

ORDER M-1030

Appeal M-9700235

Metropolitan Toronto Police Services Board

NATURE OF THE APPEAL:

The appellant is a police officer with the Metropolitan Toronto Police Services Board (the Police). Under the Municipal Freedom of Information and Protection of Privacy Act (the Act), the appellant made a request for access to records contained in his medical file, which is maintained by the Police in their capacity as his employer. Specifically, the appellant sought access to electronic mail (e-mail) correspondence between four named individuals and any non-medical correspondence which may be contained in the medical file.

The Police located four records responsive to the appellant's request and denied access to them, on the basis that, because of the operation of section 52(3), they fall outside the jurisdiction of the Act.

The appellant appealed the decision of the Police to deny him access to the records.

This office provided a Notice of Inquiry to the appellant and the Police. Representations were received from both parties.

The records in this appeal consist of a two-page e-mail dated May 23, 1997, one page containing two e-mails dated May 15 and 16, 1997, a one-page letter date-stamped May 12, 1997 and a three-page synopsis which is undated.

DISCUSSION:

JURISDICTION

The Police submit that the records are associated with two distinct investigations. The first involves the investigation of allegations made by the appellant of improper conduct by other officers which has been undertaken under the authority of Part V of the Police Services Act (the PSA). The second investigation concerns the examination of the appellant's fitness for duty as a police officer under Part IV of the PSA. The Police submit that, because of the operation of section 52(3)1 of the Act, the records are not subject to access under the Act.

The appellant has submitted lengthy representations which do not specifically address the possible application of section 52(3) to the records.

The only issue in this appeal is whether the records fall within the scope of sections 52(3) and (4) of the Act. If section 52(3) applies, and none of the exceptions found in section 52(4) apply, section 52(3) has the effect of excluding records from the scope of the Act, which removes such records from the Commissioner's jurisdiction.

Section 52(3)1

In order for a record to fall within the scope of section 52(3)1, the Police 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 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 institution.

[Orders M-815 and M-1016]

Requirement 1

As noted above, the Police submit that the records in question are associated with the investigation into allegations of misconduct made by the appellant against other police officers. Such investigations are held under the authority of Part V of the Police Services Act (PSA). Under Part V of the PSA, section 58(1) provides that the Chief of Police is obligated to investigate any apparent or alleged misconduct by a police officer. During the course of these investigations, evidence and other information is gathered, recorded, and stored in various formats.

In addition, the Police submit that section 41 of Part IV of the PSA clearly delineates their responsibilities in ensuring that a police officer is fit for duty. Again, the Police argue that during the course of such a determination, information is gathered, recorded and stored in various formats.

Having reviewed the records, I find that they 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.

Requirement 2

In order to satisfy this requirement, the Police must establish that the disciplinary matter which may have arisen from the appellant's complaint 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".

In Order M-835, Assistant Commissioner Tom Mitchinson made 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 his 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.

I agree, and have determined that the same findings apply in the circumstances of this appeal.

Having reviewed the records, I find that they were collected, prepared, maintained and/or used by the Police in the context of a potential disciplinary hearing and, therefore, are properly characterized as being in relation to it.

In addition, I find that the records were collected, prepared, maintained and/or used by the Police in the context of a determination into the appellant’s fitness for duty, which was undertaken pursuant to section 47 of the PSA. Further, I find that this investigation and any subsequent action taken by the Police in this regard would constitute a “proceeding” for the purpose of section 52(3)1. Finally, I find that the Chief of Police or his delegate has the authority to conduct proceedings in which an officer’s fitness for duty is determined and that he or she may, therefore, be properly described as an “other entity” under section 52(3)1.

Accordingly, I find that all of the records are substantially connected to either a potential disciplinary hearing under section 60 of the PSA or to a possible proceeding which would determine the appellant’s fitness for duty under section 47 of the PSA. Therefore, the second requirement under section 52(3)1 has been established.

Requirement 3

I have found above that the disciplinary investigation proceeding with which these records are associated was initiated as a result of a complaint made by the appellant under Part V of the PSA. In Order M-1016, Inquiry Officer Holly Big Canoe held that Part V proceedings “relate to the employment of a person by the institution” within the meaning of section 52(3)1. She then outlined the penalties in section 61(1) of the PSA which may be imposed after a finding of misconduct, including dismissal, demotion, suspension and the forfeiting of pay and time. Inquiry Officer Big Canoe found that these can only reasonably be characterized as employment-related actions. I adopt the Inquiry Officer’s reasoning for the purposes of this appeal. I similarly find that the Part V proceedings commenced by the appellant’s complaint relate to the employment of the individuals involved by the Police.

The Police also submit that an investigation, proceeding or anticipated proceeding into the fitness of a police officer for duty under section 47 of the PSA relates to the employment of a police officer within the meaning of section 52(3)1. The consequences to a police officer of an adverse finding following such an investigation or proceeding are described in section 47 of the PSA and include dismissal or mandatory early retirement. In Order M-835, Assistant Commissioner Mitchinson found that proceedings under Part V of the PSA relate to the employment of an officer by a police service, based on his review of the potential consequences to the officer which are contained in section 61(1) of the PSA. I adopt the reasoning behind the Assistant Commissioner’s determination for the purposes of this appeal.

In my view, because the consequences of a finding of unfitness for duty against an officer may be similar to those where a finding of misconduct is made, it follows that records relating to such a proceeding or

anticipated proceeding also “relate to the employment of an individual by the institution” within the meaning of section 52(3)1. In the present appeal, I find that the records at issue may be characterized as relating to the continued employment of the appellant by the Police and are, therefore, employment-related. Accordingly, the third requirement of section 52(3)1 has also been established.

Because all of the requirements of section 52(3)1 of the Act have been established, and none of the exceptions contained in section 52(4) are present in the circumstances of this appeal, I find that the records are excluded from the scope of the Act.

ORDER:

I uphold the decision of the Police.

Original signed by: _____
Donald Hale
Inquiry Officer

_____ November 6, 1997