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

ORDER M-962

Appeal M_9700030

Metropolitan Toronto Police Services Board

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BACKGROUND:

The appellant filed a complaint against several members of the Metropolitan Toronto Police under Part VI of the Police Services Act (the PSA). The complaint arose from an incident in which the appellant had been involved. The appellant's complaint was initially investigated by the Public Complaints Bureau of the Metropolitan Toronto Police, which concluded that no action was required. The appellant requested a review of this decision by the Police Complaints Commissioner (the PCC), which concluded that no further action was warranted.

Subsequently, the appellant submitted a request to the PCC under the Freedom of Information and Protection of Privacy Act (the provincial Act). The request was for information about the investigation of his complaint.

Under sections 25(2) and (3) of the provincial Act, the PCC transferred part of the request to the Metropolitan Toronto Police Services Board (the Police) because the PCC concluded that the Police have a greater interest in some of the responsive records. The Police are an institution under the Municipal Freedom of Information and Protection of Privacy Act (the Act).

The PCC issued its own decision on the part of the request which it did not transfer to the Police. The appellant filed an appeal of that decision which is the subject of Order P-1422, issued concurrently with this order.

NATURE OF THE APPEAL:

After receiving the transferred request, the Police issued a decision letter claiming that the records in which the Police have a greater interest all fall outside the scope of the Act by virtue of section 52(3). This section provides that certain employment and labour relations-related information are not subject to the Act. The appellant appealed this decision.

The records identified by the Police consist of materials which the Public Complaints Bureau of the Police assembled in connection with their investigation of the appellant's complaint, which were then passed on to the PCC when the appellant requested a review of the matter by that body.

The sole issue being addressed in this order is whether the records fall outside the scope of the Act (and therefore outside my jurisdiction) under section 52(3).

DISCUSSION:

JURISDICTION

I must now determine whether the records fall within the scope of section 52(3) of the Act. If so, they would be excluded from the scope of the Act unless they are records described in section 52(4), which lists exceptions to the exclusions established in section 52(3).

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.

These provisions were added to the Act by the Labour Relations and Employment Statute Law Amendment Act, 1995 (Bill 7), which came into force on November 10, 1995. The appellant, in his letter of appeal, argues that because "... this has been an on-going investigation by myself since 1992 I believe that I should have the right to their files as I should qualify for grandfathering". The appellant's request was dated November 19, 1996.

In Order P_1258, former Assistant Commissioner Tom Mitchinson considered the timing criteria for the application of sections 65(6) and (7) of the provincial Act (which are the equivalent of sections 52(3) and (4) of the Act, and were added to the provincial Act by Bill 7). In that

discussion, he found that the relevant factor was the date upon which the request was submitted. He stated:

> ... if the appellant made her requests prior to November 10, 1995, they would be subject to the law in effect prior to the enactment of Bill 7. On the other hand, if the requests were not made until after this date, they would be subject to the new provisions creating sections 65(6) and (7).

I agree with this interpretation, which is consistent with the law in relation to the retroactive application of statutes. In addition, in my view, this interpretation applies equally to sections 52(3) and (4) of the Act. Therefore, the question of when the appellant began investigating this matter is not relevant to the determination of whether these sections apply to his request. Rather, the question is, was the request submitted before or after the amendments came into force?

In this case, the request was submitted more than a year after Bill 7 became law, and therefore, I find that sections 52(3) and (4) have potential application in the circumstances of this appeal.

Turning to the question of whether section 52(3) applies, I will first address the potential application of 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 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.

[Orders M-835, M-899, M-922 and P-1242]

Requirement 1

The Police state that under section 76(1) of the PSA (which appears in Part VI of that statute), the Chief of Police is obliged to establish and maintain a Public Complaints Investigation Bureau within the police service to investigate public complaints against police officers. During the course of these investigations, information is gathered and stored.

I am satisfied that the records at issue in this file were collected, used and maintained by the Complaints Investigation Bureau of the Police, meeting requirement 1.

Requirement 2

The Police submit that when the investigation has been completed, the information is used "in relation to" the preparation of a report for the Chief of Police, who will then make a decision as

to the disposition of the complaint under section 90(3) of the PSA. By means of the final report, the investigating officers communicate the results of their investigation into a public complaint to the Chief of Police.

In Order P-1223, former Assistant Commissioner Tom Mitchinson made the following comments regarding the interpretation of the phrase "in relation to" in section 65(6) of the provincial Act, the equivalent to section 52(3) of the Act:

> In the context of section 65(6), 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. (emphasis added)

In my view, the records at issue were used by the investigating police officers for the purpose of, and therefore "in relation to" a communication. I have reached this conclusion because I am satisfied that the records were used to prepare a final report on the results of the investigation, and the final report is the means of communicating these results to the Chief of Police. Therefore, I find that requirement 2 has been established.

Requirement 3

I must now determine whether the report, or "communication", to the Chief of Police is "about an employment-related matter in which the [Police have] an interest". In my view, the report is "about" the investigation under Part VI of the PSA. In Order M-931, Inquiry Officer Donald Hale concluded that such an investigation was an employment-related matter, and because of the statutory requirements imposed on the Police in Part VI of the Act to investigate public complaints, he found that the Police "have an interest" in the investigation within the meaning of section 52(3)3. I agree with this conclusion, which in my view applies equally in this case. Accordingly, requirement 3 has also been met.

Since all three requirements have been met, I find that section 52(3) applies to the records. As these are not records to which section 52(4) applies, they are excluded from the scope of the Act.

In reaching this conclusion, I have reviewed and considered the appellant's representations. However, these dealt with his allegation that the Police and the PCC did not adequately investigate his complaints about the police investigation. This was not an issue in the inquiry, nor do I have jurisdiction to deal with this allegation in any substantive way.

ORDER:

I uphold the decision of the Police.

Original signed by: July 10, 1997
John Higgins
Inquiry Officer