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

ORDER M-899

Appeal M_9600121

Metropolitan Toronto Police Services Board

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

BACKGROUND:

On September 13, 1995, former Assistant Commissioner Tom Mitchinson issued Order M-835. That order addressed a decision made by the Metropolitan Toronto Police Services Board (the Police) in response to a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The request was for access to all records concerning a Police Services Act (the PSA) disciplinary matter regarding the appellant.

The Police identified approximately 1000 pages of records as responsive to the request and denied access to them in their entirety, claiming that they fell within the parameters of section 52(3) of the Act, and were therefore outside the scope of the Act. Former Assistant Commissioner Mitchinson found that for a record to fall within section 52(3)1 of the Act, 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.

Following his review of the records and the representations of both the Police and the appellant, the former Assistant Commissioner made the following findings:

Part 1

1. The records were all collected, prepared, maintained and/or used by the Police or on their behalf in the context of a disciplinary hearing.

Part 2

2. A disciplinary hearing conducted under section 60 of the PSA is properly characterized as a "proceeding" for the purposes of section 52(3)1;

3. The Chief of Police or his/her delegate has the authority to conduct "proceedings", and the power to determine matters affecting legal rights and obligations, and, as such, constitutes an "other entity" for the purposes of section 52(3)1;

4. In the circumstances of this appeal, all of the records are substantially connected to the disciplinary hearing and are thus properly characterized as being "in relation to" it.

Part 3

5. In the circumstances of this appeal, the disciplinary hearing was initiated as a result of an internal complaint under Part V of the PSA, and proceedings under Part V "relate to the employment of a person by the institution".

The appellant asked this office to reconsider the finding set out in point 5 on the basis that this finding is contrary to the legal jurisprudence regarding the status of police officers. The appellant referred to a line of cases which consider whether police officers are "employees". These cases hold that police officers hold a public office and are not employees. Thus, the appellant claimed that the order contained a jurisdictional error because the former Assistant Commissioner should have found that section 52(3)1 did not apply.

The Information and Privacy Commission's (the IPC's) Reconsideration Policy Statement describes the threshold for proceeding with a reconsideration as follows:

> When an application for reconsideration of an order is received, the order should be reconsidered only where:
>
> 1. there is a fundamental defect in the adjudication process (for example, lack of procedural fairness) or some other jurisdictional defect in the order; or
>
> 2. there is a typographical or other clerical error in the order which has a bearing on the decision or where the order does not express the manifest intention of the decision maker.
>
> An order should not be reconsidered simply on the basis that new evidence is provided, whether or not that evidence was obtainable at the time of the inquiry.

In the appellant's request for reconsideration as set out above, the substantive issue raised is the interpretation of section 52(3)1 of the Act. If this section were found not to apply, the records at issue would fall within the scope of the Act, and thus, within the IPC's jurisdiction. Therefore, this substantive issue is also a threshold issue in this reconsideration.

For this reason, I sent a letter inviting representations on both the threshold and substantive issues relating to the request for reconsideration. By letters dated December 19, 1996 (the Reconsideration Notices), I invited the Police and the appellant to make submissions as to whether or not I should reconsider the order, and, if so, whether Order M-835 should be amended. The Reconsideration Notices set out the appellant's objections to the findings, and included citations for the case law referred to by the appellant, other relevant case law, as well as references to the PSA.

Both parties provided submissions in response to the Reconsideration Notices. I have considered these submissions as well as the detailed submissions included in the appellant's request for reconsideration.

DISCUSSION:

This reconsideration request is somewhat unusual because the major substantive issue - the question of jurisdictional error and section 52(3)1 - is also a threshold issue which must be resolved in deciding to proceed with the reconsideration. In other words, section 52(3)1 excludes records from the scope of the Act. The jurisdiction of this Office depends, in part, on the records at issue being subject to the Act. Therefore, an incorrect finding in Order M-835 to the effect that the records are excluded from the scope of the Act by section 52(3)1 would constitute a jurisdictional error.

As a result, I have concluded that in order to determine whether I may reconsider Order M-835, I must, simultaneously, make a determination on the substantive issue. For the sake of simplicity in explaining my decision, I will indicate at this time that I have concluded that former Assistant Commissioner Mitchinson's decision, that section 52(3)1 applies to the records, thereby excluding them from the scope of the Act, was correct. I have set out my reasons for this decision below.

Section 52(3)1 of the Act provides:

> 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:
>
> > 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.

The appellant submits that a police officer is not an employee and that police discipline is a private matter between the Crown and the individual public officer. The appellant asserts that a PSA hearing "has nothing to do with 'the **employment** of a person by an institution'" [emphasis added]. Therefore, any records documenting the disciplinary proceeding are also not in relation to "the employment of a person by the institution".

