for the purpose of satisfying a legislative requirement. Once the complaint has been investigated, where both the complainant and the officer are interviewed and statements taken, the Chief makes his/her decision, and the Chief notifies the complainant of the decision (i.e., founded, unfounded, frivolous and vexatious, etc.) The complainant then has a right of appeal, if he/she does not agree with the Chief's decision. These are matters in which the London Police clearly have "an interest".

Therefore, the complaint, as a matter of law, must be investigated and certain sanctions will follow if misconduct is found to have occurred. There is always a potential for civil proceedings. Given that we are sometimes in an adversarial relationship with the public, and that the statements and other evidence gathered could be subject to a civil summons to a witness, this is clearly a "legal interest".

As noted above in my discussion of section 52(3)1, the investigations by the Police and OCCPS under the *PSA* into the appellant's allegations of misconduct by an officer were completed some six months ago. I find that I have not been provided with sufficient evidence by the Police to lead me to the conclusion that the Police and OCCPS consider their investigations of the

allegations of wrongdoing by the officer to be ongoing. Similarly, the appellant makes it clear in his submissions that he too considers the investigation of his complaint to be completed.

Based on my review of the records and the submissions of the parties, I find that due to the passage of time, there is no reasonable prospect of the legal interests of the Police being engaged in this employment-related matter in such a way as would affect their legal rights or obligations. Specifically, as six months have elapsed since the conclusion of the OCCPS investigation, I find that the Police no longer have the requisite legal interest as these events are no longer in the reasonably proximate past. In my view, there no longer exists a reasonable prospect that the legal interests of the Police will be engaged.

Accordingly, I find that section 52(3)3 also does not apply and that the records are subject to the access provisions of the *Act*.

ORDER:

1. I order the Police to issue a decision letter to the appellant with respect to the record in accordance with sections 19 and 22 of the *Act*, using the date of this order as the date of the request.
2. I reserve the right to require the Police to provide me with a copy of the letter referred to in Provision 1.

Original Signed By: _____

Donald Hale
Adjudicator

_____ June 27, 2001