Information and Privacy
Commissioner/Ontario

Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER M-1128

Appeal M-9800014

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

NATURE OF THE APPEAL:

The appellant made a request to the Toronto Police Services Board (the Police) under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The appellant is a Police employee. He requested access to his entire employment file. Specifically requested was:

1. personal service employment file;
2. personal file Divisional;
3. any and all non-medical information in the medical file; and
4. any and all Worker's Compensation Board (WCB) files or claims.

The Police located records responsive to the request and denied access to one group of them, in part, based on the exemption in section 14(1) (invasion of privacy) of the Act. The Police also advised the appellant that access was being denied to the remaining records on the basis that the records fell outside the scope of the Act pursuant to section 52(3) of the Act. The appellant, through his counsel, appealed the denial of access.

During the mediation stage of this appeal it was confirmed with the appellant that page 76 of the records was not responsive to the request and would not be at issue in this appeal.

This office provided a Notice of Inquiry to the appellant and the Police. In the event that some of the records contain the personal information of both the appellant and other individuals, the possible application of section 38(b) of the Act was also raised in the Notice. Representations were received from both parties.

RECORDS:

The records at issue in this appeal consist of correspondence, notes, forms, and reports relating to four files concerning the appellant. Specifically, these files are:

1. Occupational Health and Safety file/WCB;
2. Medical file;
3. Divisional/Personnel file (current); and
4. Personnel records file (historical).

DISCUSSION:

PERSONAL INFORMATION/INVASION OF PRIVACY

As I indicated above, the Police have claimed that one group of records falls within the invasion of privacy exemption. I will address these records first before determining whether I have jurisdiction to deal with the remaining records.

Under section 2(1) of the Act, "personal information" is defined as "... recorded information about an identifiable individual". The records all contain the personal information of the appellant. I note, however, that he has received the vast majority of the information in the records. The only information which has been

withheld from him in the 18 pages which have been severed pertains to prisoners, accused individuals or other individuals who have made claims for worker's compensation. This information qualifies as the personal information of these individuals.

Where a record contains the personal information of both the appellant and another individual, section 38(b) allows the institution to withhold information from the record if it determines that disclosing that information would constitute an unjustified invasion of another individual's personal privacy. On appeal, I must be satisfied that disclosure **would** constitute an unjustified invasion of another individual's personal privacy. The appellant is not required to prove the contrary.

Sections 14(2) and (3) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 14(2) provides some criteria for the head to consider in making this determination. Section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy.

The only way in which a section 14(3) presumption can be overcome is if the personal information at issue falls under section 14(4) of the Act or where a finding is made under section 16 of the Act that there is a compelling public interest in disclosure of the information which clearly outweighs the purpose of the section 14 exemption.

In his representations, the appellant indicates that the information which identifies other individuals can be blacked out. In this regard, he states:

> It is the appellant's submission that if there is mention of other individuals or other information that can identify other persons, that he should be able to obtain his own records with the names or identifying feature blacked out from the records.

As the only information which has been severed would serve to identify other individuals, this information is no longer at issue. As I noted above, the appellant has received everything which pertains to himself in the records at issue under this exemption.

JURISDICTION

The interpretation of sections 52(3) and (4) is a preliminary issue which relates to the Commissioner's jurisdiction to continue an inquiry. These sections read:

> (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 Police have divided the records to which section 52(3) has been applied into six packages. The Police claim that paragraph 3 of section 52(3) applies to the records in package one. These records consist of the appellant's application for employment and related documentation.

The Police claim that paragraph 1 of section 52(3) applies to the remaining five packages of records. These records consist of the WCB Employer's Report of Injury, records relating to the WCB assessment of the appellant, records relating to sick time, job performance and transfer requests, doctors' notes and other medical information, records relating to the incident which led to the claim, and records relating to the processing of the WCB claim.

Section 52(3)1

In order for a record to fall within the scope of section 52(3)1, I must find that:

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

[Order M-815]

In this case, the institution is the Police.