In support of this position, the appellant refers to several court cases which have determined that there is no master-servant relationship between a police officer and a municipality or police board (see Appendix "A" for full citations of the cases referred to by the appellant). The cases which the appellant cited are unanimous in finding that police officers are not considered to be employees.

The Police state that police officers receive salaries and benefits from the institution. They assert further that despite the special status provided by the PSA to police officers with respect to their authority and responsibilities, the Uniform Collective Agreement (section 3.01(a) - Article 3 - Management Rights) acknowledges that management has certain authority over police officers, and therefore, establishes an employer-employee relationship.

The Police also refer to a number of provisions of the PSA concerning employment-related activities and have submitted a number of recruitment and other Human Resources forms used

by the Employment Unit of the Police. They note, in particular, the Application for Employment and Offer of Employment documents which contain specific references to the employment of the police officer by the institution. For example:

The acknowledgment at the end of the Application for Employment, which is signed by the applicant, states:

> The information which I have provided is correct to the best of my knowledge and I understand that a misrepresentation may disqualify me from employment, or cause my dismissal if already employed with the Service.

The first paragraph of the Offer of Employment provides:

> This is to confirm your employment as a Police Constable with the Metropolitan Toronto Police Service, subject to approval of the Police Services Board ... Your continued employment is contingent upon the successful completion of the training program at which time you will be reclassified to the position of Police Constable.

In my view, the rationale for a finding that a police officer is not an employee is aptly stated in Attorney-General for New South Wales v. Perpetual Trustee Co. (LD), [1955] A.C. 457 at 489:

> ... there is a fundamental difference between the domestic relation of servant and master and that of the holder of a public office and the State which he is said to serve. The constable falls within the latter category. His authority is original, not delegated, and is exercised at his own discretion by virtue of his office: he is a ministerial officer exercising statutory rights independently of contract.

Similarly, in St. Catharines Police Association and Board of Police Commissioners for the City of St. Catharines, [1971] 1.O.R. 430 (H.C.J.), the Court stated at page 435:

> ... the Board of Police Commissioners has certain rights and obligations by virtue of the Police Act, but do not have the latitude in prescribing the nature of police officers' duties which the general law considers incidental to the employer-employee relationship.

These cases and the others cited by the appellant turn on the issue of whether a police officer is an "employee" at common law. However, in this case, I must decide whether the proceedings under Part V of the PSA relate "to the employment of a person by the institution". This decision must, therefore, be made in the context of the provisions of the PSA itself, and in particular, must determine whether that statute characterizes the work of police officers as "employment".

A number of provisions of the PSA, including those found in Part V, refer to the "employment" of the individual police officer. The following are only a few examples.

Section 40(1) states (in part) that:

> A board may terminate the **employment** of a member of the police force for the purpose of abolishing the police force or reducing its size... [emphasis added]

Section 44 of the PSA concerns probationary periods of police officers. Section 44(3) provides, in part:

> A board may terminate a police officer's **employment** at any time during his or her probationary period... [emphasis added]

Sections 61(7) and 104 of the PSA concern a police officer's "**employment record**".

Section 49(1)(d) states:

> A member of a police force shall not engage in any activity in which he or she has an advantage derived from **employment** as a member of a police force. [emphasis added]

While it appears that the Courts are clear that, generally speaking, police officers are not "employees", in the context of the PSA, the legislature has made it abundantly clear that what police officers do for Police Services Boards constitutes "employment". In my view, the statutory context of the PSA is the governing factor, and I find that proceedings under Part V of the PSA relate to "employment".

Order M-835

In Order M-835, former Assistant Commissioner Mitchinson considered the provisions under Part V of the PSA, under which the disciplinary proceedings took place, and concluded:

> 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.

Conclusions

For the reasons outlined above, I conclude that the former Assistant Commissioner's analysis and findings with respect to this issue in Order M-835 are correct, and accordingly, there is no jurisdictional defect in the order. Therefore, I find that this request for reconsideration does not fit within any of the grounds outlined in the Commissioner's Office policy statement and I decline to reconsider Order M-835.

ORDER:

The decision in Order M-835 is correct and I decline the appellant's request for reconsideration.

Original signed by: February 18, 1997
Laurel Cropley
Inquiry Officer

APPENDIX "A"

CASE LAW REFERRED TO BY THE APPELLANT

1. Re St. Catharines Police Association and Board of Police Commissioners for the City of St. Catharines, [1971] 1.O.R. 430 (H.C.J.);

2. Re Metropolitan Toronto Board of Commissioners of Police and Metropolitan Toronto Police Association (1975), 8 O.R. (2d) 65 (C.A.);

3. Mahood v. Hamilton-Wentworth Regional Board of Police Commissioners et. al. (1977), 14 O.R. (2d) 708 (Ont. C.A.);

4. Attorney-General for New South Wales v. Perpetual Trustee Co. (LD), [1955] A.C. 457.