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

ORDER M-1130

Appeal M-9800106

Halton Regional 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 Halton Regional Police Services Board (the Police) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to a copy of a video-taped statement given by the requester to the Police. The Police denied access to the videotape on the basis that because section 52(3) applies, the record falls out of the scope of the Act. The requester appealed the decision to deny access.

During mediation, the Police issued a revised decision denying access on the basis of section 52(3) and alternatively claiming the application of sections 8(2)(a) and (c)(law enforcement), section 38(a) (discretion to refuse requester's own information) and sections 14(1) and 38(b) (invasion of privacy) of the Act.

The record at issue consists of a video-taped statement given by the appellant to the Police following his arrest for break and enter. The appellant was later released without any charges being laid. The appellant subsequently filed a complaint of wrongful arrest against the arresting police officer and other officers. The appellant has also filed a civil suit against the Police, the Regional Municipality of Halton and certain individual police officers.

This office provided a Notice of Inquiry to the appellant and the Police. Representations were received from both parties. As part of his representations, the appellant provided written confirmation from those individuals mentioned by the appellant in the videotape, consenting to the disclosure of their personal information to the appellant.

PRELIMINARY ISSUE

APPELLANT'S SUBMISSIONS

The appellant submits that since he is both the author and the subject of the record, he believes that he is entitled to it. He states "[t]he record I am wanting to access is my voluntary witness statement to the Halton Regional Police. [The Act] is supposed to give a person access to their own personal information and I strongly believe that I have every right to access this record".

In my view, a plain reading of the statute does not support the view that records which contain the personal information of requesters or appellants are exceptions to the exclusions provided by section 52(3) of the Act. In Order P-1255, Assistant Commissioner Tom Mitchinson had occasion to consider whether similar issues could result in exceptions to the application of section 65(6) of the provincial Freedom of Information and Protection of Privacy Act, the equivalent of section 52(3) of the Act.

In that order, he considered the reasoning and approach utilized by former Inquiry Officer John Higgins. In Order M-444 Inquiry Officer Higgins concluded that it would be an absurd result to apply the presumption against disclosure to personal information authored by or provided to an institution by a requester or, to the personal information of other individuals which would clearly have been known to a requester.

The Assistant Commissioner concluded:

> It might appear that a similar approach could be applied, in appropriate circumstances, when considering sections 65(6) and (7) of the Act. However, in my view, there is a significant difference in context which dictates the opposite result when considering these sections. In Orders M-444 and P-1014, there was no question that the Inquiry Officer was dealing with records which **were** subject to the Act. In that situation, the Act presumes a right of access unless an exemption applies, or the request is frivolous or vexatious, as set out in sections 10(1) and 47(1). Within that statutory context, non-disclosure of the particular information that Inquiry Officer Higgins was considering would, indeed, have been absurd and contrary to the legislature's apparent intention, looking at the Act as a whole.
>
> I feel that the situation is different where non-disclosure results from an exclusion of records from the whole statutory access and privacy scheme. In my view, when a record is, on its face, outside the Act because of the application of section 65(6), there is no "presumptive" right of access against which to measure a result of non-disclosure and declare it absurd or unreasonable.

I agree with this conclusion and find that it applies equally to the circumstances of this appeal. That is, where, as in this case, an institution claims that a record falls outside the scope of the Act and thus, outside the jurisdiction of this office, the fact that a record may have been authored by a requester or contains his personal information does not operate as an exception to the exclusions set out in section 52(3).

Because section 52(3) is a preliminary matter and goes to the jurisdiction of the Commissioner and her delegates to continue a hearing, I will consider its application below. Should I find that section 52(3) does not apply and the record is subject to the Act, I will then consider the appellant's arguments within the context of the exemptions that the Police have raised.

DISCUSSION:

JURISDICTION

The interpretation of section 52(3) and (4) is a preliminary issue which goes to the jurisdiction of the Commissioner or her delegate to continue an inquiry.

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 an 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 submit that section 52(3)1 applies to exclude the record from the Act.

In order for a record to fall within the scope of 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.

The record at issue is a videotaped statement given by the appellant to the Police at the time of his arrest and detention at the Police station. Following the taking of his statement, the appellant was released unconditionally. The appellant subsequently filed a complaint against the arresting police officer and other police officers. The Police submit that the record was used by its Professional Standards Bureau to investigate the complaint against the arresting police officers and other police officers. The Police state that the record was collected, maintained and used during a disciplinary hearing following the investigation of the appellant's complaint. The Police submit that it is also involved in a civil suit launched by the appellant and that the record was also collected and is being maintained for possible use in the civil proceedings.

The appellant submits the record is not related to the "employment of a person". He argues that the only involvement of a police officer was in taking the appellant's statement in performance of his duties as a police officer. The appellant states that "the record itself has no bearing on the employment of the officer but rather the responses to questions posed by the Police in regards to the allegations."

In the circumstances of this appeal, I agree that the original purpose of the record was to record the appellant's verbal statement at the time that he was arrested for an alleged break and entry incident. However, this does not preclude the record from being used for other and secondary purposes. Having viewed the videotape which shows the appellant giving his statement to the arresting officer, and having considered the representations of the Police, I accept that, in the particular circumstances of this appeal, the record was also collected, maintained and used for the subsequent investigation into charges of misconduct against the arresting officer and other police officers. Therefore, I accept the position of the Police that the record was collected, maintained and used by the Police and the first requirement of section 52(3)1 has been met.

Requirement Two

In order to satisfy the second requirement, the Police must establish that the disciplinary hearing is a "proceeding", that the "proceeding" was "before a court, tribunal or other entity", and that the record was collected, maintained or used "in relation to" the "proceeding".

The Police submit that a complaint of misconduct was received against the arresting police officer and other officers. Pursuant to section 56(1) of the Police Services Act, (the PSA), the Chief of Police is obliged to investigate allegations of misconduct under section 64(1). The Police submit that the allegations were investigated and a disciplinary hearing was convened. The Police submit that the record formed part of the evidence presented at the disciplinary hearing.

In Order M-835, Assistant Commissioner Tom Mitchinson found that a disciplinary hearing conducted under 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 and that such hearings are properly characterized as "proceedings" for the purpose of section 52(3)1 of the Act. The Assistant Commissioner also found that 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 with these findings and find that they apply equally in the circumstances of this appeal. I also find, having viewed the record, that the content is "sufficiently connected" to the issues addressed in the disciplinary hearing and can be characterized as being in relation to it (Order P-1255). Therefore, I find that the record was collected, maintained and used by the Police in relation to proceedings before an other entity. Requirement two has been satisfied.

Requirement Three

The Police submit that the disciplinary hearing was initiated as a result of a complaint of wrongful arrest made by the appellant against the arresting officer and other police officers. The Police state that under section 68(1) of the PSA , the penalties imposed upon the subject police officers can include dismissal, suspension, demotion and forfeiting of pay and time off. In my view, these actions can only reasonably be characterized as being related to the employment of a person by the Police. I find, therefore, that the record was collected, maintained and used by the Police in relation to a proceeding before another entity relating to the employment of a person. I find that the third requirement has also been met.

As all three requirements of section 52(3)1 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 record falls outside the scope of the Act.

Because I have found that section 52(3) applies and the record is outside the jurisdiction of this office, I am unable to address the application of the exemptions raised by the Police in the alternative.

ORDER:

I dismiss this appeal.

Original signed by: July 16, 1998
Mumtaz Jiwan
Adjudicator