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

ORDER M-992

Appeal M_9700133

Hamilton-Wentworth Regional Police Services Board

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NATURE OF THE APPEAL:

The Hamilton-Wentworth Regional Police Services Board (the Police) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for all test results, assessments, notations, memos, etc., relating to an application for employment by the requester.

The Police identified a number of records responsive to the request and denied access on the basis that the records fall within the provisions of section 52(3) of the Act. The requester (now the appellant) appealed this decision to the Commissioner's office.

During the mediation stage of the appeal, the appellant took the position that additional responsive records should exist relating to his most recent application and his previous applications. He also believed that other records relating to him, not necessarily connected with the job competitions, should exist.

The Police explained that the records relating to two previous applications would have been purged in accordance with their retention schedules. They did conduct another search for any additional responsive records but no further records were located. The appellant maintains that additional responsive records relating to the applications should exist. The appellant agreed to submit a new request to the Police for the other records which he believes exist which do not relate to his job applications.

Therefore, the issues in this inquiry are whether the Police conducted a reasonable search for the records relating to all the job competitions and whether section 52(3) of the Act applies to the records.

This office sent a Notice of Inquiry to the Police and the appellant. Representations were received from the Police only.

DISCUSSION:

REASONABLE SEARCH

Where an appellant provides sufficient details about the records which he is seeking and the Police indicate that further records do not exist, it is my responsibility to ensure that the Police have made a reasonable search to identify any records which are responsive to the request. The Act does not require the Police to prove with absolute certainty that further records do not exist. However, in my view, in order to properly discharge its obligations under the Act, the Police must provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate records responsive to the request.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records may, in fact, exist.

In the case before me, the appellant's request outlines the type of information he is seeking. In his appeal letter, the appellant states that he requested "my test results and all else regarding my test ...".

Two issues arise with respect to reasonableness of search. The first relates to the appellant's most recent application for employment; the second to his previous applications. With respect to the latter, the Police state that the appellant applied on two previous occasions. The Police state that information relating to the appellant's first application, made in July 1994, was shredded in accordance with the Record Retention policy in September 1995. The information relating to the second application made in July 1995 was shredded in November 1996. The Police attached a copy of the retention policy to their representations. It states that information relating to unsuccessful applications may be destroyed 13 months after it is determined that the candidate is unsuccessful.

With respect to the most recent application, the Police state that the appellant was contacted and advised the Police that he "wanted all information about the unsuccessful attempt for employment and the testing which he had just completed." However, in response to a specific question about clarification in the Notice of Inquiry, the Police state the appellant was not contacted for additional information because it was clear that the appellant "specifically requested all test results from his unsuccessful application...".

The Police also explain the manner in which competitions are conducted. Once an application is received, the tests are used as a screening mechanism. If the candidate is unsuccessful in completing the test, the application goes no further. The records contain information relating to the appellant up to that point. It is clear that the Police did conduct a search for more than just test scores because the records provided to this office contain more than just test scores.

In Order M-909, Inquiry Officer Laurel Cropley defined a reasonable search. She stated:

> ... [A] reasonable search would be one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request.

I have reviewed the records and the representations of the Police. In the absence of any representations from the appellant and applying the definition of reasonable search set out in Order M-909, I find that the Police have conducted a reasonable search to locate the records relating to the appellant's three applications for employment.

JURISDICTION

The interpretation of sections 52(3) and (4) is a preliminary issue which goes to the jurisdiction of the Commissioner or her delegate to continue an inquiry. If the requested records fall within the scope of section 52(3) of the Act, they would be excluded from the scope of the Act unless they are records described in section 52(4). Section 52(4) 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.

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

The records at issue in this appeal consist of an application for employment, multiple choice and written answers, test results and a letter from the Police to the appellant.

Section 52(3)3

In Order P-1242, former Assistant Commissioner Tom Mitchinson held that in order for a record to fall within the scope of paragraph 3 of section 65(6) of the Freedom of Information and Protection of Privacy Act, which is the provincial equivalent to section 52(3)3 of the Act, an institution must establish that:

1. the record was collected, prepared, maintained or used by the institution 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 institution has an interest.

Requirement 1

In my view, it is clear that job competition records are either collected, prepared, maintained or used by the employer, and in many cases, all four. Therefore, Requirement 1 has been established.

Requirement 2

The Police state that all the information in the records was used in relation to the hiring process of the Police Service.

In Order P-1223, former Assistant Commissioner Mitchinson stated 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 52(3)1, 2, or 3]", it would be "in relation to" that activity.

Previous orders have found that, in the context of a job competition, an application, reference letters and letters to the applicants are "communications" (Orders M-861, P-1258).

Records generated with respect to these activities would either be for the purpose of, as a result of, or substantially connected to these communications, and therefore, properly characterized as being "in relation to" them (Order P-1258).

In the circumstances of this appeal, I find that the Police prepared, maintained or used all the records "in relation to" communications which took place around the job competition process. Therefore, Requirement 2 has been met.

Requirement 3

In order to satisfy the third requirement, the Police must establish that these communications are about labour relations or employment-related matters in which it has an interest.

I find that a job competition is an employment-related or labour relations matter.

In Order M-830, former Assistant Commissioner Mitchinson found that job competitions are matters in which an institution "has an interest" because the job competition process involves certain legal obligations which an employer must meet under the Ontario Human Rights Code, for example, a duty not to discriminate in selecting an employee in a job competition.

I agree with this conclusion and find that in the circumstances of this appeal, the Police have "an interest" in the job competitions which are the subject of the records in this appeal. Therefore, Requirement 3 has been established.

Accordingly, all of the requirements of section 52(3)3 of the Act have been established by the Police. Since none of the exceptions contained in section 52(4) are present in the circumstances of this appeal, I find that the records fall within the parameters of section 52(3)3. Therefore, they are excluded from the scope of the Act.

ORDER:

I uphold the decision of the Police.

Original signed by: August 28, 1997
Marianne Miller
Inquiry Officer