



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

# **ORDER MO-1166**

**Appeal MA-980188-1**

**York Regional Police Services Board**



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## **BACKGROUND:**

On November 25, 1995, a motor vehicle accident occurred in the Town of Georgina resulting in the death of a man. An off-duty police officer employed by the York Regional Police Services Board was involved. Following the Police investigation into the accident, the off-duty officer was charged under section 220 of the Criminal Code with Criminal Negligence Causing Death in connection with his involvement in the accident. In the course of the prosecution of the off-duty officer, questions were raised by the Crown Attorney about the conduct of various other police officers involved in the investigation of the accident. An investigation into those concerns by the York Regional Police Professional Standards Unit was begun. This investigation continues to the present time.

## **NATURE OF THE APPEAL:**

The York Regional Police Services Board (the Police) received a request on behalf of the family of the individual who was killed in the motor vehicle accident under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The request was for access to information concerning the investigation into the conduct of any police officers at the scene of the motor vehicle accident, as well as any information regarding the traffic accident investigation itself.

The Police located a large number of records responsive to the request and denied access to them, in their entirety, claiming that under section 52(3)1 of the Act, the records fall outside the ambit of the Act.

The requester, now the appellant, appealed the decision of the Police to deny access to the records.

A Notice of Inquiry was provided to the appellant and the Police. Representations were received from both parties. The Police indicate that the parties to this appeal have agreed to proceed only with respect to those records which relate to the investigation into the conduct of the officers involved in the accident investigation. The records which are responsive to the second part of the request, those concerned with the motor vehicle accident, are the subject of a separate request and will not, accordingly, be addressed in this order.

## **RECORDS:**

The records which remain at issue in this appeal consist of various notes, statements, reports, transcripts, Mobile Data Terminal transmission messages, correspondence and a report into the officers' conduct. These documents fill two "banker's boxes". The records maintained by the Professional Standards Unit also include a number of records taken from the accident investigation files which are the subject of the second request.

## **DISCUSSION:**

### **JURISDICTION**

The sole issue to be determined in this appeal is whether the requested information falls within the scope of sections 52(3)1 and 52(4) of the Act. These provisions read, in part, as follows:

[IPC Order MO-1166/November 24, 1998]

- (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.
- (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.

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

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 the records fall outside the ambit of the Act as a result of the operation of section 52(3)1 of the Act.

### **Section 52(3)1**

The Police state that the records were compiled by its Professional Standards Unit in the course of an investigation into whether any York Regional police officers had violated either the provisions of the Scheduled Code of Offences made pursuant to the Police Services Act (the PSA) or the Criminal Code.

Further, the Police indicate that if, as a result of the investigation, it was determined that any officer had violated the Scheduled Code of Offences or the Criminal Code, they would be charged in accordance with Part V of the PSA and would be required to appear before a discipline hearing which would have the power to make a determination of guilt and mete out the appropriate punishment. The discipline hearing before the designated Hearings Officer is conducted under the provisions of the Statutory Powers and Procedures Act. The Police further submit that the discipline hearing before a Hearings Officer is, in effect, a tribunal for the purposes of section 52(3)1.

The Police also indicate that the investigation by the Professional Standards Unit remains on-going, though it has been delayed by the illness of the officer-in-charge of the accident scene, who has yet to be interviewed by the Professional Standards Unit.

As a result, the Police submit that the records at issue were collected, prepared and are maintained in anticipation of proceedings before either a Court (if criminal charges are warranted) or a discipline hearing under the provisions of Part V of the PSA. The Police maintain that the investigation remains current and is related to the employment of a person by the Police, specifically, the officers who were involved in the motor vehicle accident investigation.

The appellant concedes that the records were collected, prepared, maintained and used by the Police in relation to the Court proceedings against the off-duty officer. However, the appellant submits that the records which were compiled relate to the criminal proceedings involving the off-duty officer, which were resolved in August of 1997. He argues that:

It cannot be said that any of the documents touching upon the question of liability in the motor vehicle accident or criminal culpability could have been prepared in relation to his [the off-duty officer's] employment by the police. The documents were prepared in respect of his criminal culpability and for no other purpose.

