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

ORDER M-835

Appeal M_9600121

Metropolitan Toronto Police

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NATURE OF THE APPEAL:

The appellant is a former police officer with the Metropolitan Toronto Police Department (the Police). While employed with the Police, the appellant was the subject of an internal complaint which led to an investigation and ultimately to disciplinary charges against him under the Police Services Act (the PSA). These charges were dismissed. The appellant subsequently launched a civil action against the Police, alleging malicious prosecution and negligent prosecution. This lawsuit is still before the courts.

The appellant submitted a request to the Police under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to all records concerning his PSA disciplinary matter.

The Police identified approximately 1,000 pages of records, including letters, reports, minutes, memoranda, statements, court documents, transcripts, trial exhibits, copies of police officers' notebooks, handwritten notations, and other supporting documentation, which were prepared and collected prior to, during and after the appellant's disciplinary hearing.

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

The appellant appealed the decision of the Police.

This office sent a Notice of Inquiry to the appellant and the Police seeking representations on the jurisdictional issue raised by sections 52(3) and (4) of the Act. Representations were received from both parties.

DISCUSSION:

The only issue in this appeal is whether the records fall within the scope of sections 52(3) and (4) of the Act. 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.
>
> 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.

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 listed in 52(4) are present, then the record is excluded from the scope of the Act and not subject to the Commissioner's jurisdiction.

Section 52(3)1

In Order M-815, I stated that 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.

1. Were the records collected, prepared, maintained or used by the Police or on their behalf?

The Police submit that all of the records:

> . . . were collected, prepared, maintained and/or used by a number of [Police] employees, including the appellant's supervisor, Internal Affairs, the appellant and/or his counsel, command officers, the Trial Preparation Office, Reporting Centre and [other police officers involved with a related case], and the Metropolitan Toronto Police Services Board.

The appellant's representations do not deal specifically with this requirement.

Having reviewed the records, I agree with the Police, and find that the records were collected, prepared, maintained and/or used by the Police or on their behalf. Therefore, the first requirement of section 52(3)1 has been established.

2. Was this collection, preparation, maintenance and/or usage in relation to proceedings or anticipated proceedings before a court, tribunal or other entity?

In order to satisfy this requirement, the Police must establish that the disciplinary matter was a "proceeding"; that the proceeding was "before a court, tribunal or other entity"; and that the records were collected, prepared, maintained or used "in relation to" the "proceeding".

"proceedings before a court, tribunal or other entity"

According to the Police, they received an internal complaint, alleging misconduct by the appellant, pursuant to section 56(a) of the PSA, which states:

> A police officer is guilty of misconduct if he or she,
>
> (a) commits an offence described in a prescribed code of conduct.

The Chief is obliged to investigate allegations of misconduct under section 58(1), which states:

> Any apparent or alleged misconduct by a police officer shall be investigated by his or her chief of police.

The Chief may delegate his or her powers and responsibilities under Part V (including the obligations imposed by section 58(1) by virtue of section 69, which states, in part, as follows:

> A chief of police may authorize any member of the police force to exercise any power or perform any duty of the chief of police referred to in this Part, subject to the following rules:
>
> 1. A hearing under section 60 shall be conducted by a police officer of the rank of inspector or higher.

2. A police officer from another police force who meets the requirements of paragraph 1 may conduct the hearing, with the approval of his or her chief of police.

In response to the complaint concerning the appellant, the Police state that the Chief delegated responsibility to a Superintendent under section 69 of the PSA to undertake an investigation pursuant to section 58(1).

Because the appellant refused to accept the penalty assessed by the Superintendent after the investigation, a hearing was conducted, pursuant to section 60 of the PSA. The issue here is whether this hearing constitutes a "proceeding" for the purposes of section 52(3)1 of the Act, and, if so, whether this "proceeding" is "before a court, tribunal or other entity".

Section 60 of the PSA reads, in part, as follows:

(1) A chief of police may hold a hearing to determine whether a police officer belonging to his or her police force is guilty of misconduct.

(2) The chief of police shall designate to be prosecutor at the hearing,

(a) a police officer of the rank of sergeant or higher;

(b) if there is none of that rank, a police officer of a rank equal to or higher than that of the police officer who is the subject of the hearing; or

(c) a legal counsel.

