



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

ORDER MO-1190

Appeal MA-980212-1

Toronto Police Services Board



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NATURE OF THE APPEAL:

The Toronto Police Services Board (the Police) received a request under the Municipal Freedom of Information and Protection of Privacy (the Act) from one of its employees for access to all non-medical information contained in his departmental medical file.

The Police identified 96 pages of responsive records, granted access in full to 16 pages and partial access to 12 other pages. The Police claimed section 14(1) of the Act (invasion of privacy) as the basis for withholding the remaining parts of these 12 pages.

The Police denied access to the remaining 73 pages on the basis that they fall outside the scope of the Act pursuant to section 52(3) of the Act. These records consist of police officers' notebooks and internal correspondence relating to events which took place in 1998.

The appellant appealed the decision of the Police.

During mediation, the appellant agreed that the 12 pages to which partial access had been denied were no longer at issue.

A Notice of Inquiry was sent to the Police and the appellant. Representations were received from the Police only.

DISCUSSION:

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

- (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:

[IPC Order MO-1190/February 19, 1999]

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 application of the Act to the requested records.

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 claim that all three paragraphs of section 52(3) apply. I will address the application of section 52(3)3 first.

Section 52(3)3

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

1. they were collected, prepared, maintained or used by 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 has an interest.

[Order P-1242]

Requirement 1

The Police submit that the records were collected and used by the Police physician in relation to his assessment of the appellant. The Police explain that their physician is responsible for evaluating Police personnel with respect to medical issues. The Police state that the records were also used in the decision-making process which led to the appellant's transfer to another Unit within the Police Service.

In my view, the records were clearly collected and used by the Police, and I find that the first requirement of section 52(3)3 has been established.

Requirement 2

The Police submit that the collection and usage of the records was in relation to communications, meetings and/or discussions about the appellant's assessment with the physician. The Police further submit that once the physician determined that there was no medical reason for the appellant's conduct, this conduct became the subject of an investigation undertaken pursuant to the Police Services Act (the PSA). As part of the informal dispute resolution process under Part V of the PSA, a transfer to another Unit within the Police Service was negotiated by the Deputy Chief, the Police Association, the appellant and the appellant's Unit Commander.

In my view, the records represent communications in relation to the appellant's medical assessment within the work environment, and were also used in a meeting for the purpose of subsequent negotiations as described by the Police. Therefore, I find that the second requirement of section 52(3)3 has been established.

Requirement 3

In Order M-835, I found that proceedings under the PSA which deal with internal complaints "relate to the employment of a person by the institution". Clearly, an assessment of an employee's job performance and a decision to transfer an employee to another Unit is an employment-related matter. Therefore, the records qualify as records about "employment-related matters" for the purposes of section 52(3)3.

The only remaining issue is whether this is an employment-related matter in which the Police "have an interest".

Previous orders have held that an interest is more than mere curiosity or concern. An "interest" for the purposes of section 52(3)3 must be a legal interest in the sense that the matter in which the Police have an interest must have the capacity to affect the legal rights or obligations of the Police (Orders P-1242 and M-1147).

However, several recent orders of this office have considered the application of section 52(3)3 (and its provincial equivalent, section 65(6)3) in circumstances where there is no reasonable prospect of the institution's "legal interest" in the matter being engaged (Orders P-1575, P-1586, M-1128, P-1618 and M-1161). The conclusion of this line of orders has essentially been that an institution must establish an interest that has the capacity to affect its legal rights or obligations, and that there must be a reasonable prospect that this interest will be engaged. The passage of time, inactivity by the parties, loss of forum or conclusion of a matter have all been considered in arriving at a determination of whether an institution has a "legal interest" in the records.

According to the Police, once their physician determined that there was no medical reason for the appellant's conduct, an investigation was undertaken pursuant to Part V of the PSA, ultimately resulting in the appellant's transfer to another Unit within the Police Service. The Police rely on previous orders of this office which have found that the statutory requirements of the PSA which require a police force to investigate internal complaints and the penalties which may be imposed after a finding of misconduct, including informal resolution, are matters in which the Police have "an interest" (for example Orders P-1583, M-835, M-899 and M-931). The Police submit that all of the records at issue in this appeal were collected prepared, maintained and used in an employment-related matter in which the Police have a legal interest, that being the maintenance of discipline within the Toronto Police Service.

As far as the time-based requirement of section 52(3)3 is concerned, the Police submit that the matter involving the appellant remains current. The Police argue that, although the matter was resolved informally via the appellant's transfer to another Unit, the transfer occurred less than a year ago, and the appellant can still grieve his transfer under the terms of the Collective Agreement between the Police and the Police Association to which the appellant is a member. If the informal resolution fails, the Police point out that the Chief is still in a position to act on the matter under the provisions of the PSA.

The appellant did not provide any representations in response to the Notice of Inquiry.

I accept the arguments provided by the Police. Although I have no evidence to suggest that the appellant has initiated or intends to initiate a grievance with respect to his transfer, it would appear that he has a right to do so, and if this occurs, the records at issue in this appeal would clearly be relevant to any grievance process or actions taken by the Police under the PSA. In my view, the Police have established an interest that has the capacity to affect its legal rights, and that there is a reasonable prospect that this interest will be engaged. Therefore, I find that the Police have a sufficient "legal interest" in this employment-related matter to bring the records within the ambit of the third requirement of section 52(3)3.

Therefore, I find that the requirements of section 52(3)3 have been established. 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: _____
Tom Mitchinson
Assistant Commissioner

_____ February 19, 1999