1. Were the records collected, prepared, maintained or used by the Police or on its behalf?

Having reviewed the records, I find that all of the records were collected, prepared, maintained or used by the Police. The first requirement of section 52(3)1 has been met for all the records.

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

The second part of section 52(3)1 requires that the records were collected, prepared, maintained or used in relation to proceedings or anticipated proceedings before a court, tribunal or other entity.

Previous orders of this office have held that the Worker's Compensation Board is a tribunal established by statute (Orders M-815 and M-1034). I agree with the findings in these orders.

The Police indicate that as a result of an on-duty incident several years ago, the appellant submitted a claim to the WCB. This claim was allowed and the Police did not object. Subsequently, the appellant submitted a claim for a recurrence. The WCB also allowed this claim. The Police advise that they have objected to the second claim, and that they are currently awaiting a hearing date.

I am satisfied that the hearing of the Police's objection to the WCB claim is pending before the WCB. Accordingly, I find that the records relating to the WCB were collected, prepared, maintained or used by or on behalf of the Police in relation to proceedings or anticipated proceedings before a tribunal and/or other entity.

3. Do these anticipated proceedings relate to labour relations or the employment of a person by the Police?

In Order P-653, Inquiry Officer Holly Big Canoe found that "... "labour relations information" refers to information concerning the **collective** relationship between an employer and its employees". I agree with the Inquiry Officer's definition and adopt it for the purposes of this appeal.

In the present case, the records relate to a claim for compensation filed by the appellant with the WCB. I find that the records relate to the WCB claim. In my view, an individual claim for compensation does not concern the collective relationship between an employer and its employees. Rather, it concerns a matter arising from the employment of the individual by the employer. Therefore, I find that proceedings or anticipated proceedings resulting from the claim relate to "employment" for the purpose of section 52(3)1.

All of the requirements of section 52(3)1 of the Act have been met. None of the exceptions listed in section 52(4) are present in the circumstances of this appeal and I find that the records in packages two through six fall within the parameters of section 52(3)1 and therefore, are excluded from the scope of the Act.

Section 52(3)3

In order for the records in package one to qualify under section 52(3)3, the Police must establish that:

1. The records were collected, prepared, maintained or used by an institution (in this case, 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 have an interest.

[Order P-1242]

Requirements 1 and 2

As noted above, the records in package one consist of the appellant's application for employment and related documentation, such as fingerprints, personal history form, information sheet with recommendations, questionnaire, employment check sheet and reference forms, school information, oaths of office, etc. I find that all of these records were collected, prepared and/or maintained by the Police in their capacity as the appellant's employer, thereby satisfying the first requirement of section 52(3)3.

With respect to the second requirement of section 52(3)3, the Police state that:

> As a result of the requester's application for employment, the above records were collected, prepared, maintained and/or used for the purpose of that application, as a result of the hiring process or substantially connected to the hiring process.

The Police rely on previous orders of this office which have found, in the job competition context, that such records are prepared, maintained or used "in relation to" communications which took place around the job competition process (Orders M-861, M-992 and P-1258).

I find that the records in package one have been maintained and were used by the Police in relation to various communications regarding the hiring of the appellant. As such, I find that the second requirement of section 52(3)3 has been satisfied with respect to these records.

Requirement 3

I am satisfied that the appellant was a prospective employee of the Police, at the time that these records were created. I am also satisfied that these records were created by the Police and that they pertain to the employment of the appellant by the Police. Accordingly, the records in package one qualify as records about "employment-related matters" for the purposes of section 52(3)3.

The question which must now be answered is whether the Police have a legal interest in the matters addressed in these records. Previous orders have held that an "interest" for the purposes of section 52(3)3 must be more than a mere curiosity or concern. An "interest" must be a legal interest in the sense that the matter in which the Police have an interest must have the capacity to affect their legal rights or obligations (Order P-1242).

The Police submit that their legal interest in the records arises from their obligations under the Ontario Human Rights Code in the job competition process. The Police rely on the orders referred to above to support this position.

In two recent orders, Assistant Commissioner Tom Mitchinson has considered the meaning and intent of the application of "legal interest" in various contexts.