(3) The oral evidence given at the hearing shall be recorded and copies of transcripts shall be provided on the same terms as in the Ontario Court (General Division).

(4) Before the hearing, the police officer shall be given an opportunity to examine any physical or documentary evidence that will be produced or any report whose contents will be given in evidence.

. . .

(6) Despite section 12 of the Statutory Powers Procedure Act, the police officer shall not be required to give evidence at the hearing.

. . .

(8) The person conducting the hearing shall not communicate directly or indirectly in relation to the subject_matter of the hearing with any person or person's counsel or representative, unless the police officer and the prosecutor receive notice and have an opportunity to participate.

> (9) However, the person conducting the hearing may seek legal advice from an adviser independent of the police officer and the prosecutor, and in that case the nature of the advice shall be communicated to them so that they may make submissions as to the law.

The penalties which may be imposed are outlined in section 61(1) of the PSA as follows:

> If misconduct is proved at the hearing on clear and convincing evidence, the chief of police may,
>
> (a) dismiss the police officer from the police force;
>
> (b) direct that the police officer be dismissed in seven days unless he or she resigns before that time;
>
> (c) demote the police officer, specifying the manner and period of the demotion;
>
> (d) suspend the police officer without pay for a period not exceeding thirty days or 240 hours, as the case may be;
>
> (e) direct that the police officer forfeit not more than five days' or forty hours' pay, as the case may be; or
>
> (f) direct that the police officer forfeit not more than twenty days or 160 hours off, as the case may be.

In Order P-1223, I considered the interpretation of "proceeding" in the context of section 65(6)1 of the provincial Freedom of Information and Protection of Privacy Act, which I find is equally applicable to section 52(3)1, the equivalent provision in the municipal Act. In that order I stated:

> The words "proceedings" and "anticipated proceedings" appears in section 65(6)1 in the context of the phrase "proceedings or anticipated proceedings **before a court, tribunal or other entity**". In my view, the words I have highlighted in bold must be considered in defining the words "proceedings" and "anticipated proceedings".
>
> . . .
>
> Given the references to proceedings "before a court, tribunal or other entity", I am of the view that a dispute or complaint resolution process conducted by a court, tribunal or other entity which has, by law, binding agreement or mutual consent, the power to decide the matters at issue would constitute "proceedings" for the purposes of section 65(6)1.

In Order M-815, I went on to interpret the terms "tribunal" and "other entity" under section 52(3)1 as follows:

> A number of tribunals have been established by statute as part of the administrative justice system in Ontario. The Ontario Labour Relations Board, the Workers' Compensation Board and the Environmental Assessment Board are some of the more well-known examples, but there are dozens of other bodies performing similar functions outside the regular court system. What distinguishes these bodies as "tribunals" is that they have a statutory mandate to adjudicate and resolve conflicts between parties and render decisions which affect legal rights or obligations. In my view, this is the appropriate definition for the term "tribunal" as it appears in section 52(3)1.
>
> As far as "other entity" is concerned, it is important to note that the term is included in the list along with "court" and "tribunal", and also as part of the phrase "proceedings or anticipated proceedings before a court, tribunal or other entity". As such, I believe that an "other entity" for the purposes of section 52(3)1 must be a body or person that could preside over "proceedings", and it should be viewed as distinct from, but in the same class as a court or tribunal. Thus, to qualify as an "other entity", the body or person must have the authority to conduct "proceedings", and the power, by law, binding agreement or mutual consent, to decide the matters at issue.

Applying these various interpretations to the circumstances of this appeal, I make 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 which has, by law, the power to decide disciplinary matters. As such, these hearings are properly characterized as "proceedings" for the purpose of section 52(3)1.

- The Chief of Police or delegate has 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.

"in relation to"

In Order P-1223, I stated:

> In the context of section 65(6) [the provincial equivalent of section 52(3)], I am of the view that if the preparation (or collection, maintenance, or use) of a record was for the purpose of, as a result of, or substantially connected to an activity listed in sections 65(6)1, 2, or 3, it would be "in relation to" that activity.

