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

ORDER M-840

Appeal M_9600203

Sudbury Regional Police Services Board

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NATURE OF THE APPEAL:

The appellant is a lawyer representing three clients who have been involved in incidents with a police officer employed by the Sudbury Regional Police Services Board (the Police). Two clients have been charged with assaulting the police officer, and these charges are still before the courts. According to the appellant, the third client faced similar charges, was acquitted, and has laid private criminal charges against the police officer.

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 disciplinary records relating to the police officer.

The Police identified 22 pages of responsive records. Pages 5-22 consist of internal memoranda concerning various work-related matters involving the police officer. Pages 2-4 are a memorandum from the police officer to the Police, requesting legal indemnification in responding to the private criminal charges, and a copy of the summons relating to these charges. Page 1 is a memorandum in response from the Police to the appellant.

The Police denied access to all responsive records, claiming that they fall within the parameters of section 52(3)1 and 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 the records were all collected and prepared by various police officers in the course of dealing with a number of matters involving the police officer. These records are maintained in what the Police refer to as a "discipline/counselling" file.

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

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

The Police submit that the records relate to the disciplinary process established under Part V of the Police Services Act (the PSA).

In order to satisfy this requirement, the Police must establish that a disciplinary matter under Part V of the PSA is a "proceeding", and that such a proceeding is "before a court, tribunal or other entity". Because no disciplinary investigation or hearing has taken place in the circumstances of this appeal, if these two aspects of the second requirement are established, the Police must then go on to establish that these proceedings are "anticipated", and that the records at issue in this appeal were collected, prepared and/or maintained "in relation to" these "anticipated proceedings".

"proceedings before a court, tribunal or other entity"

Part V of the PSA establishes a process for dealing with misconduct by police officers. Section 56 defines misconduct, and sections 58-61 provide details regarding investigations, hearings and penalties.

Under section 58, the Chief of Police is obliged to investigate situations of apparent or alleged misconduct by a police officer. Section 59 provides a process for situations where "the misconduct is not of a serious nature", and section 60 outlines a detailed hearings process for all other situations.

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 "proceedings" 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" appear 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.

(see also Order M-835)

"anticipated proceedings"

In Order P-1223, I made the following comments regarding how to ascertain if proceedings are "anticipated".

> In terms of determining what constitutes "anticipated" proceedings, in my view, this is largely a question of fact which must be considered in the circumstances of a particular case.
>
> Former Commissioner Sidney B. Linden faced an analogous situation in Order 52 in determining what constituted "in contemplation of litigation" under section 19 of the Act. While acknowledging that each case turned on its particular facts, Commissioner Linden found that to qualify as being "in contemplation of litigation", one common requirement was that "there must be a reasonable prospect of such litigation at the time of the preparation of the document - litigation must be more than just a vague or theoretical possibility". I feel that a similar approach is appropriate in considering the term "anticipated proceedings". In my view, to fall within the definition of this term, there must be a reasonable prospect of such proceedings at the time of the preparation of the record - the proceedings must be more than just a vague or theoretical possibility.

The Police submit that:

> The purpose of any record prepared by this institution in the discipline/ counselling file of an employee is to inform the Chief of Police of the nature of the incident, the parties involved and the overall outcome. A decision is then made by the Chief, on the advice of the employee's supervisor, as to whether proceedings under the Police Act [sic] will take place.

The Police appear to feel that any record which is placed in an individual police officer's "discipline/counselling" file is automatically characterized as having been prepared, collected or maintained in relation to an anticipated disciplinary hearing under section 60 of the PSA. In my view, this interpretation is too broad. In any workplace, certain incidents arise which warrant documentation in an employee's personnel file. In the case of police officers, the statutory provisions of Part V of the PSA impose a process for dealing with certain personnel-related incidents, however it is clear that not all incidents lead to disciplinary hearings. In my view, although all allegations of misconduct may possibly lead to a disciplinary hearing, in many instances this possibility is properly characterized as "vague or theoretical", particularly if there is evidence that the possibility of a hearing was considered and rejected.

As stated in Order P-1223, what constitutes "anticipated" is fact-specific. Having reviewed the contents of the records at issue in this appeal, I am satisfied that there was a reasonable prospect of a disciplinary hearing when the records were collected, prepared and/or maintained.

"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.

I find that all of the records, with the exception of the summons and related memoranda (pages 1_4) were collected, prepared and/or maintained by the Police for the purpose of an anticipated disciplinary hearing, and therefore are properly characterized as being in relation to it.

As far as pages 1-4 are concerned, I find that they relate to criminal charges faced by the police officer which are unconnected to any of the other records at issue in this appeal, and I find that the collection, preparation and/or maintenance of the summons and related memoranda was not for the purpose of, as a result of, or substantially connected to the anticipated proceedings, and therefore not properly characterized as being in relation to it.

Therefore, the second requirement under section 52(3)1 has been established for pages 5-22 of the records, but not pages 1-4.