In the first case (Order P-1575), the Assistant Commissioner examined notes "made during an employee performance and evaluation process ...". He stated:

> I accept that the Ministry has an interest in or an obligation to administer its performance appraisal process and policies fairly. However, in my view, that is not sufficient to bring the employment-related matter within the scope of section 65(6)3. To meet the requirements of this section, the Ministry must establish an interest that has the capacity to affect its legal rights or obligations.

He considered whether the matter at hand was grievable and he looked at the collective agreement and the Ontario Labour Relations Act. In the end, he found that there was no evidence that a grievance had been filed, nor was there evidence of arbitrary discrimination or unfair actions on the part of the Ministry. Further, he found that several months had passed since the appellant had received her performance appraisal and that there was no evidence that "exceptional circumstances" existed which would allow her to take any steps in now bringing a complaint. He concluded:

> Even if the appellant has a right to grieve her performance appraisal, which is certainly not clear, the time period for filing a grievance has long-since expired. **Therefore, I find that there is no legal forum in which the appellant can challenge the Ministry with respect to her performance appraisal under the terms of the collective agreement with OPSEU.** Accordingly, I find that the performance appraisal is not an employment-related matter in which the Ministry has an interest, and the third requirement of section 65(6)3 has not been established. [emphasis added]

In Order P-1586, the Assistant Commissioner examined whether Ontario Hydro (Hydro) had an interest in records relating to matters regarding the resignation of a named individual. He expressed his view that:

> ... the routine discharge of responsibilities imposed by statute is not, in and of itself, sufficient to constitute an ongoing legal intent. The statutory responsibility must be considered in context.

In considering Hydro's legal obligations to properly discharge its responsibilities under the Power Corporation Act, he found:

> ... several months have passed since the affected person's employment with Hydro ended, and the matters under consideration at the time the meeting minutes were created have concluded. In other words, the context has changed. There is no evidence before me to suggest that there is an ongoing dispute or other employment-related matter involving Hydro and the affected person that has the capacity to affect Hydro's legal rights or obligations.

In my view, the reasoning in these two orders can be similarly applied to the circumstances of the present appeal. In considering whether the Police have a "legal interest" in the matter, that is, the appellant's application for employment and subsequent hiring, in my view, there must be a reasonable prospect that this interest will be engaged.

The records at issue in this discussion were collected and used by the Police over ten years ago. There is no indication from either the appellant or the Police that the hiring process has been challenged or is at issue in any way. The fact that no action has been taken in this regard since the appellant was hired leads me to conclude that there is no reasonable prospect that the institution's legal interest in the circumstances of his hiring would be engaged in the future.

As I noted above, section 52(3) is record specific and fact specific. In the circumstances of this case, there is no matter pending or reasonably foreseeable which has the capacity to affect their legal rights or obligations. Therefore, I find that the Police have not demonstrated that they have sufficient legal interest in the appellant's application records to bring the records within the ambit of section 52(3)3.

Accordingly, as the interest of the Police in the subject matter of the records in package one does not qualify as a "legal interest" for the purposes of section 52(3)3, these documents are within the scope of the Act.

By way of summary, I find that the records pertaining to the appellant's WCB claim are outside the scope of the Act as a result of the operation of section 52(3)1. However, those records which relate to the appellant's application for employment fall within the jurisdiction of the Act. I will, therefore, order the Ministry to provide the appellant with a decision letter with respect to access to those records only.

ORDER:

1. I uphold the decision of the Police to deny access to the records in packages two through six on the basis that these records fall outside the scope of the Act. This portion of the appeal is, therefore, dismissed.

2. I uphold the decision of the Police to deny access to personal information of individuals other than the appellant.

3. I order the Police to provide the appellant with a decision letter with respect to the records in package one in accordance with the time frames set forth in section 19 of the Act, using the date of this order as the date of the request, and without recourse to a time extension under section 20 of the Act.

4. I further order the Police to provide me with a copy of the letter referred to in Provision 3 by forwarding a copy to my attention c/o the Office of the Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario M5S 2V1.

Original signed by: July 9, 1998
Laurel Cropley

Adjudicator