Having reviewed the records at issue in this appeal, I find that they were all collected, prepared, maintained and/or used by the Police in the context of the disciplinary hearing, and therefore are properly characterized as being in relation to it. Specifically, I find that most of the records were collected, prepared, maintained and/or used by the Police for the purpose of investigating the

conduct of the appellant, and participating in the disciplinary hearing arising from this investigation. The rest of the records were collected, prepared, maintained and/or used by the Police in dealing with the issue of possible reimbursement of the appellant's legal fees, which arose as a result of the disciplinary hearing. Finally, I find that all of the records are substantially connected to the disciplinary hearing.

Therefore, the second requirement under section 52(3)1 has been established.

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

Section 52(3)1 uses the phrase "relating to labour relations **or** to the employment of a person by the institution" (emphasis added). In Order P-1223, I stated that:

> ... [I]n my view, the legislature must have intended the terms "labour relations" and "employment" to have separate and distinct meanings and application. My view is supported by the presumption of consistent expression in statutory interpretation, one of whose tenets is that "it is possible to infer an intended difference in meaning from the use of different words or a different form of expression" (Dreidger on the Construction of Statutes, 3rd ed., p.164).

I went on in that same order to find that "labour relations" for the purposes of section 65(6)1 of the provincial statute is properly defined as "the collective relationship between an employer and its employees". This interpretation is equally applicable to section 52(3)1 of the municipal Act

The appellant makes a number of submissions on this issue. He points out that, after consulting with a number of government officials, he was assured that the purpose of the new sections 52(3) and (4) provisions was to restrain access to strategic documents in labour negotiations and disputes, and that the changes were brought about to put public sector employers and employees on a more even keel with respect to labour relations. The appellant also states:

> . . . my understanding of the Act is that the new sections, 52(3) and (4) are to be read together and that the intent of the government is to limit access to documents referring to a process of collective bargaining or arbitration.

The appellant submits that police discipline and the PSA are not properly considered "within the realm of 'labour relations'". In his view:

> This is not a grievance submitted by an employee who has somehow lost a benefit in the day to day going on of his job. This is the Police Services Act, an Ontario Statute that is "the law", an external process completely separate from 'labour relations'.

The Police submit that:

> It is incumbent on [the Police's] management to ensure that all members adhere to the rules, regulations and procedures of the Metropolitan Toronto Police Service.

> [The appellant] was deemed not to have fulfilled his employment duties/responsibilities by failing to comply with the above noted regulations. It therefore follows that the requested records, concerning the lodging of this complaint and its investigation, the ensuring disciplinary hearing, and the concluding reports concerning this matter, clearly relate to the appellant's employment by [the Police].

My review of the representations and records has confirmed that the appellant was a member of a police association at the time of the disciplinary investigation and hearing, although it is not clear whether the association played any role in the hearing itself. As such, I am not prepared to find that the proceedings relate to "labour relations" as I have defined it.

However, section 52(3)1 is not restricted to labour relations matters. It also deals with proceedings relating to "the employment of a person by the institution".

In the circumstances of this appeal, the disciplinary hearing was initiated as a result of an internal complaint under Part V of the PSA, not under the public complaints part of the statute (Part VI). Despite what I acknowledge to be a general public interest in policing matters, I find that these Part V proceedings do in fact "relate to the employment of a person by the institution". The penalties outlined in section 61(1), which may be imposed after a finding of misconduct, involve dismissal, demotion, suspension, and the forfeiting of pay and time. In my view, these can only reasonably be characterized as employment-related actions, despite the fact that they are contained in a statute and applied to police officers.

Therefore, the third requirement of section 52(3)1 has also been established.

In summary, I find that the records at issue in this appeal were collected, prepared, maintained and/or used by the Police in relation to proceedings before an "other entity", the disciplinary hearing officer, and that these proceedings relate to the employement of the appellant by the Police. All of the requirements of section 52(3)1 of the Act have thereby been established by the Police. None of the exceptions contained in section 52(4) are present in the circumstances of this appeal, and I find that the records fall within the parameters of section 52(3)1 and therefore are excluded from the scope of the Act.

ORDER:

I uphold the decision of the Police.

Original signed by: September 13, 1996
Tom Mitchinson
Assistant Commissioner