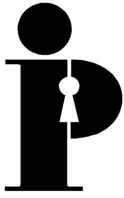

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-1193

Appeal MA-980281-1

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

BACKGROUND:

The appellant, an employee of the Ministry of the Solicitor General and Correctional Services, applied for a position as a Police Constable with the Toronto Police Service (the Police). After proceeding successfully through most of the recruitment process, he was informed by letter on July 15, 1998 that his application would not be considered further in the process or re-activated in the future. In the same letter, he was also informed that employment-related records were excluded from the jurisdiction of the Municipal Freedom of Information and Protection of Privacy Act (the Act) and requests to access employment-related information would not be considered.

The appellant initiated a meeting with the Recruitment Department and was informed during this meeting that he was never going to be a police constable with the Toronto Police Service, that something in his background check was the reason for this, that any person who received such a letter always knows "deep down" the reason for it, and that the Police did not have to disclose reasons for this decision.

Subsequently, the appellant returned to the Ministry of Solicitor General and Correctional Services and asked to examine his personnel file. After being permitted to examine his file, being assured by his employer that he was not subject to any investigation and was, in fact, considered by all accounts to be an excellent employee, the appellant again contacted the Police. He was informed by the Recruitment Department that he was "screened out" and that his application was not to be accepted ever in the future. After reviewing the data files on the computer, the Recruitment Officer told him that the Police were certain that he had "established a pattern" which indicated his unsuitability for a career in policing.

NATURE OF THE APPEAL:

The appellant made a request under the Act to the Police. The request was for access to:

> ... a complete copy of my personal file as a candidate with the Toronto Police ... This file request is inclusive to all aspects of my progress within the recruitment process (ie GAT.B, MMPI-2, Interview scores and answers, background analysis in detail).
>
> Please specify the area of concern Toronto Police had with my candidacy for Police Constable, which ultimately resulted in my permanent exclusion from future employment considerations within this field (ie. Police Constable with Toronto).

The Police located 212 pages of records responsive to the request, and access to them was denied on the basis that section 52(3) took the records outside the scope of the Act.

The appellant appealed the denial of access. During mediation, the Police specified that they were relying upon section 52(3)3 in this appeal.

I sent a Notice of Inquiry to the Police and the appellant. Representations were received from both parties.

RECORDS:

The record at issue is a file relating to the appellant's application for a Police Constable position. The record consists of 212 pages and contains an application for employment, a background investigation report, employment reference reports, letters of reference, personal history forms, personal certifications, summary evaluation sheets, interview notes and test results, an authorization for the collection of personal information, and correspondence.

ISSUES:

JURISDICTION:

In this appeal, the sole issue to be decided is the interpretation of sections 52(3)3 and (4) of the Act. These amendments to the Act may apply to the records requested by the appellant.

If section 52(3)3 applies, and none of the exceptions found in section 52(4) apply, section 52(3)3 has the effect of excluding records from the scope of the Act, which removes such records from the Commissioner's jurisdiction.

In order to fall within the scope of paragraph 3 of section 52(3), 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 meetings, consultations, discussions or communications; **and**

3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

Collected, prepared, maintained or used

The Police submit that the records were collected and/or prepared by the Police to assess the appellant's suitability for employment as a Police Constable and were used by management personnel in relation to the final decision concerning the appellant's application for employment.

The records document the recruitment process, and it is apparent on review of each of them that they were collected, prepared or used by the Police as part of this process. Accordingly, I find that the first requirement under section 52(3)3 has been met.

In relation to meetings, consultations, discussions or communications

The Police submit that the records were prepared following consultation and discussions in relation to the application and are substantially connected to the hiring process. The Police submit that the records communicate to management personnel the subsequent findings of the recruiting officer responsible for processing the application.

Despite the fact that this part of the Police representations speaks only to those records prepared by the Police, it is apparent on review of the records that they all were collected, prepared or used in relation to meetings, discussions or communications which took place in relation to the appellant's application for employment, and the second requirement under section 52(3)3 has also been met.

Labour relations or employment related matters

The Police submit that requirement 3 has been met, because a job competition was found to be an employment-related matter in Order M-992. Additionally, the Police submit that Order M-1127 states:

> I find that a job competition is an employment-related or labour relations matter. In my view, the complete hiring process, including the screening of potential candidates, must be considered to be an employment-related matter, regardless of the fact that the person may not ultimately be the successful candidate.

I accept that a job competition is an employment-related matter. However, this finding alone is not sufficient to satisfy the third requirement of section 52(3)3. The employment-related matter must be one in which the institution "has an interest."

