



**Information and Privacy
Commissioner/Ontario**

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

ORDER M-1159

Appeal M-9800064

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 the notebooks of two named police officers for Tuesday, April 15, 1997.

The Police informed the requester that one of the police officers did not keep a notebook for this date and therefore such a record does not exist. The Police denied access to the other police officer's notebook entries, consisting of eight pages, pursuant to section 52(3)1 and 3 of the Act. These notebook entries relate to events leading to the requester's suspension from duty as a uniformed member of the police force. As such, the Police determined that the notes were employment-related records and fell outside the scope of the Act.

The requester, now the appellant, appealed the decision of the Police.

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

After issuing the Notice of Inquiry, this Office released a number of orders dealing with the interpretation of section 52(3) and its provincial counterpart. Because these orders could have an impact on the present appeal, both parties were sent a Supplementary Notice of Inquiry and provided with an opportunity to make further representations. Additional representations were received from the Police.

DISCUSSION:

JURISDICTION

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, in part, 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.
 - ...
 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.

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 claim that both sections 52(3)1 and 52(3)3 apply.

Section 52(3)1

The Police state that allegations of misconduct had been made against the appellant. The Police submit that the Police Services Act (the PSA) imposes an obligation on the Chief of Police to investigate any apparent or alleged misconduct. According to the Police, the records at issue in this appeal relate to such an investigation, which resulted in criminal charges.

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 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.

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 its investigation. Therefore, the first requirement has been established.

Requirements 2 and 3

The Police state that, pursuant to the PSA, criminal complaints against a police officer may result in a hearing, and if a finding of misconduct results, certain penalties may be imposed, including dismissal, demotion, suspension and/or the forfeiture of pay and accrued time. The Police submit that the requested records were prepared in anticipation of the appellant being subject to such a hearing under the PSA.

In Order M-835, I 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 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.
- Proceedings under Part V of the PSA which deal with internal complaints “relate to the employment of a person by the institution”.

I have reached the same conclusions in the present appeal. I find that the notebook entries were collected, prepared, maintained and/or used by the Police as part of its investigation into the conduct of the appellant, with a view towards an anticipated disciplinary hearing under section 60 of the PSA. As such, they are properly characterized as being “in relation to” the anticipated disciplinary hearing, which is a proceeding relating to the employment of the appellant. I also find that the Chief of Police or his delegate has the authority to decide disciplinary matters and is properly described as an “other entity” under section 52(3)1.

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

The issue of timeliness was the subject of the Supplementary Notice of Inquiry.

In their representations in response to this Supplementary Notice, the Police state that disciplinary charges have been laid against the appellant, pursuant to the PSA, but that these charges were adjourned *sine die*, pending the conclusion of the criminal proceedings which arose from the investigation. The Police go on to state:

The Trial Preparation Office of Toronto Police Service has confirmed that the file concerning the above noted Police Services Act charges against the appellant has not yet been concluded. As such, the police disciplinary process, an employment-related matter which could result in a Police Act [sic] hearing, is still current and pending.

I am satisfied that Police have established that there are current proceedings before the courts as well as anticipated proceedings before the Chief of Police under section 60 of the PSA relating to the employment of the appellant. Therefore, I find that all three requirements of section 52(3) 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: _____

Tom Mitchinson
Assistant Commissioner

_____ November 5, 1998