3. Do these anticipated 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" (Driedger 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:

> The Act clearly distinguishes between "labour relations" matters, which are dealt with in Part VIII, and "disciplinary proceedings", which are dealt with in Part V.

> Part VIII is a general, and extensive, Code, permitting the arbitration of labour relation disputes between police association and police forces. It creates a quasi judicial method of handling disputes which are often handled through displays of industrial strength in other sectors.
>
> In the police context, therefore, disciplinary proceedings involving an individual officer can be clearly distinguished from "labour relations" matters.

Part VIII of the PSA is headed "Labour Relations", and I agree with the appellant that this part of the statute deals primarily with particular bargaining, conciliation and arbitration processes for police associations and police services boards throughout the province. It is clear to me that any records collected, prepared, maintained and/or used by police services boards concerning the activities outlined in Part VIII would qualify as "labour relations" activities for the purposes of section 52(3) of the Act.

However, in my view, there are other activities which take place in the operation of police forces which are properly characterized as "relating to the collective relationship between an employer and its employees" which do not fall within the parameters of Part VIII of the PSA, yet still qualify as "labour relations" activities. For example, if a police officer files a grievance under the terms of a collective agreement between a police association and a police services board, and is represented or supported by the association in this dispute, in my view, this would satisfy the definition of "labour relations", despite the fact that it is not an activity outlined in Part VIII.

In the circumstances of this appeal, the only indication of an involvement of a police association in the context of any of the records relates to the treatment of the police officer's request for legal indemnification for defending the private criminal charge. I find that these records (pages 1-4) are "about labour relations", and all other pages of records are not.

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" (Order M-835).

The Police do not claim that the records relate to labour relations, but contend that they all deal with various employment-related activities concerning the police officer.

The appellant submits that:

> Police disciplinary proceedings are dealt with in a quasi judicial fashion, before a tribunal, but that tribunal does not deal primarily, or solely, with the employment of the officer by the institution.
>
> In the statutory scheme, certain kinds of misconduct are defined, and the tribunal (the Chief of Police or the Police Commission [sic]) is given authority to hold a hearing to determine whether the allegation is proven. If the allegation is proven, the Chief may impose certain statutory penalties, which may affect the employment of the individual, but might equally well involve a reprimand, the forfeiting of days off, or the forfeiting of days paid. In other words, the tribunal that investigates disciplinary proceedings may, depending on the nature of the

> allegation, be empowered to deal with the officer's employment status, but may equally well deal with lesser, and statutory, penalties.

I do not accept the appellant's position. In my view, the distinctions the appellant draws among the various penalty provisions of Part V are not supportable. I made the following finding on this point in Order M-835, which I feel is equally applicable in the circumstances of this appeal:

> Despite what I acknowledge to be a general public interest in policing matters, I find that these Part V [of the PSA] 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 been established for all pages of records.

In summary, I find that pages 5-22 of the records were collected, prepared and/or maintained by the Police in relation to anticipated proceedings before an "other entity", a disciplinary hearing officer, and that these proceedings relate to the employment of the police officer by the Police. All of the requirements of section 52(3)1 of the Act have thereby been established by the Police for these pages. None of the exceptions contained in section 52(4) are present in the circumstances of this appeal, and I find that pages 5-22 fall within the parameters of section 52(3)1, and therefore are excluded from the scope of the Act.

I have found that pages 1-4 do not meet the second requirement, and therefore section 52(3)1 does not apply to them. Accordingly, I will now consider the possible application of section 52(3)3 to these pages.

Section 52(3)3

In order to satisfy the requirements of section 52(3)3, the Police must establish:

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 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 has an interest.

In my discussion of section 52(3)1, I found that pages 1-4 were collected, prepared and/or maintained by the Police, thereby also satisfying the first requirement of section 52(3)3. The memorandum submitted by the police officer with the attached summons (pages 2-3) requests legal indemnification in accordance with the collective agreement between the Police

and the police association of which the police officer is a member. The memorandum from the Police in response also refers to the terms of the collective agreement governing this topic.

It is clear that the collection, preparation and/or maintenance of these records was in relation to discussions or communications between the police office and the Police, and I find that the second requirement of section 52(3)3 has also been established.

I have already determined that these records are about labour relations matters. As far as whether these are matters in which the Police "has an interest", in my view, the question of whether the Police are responsible under the terms of the collective agreement to provide legal indemnification is something which "has the capacity to affect the Ministry's legal rights or obligations", thereby meeting the standard established in previous orders for determining whether an institution "has an interest" in a matter (e.g. Orders P-1242, P-1258 and M-830).

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

In summary, I find that pages 1-4 of the records were collected, prepared and/or maintained by the Police in relation to discussions or communications about labour relations matters in which the Police has an interest. All of the requirements of section 52(3)3 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 pages 1-4 fall within the parameters of section 52(3)3 and therefore are excluded from the scope of the Act.

ORDER:

I uphold the decisions of the Police.

Original signed by: September 20, 1996
Tom Mitchinson
Assistant Commissioner