Legal Interest

In Order P-1242, Assistant Commissioner Tom Mitchinson found:

> [A]n "interest" is more than mere curiosity or concern. An "interest" must be a legal interest in the sense that the matter in which the institution has an interest must have the capacity to affect the institution's legal rights or obligations.

The interpretation of this term has been refined in recent orders.

In Order P-1575, Assistant Commissioner Mitchinson dealt with a request for notes "made during an employee performance and evaluation process". He concluded that, while the institution had an interest to administer its performance appraisal process fairly, that was not sufficient to bring the employment-related

matter within the scope of section 65(6)3 (the provincial equivalent of section 52(3)3 of the Act). To meet the requirements of this section, the institution must establish an interest that has the capacity to affect its legal rights or obligations. Assistant Commissioner Mitchinson considered whether the performance appraisal process was grievable, and 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. Finally, Assistant Commissioner Mitchinson 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.

In Order P-1586, the records related to meeting minutes regarding the resignation of a named individual. In considering the institution's legal obligations to properly discharge its responsibilities under the Power Corporation Act, Assistant Commissioner Mitchinson found that several months had passed since the named individual's employment ended, and the matters under consideration at the meeting were concluded. Therefore, he found that the context had changed and that there was no evidence before him to suggest that there was an ongoing dispute or other employment-related matter involving the institution and the named individual that had the capacity to affect the institution's legal rights or obligations.

In Order M-1128, Inquiry Officer Laurel Cropley used the same line of reasoning in concluding that the institution did not have a legal interest in records consisting of the appellant's application for employment and related documentation, dating back approximately 10 years, as there was not a reasonable prospect that this interest would be engaged.

Finally, in Order P-1618, Assistant Commissioner Mitchinson dealt with a request for records relating to the investigation of a complaint against two OPP police officers made under the Police Services Act. He found that the investigation was about an employment-related matter, and that the OPP's statutory obligation to investigate the complaint constituted a legal interest in an employment-related matter at the time of the investigation. However, because six years had passed since the investigation and its subsequent review was completed, there was no outstanding interest in the investigation that had the capacity to affect the OPP's legal rights or obligations, and the Assistant Commissioner found that the records did not fit within the scope of section 65(6)3.

The Police state that the selection process for police constables is based on a province-wide policy developed by the Ministry of the Solicitor General and Correctional Services. This policy document, the Ontario Association of Chiefs of Police Constable Selection System, specifies the length of time unsuccessful applicants must wait before reapplying. With the exception of the physical skills and abilities test, unsuccessful applicants must wait one year before reapplying to any police service in Ontario for the position of police constable (an applicant who has failed only the physical skills portion of the test may reapply after six months).

The Police argue that the routine discharge of the hiring responsibility of the Police Services Act includes an ongoing legal interest, in that applicants may be precluded from submitting application for employment as a police constable throughout Ontario for a period specified by the policy document of the Ministry of the Solicitor General and Correctional Services (in this case one year). The Police have not, however, provided details respecting how or in what forum the appellant might engage the legal interests of the Police should he wish to challenge this decision.

The Police also submit that the appellant has made four prior requests for access to information concerning his application and the application process to the Police. The Police argue that it is somewhat unlikely that casual curiosity would compel an individual to submit this number of requests, and suggest that these requests provide a convincing argument that in fact outstanding interests in this job competition do exist, interests which "will undoubtedly affect the [Police] Service's legal rights or obligations."

Because the appellant is not an employee of the Police, there is no grievance process available to him, and I am not aware of any other statutory provisions or principle of common law that would provide a basis for any cause of action. Having reviewed the records and information before me, there are no apparent grounds for a complaint under the Employment Standards Act or the Human Rights Code, nor has the appellant made a complaint to either of these bodies, and I have been provided with no evidence of any other statutory right or common law basis for redress available to the appellant.

The Police argue that it is erroneous to conclude that the passage of a particular period of time without a legal action having been taken ensures the conclusion of the legal interest of an institution. In the circumstances of this appeal, I have not based my conclusions on the passage of a particular time frame, but on the absence of a right or basis for redress available to the appellant.

Accordingly, I find that, in the circumstances of this appeal, there is no employment-related matter pending or reasonably foreseeable which has the capacity to affect the legal rights or obligations of the Police, and I find that the Police have not demonstrated that it has sufficient legal interest in the records to bring them within the ambit of section 52(3)3.

Therefore, I find that the records are subject to the Act.

ORDER:

1. I order the Police to issue a decision letter to the appellant in accordance with the provisions of sections 19, 21 and 22 of the Act, regarding access to the requested records, treating the date of this order as the date of the request.

2. I order the Police to provide me with a copy of the correspondence referred to in Provision 1 by sending a copy to me when it sends this correspondence to the appellant.

Original signed by: March 1, 1999
Holly Big Canoe
Adjudicator