There may be documents in the list of requested items which will have an impact upon the employment of involved York Regional Police officers. It cannot be said however that documents prepared by [the Crown Attorneys] were collected in anticipation of anything other than [the off-duty officer's] criminal trial.

In order for a record to fall within the scope of paragraph 1 of section 52(3) of the Act, the Police must establish that:

1. the record was collected, prepared, maintained or used by the Police or on their 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.

### **Requirement 1**

I have examined the records and I am satisfied that they were collected, prepared, maintained and/or used by the Police as part of the investigation undertaken by the Professional Standards Unit into the conduct of all of the officers involved in the motor vehicle accident investigation. The records were not prepared only for the purpose of determining the criminal culpability of the off-duty officer, as suggested by the appellant, but also in support of the investigation into the conduct of the other officers involved. Therefore, the first requirement has been established.

### **Requirements 2 and 3**

As noted above, the Police indicate that, pursuant to the PSA, the investigation into the conduct of the police officers may result in a hearing, and if a finding of misconduct results, certain penalties may be imposed. The Police submit that the requested records were prepared in anticipation of such a hearing under the PSA.

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 have 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.
- Proceedings under Part V of the PSA which deal with internal complaints against police officers “relate to the employment of a person by the institution”.

I have reached the same conclusions in the present appeal. I find that the records were collected, prepared, maintained and/or used by the Police as part of its investigation into the conduct of the involved officers, with a view towards an anticipated disciplinary hearing under section 60 of the PSA or some other proceedings before a court, if charges were warranted under the Criminal Code. Again, the records were

not created solely for the purpose of determining the guilt or innocence of the off-duty officer. The conduct of all of the officers involved in the accident investigation was the subject of the investigation which gave rise to the creation of the records.

As such, I find that they are properly characterized as being “in relation to” the anticipated disciplinary hearing, which is a proceeding relating to the employment of the officers who were involved in the accident investigation. I also find that the designated Hearings Officer who presides over the discipline hearing has the authority to decide disciplinary matters and is properly described as an “other entity” under section 52(3)1.

In Order P-1618, Assistant Commissioner Mitchinson concluded that section 65(6)1 [the provincial equivalent to section 52(3)1], is “time sensitive”. He stated that:

... in my view, in order for section 65(6)1 to apply to these records in the context of the present appeal, it must be established that the proceedings or anticipated proceedings referred to are current or are in the reasonably proximate past so as to have some continuing potential impact for any ongoing labour relations issues which may be directly related to the records.

...

In my view, section 65(6) must be understood in context, taking into consideration both the stated intent and goal of the Labour Relations and Employment Statute Law Amendment Act (Bill 7) - to restore balance and stability to labour relations and to promote economic prosperity; and overall purposes of the Act - to provide a right of access to information under the control of institutions and to protect the privacy of and provide access to personal information held by institutions. When proceedings are current or anticipated, in my view, there is a reasonable expectation that a premature disclosure of the type of records described in section 65(6)1 could lead to an imbalance in labour relations between the government and its employees. However, when proceedings have been completed, are no longer anticipated, or are not in the reasonably proximate past, disclosure of these same records could not possibly have an impact on any labour relations issues directly related to these records, and different considerations should apply.

As noted above, the Police indicate that the investigation by its Professional Standards Unit remains ongoing and will resume once the officer-in-charge of the accident scene is able to be interviewed. This investigation may yet result in disciplinary measures being taken against the officers involved in the accident investigation or charges being laid under the provisions of the Criminal Code. In my view, because the investigation remains ongoing, the “time sensitive” nature of the records still exists. While the criminal proceedings against the off-duty officer are completed, the disciplinary process with respect to the investigation by the Professional Standards Unit is not yet finished.

I am satisfied that the Police have established that there exist anticipated proceedings before the Hearings Officer under section 60 of the PSA relating to the employment of the officers involved in the accident investigation. Therefore, I find that all three requirements of section 52(3)1 have been met. None of the exceptions in section 52(4) apply in the circumstances of this appeal, and I find that the records fall outside the jurisdiction of the Act.

**ORDER:**

I uphold the decision of the Police.

Original signed by: \_\_\_\_\_  
Donald Hale  
Adjudicator

\_\_\_\_\_  
November 24, 1998