



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

ORDER MO-1240

Appeal MA-990065-1

Toronto Police Services Board



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NATURE OF THE APPEAL:

The appellant made a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) to the Toronto Police Service (the Police). The request was for access to a copy of the audio/videotaped record of the appellant's booking and release at a particular Police Division.

The Police denied access to a copy of the videotape pursuant to sections 8(1)(a), 8(1)(f) and 38(a) of the Act.

The appellant appealed the decision of the Police.

I sent a Notice of Inquiry to the Police and the appellant. Representations were received from both parties. After reviewing these representations, it appeared that the records might be excluded from the scope of the Act under section 52(3) of the Act. Accordingly, I sent a Supplementary Notice of Inquiry to the Police and the appellant respecting this issue. Representations were received from both parties.

RECORD:

The record consists of a videotape (with sound) of the booking and release of the appellant.

DISCUSSION:

JURISDICTION

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

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 rely on section 52(3)1.

Section 52(3)1

In order for a record to fall within the scope of section 52(3)1, 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 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 institution.

Requirement 1

The Police explain that the record is a videotape of the appellant being booked and released after his arrest, and that such videotaping is a standard Police procedure to ensure an accurate record of the proceedings for use as may be necessary in any criminal case involving the person booked, as well as any complaint investigation or civil actions which may follow.

The appellant filed a complaint against several police officers, and the Police indicate that the videotape was used by the Professional Standards Unit and the Ontario Civilian Commission on Police Services (OCCPS) to investigate the appellant's complaint.

In my view, this record was used by the Police and the OCCPS, and I find that the first requirement of section 52(3)1 has been established.

Requirement 2

The Toronto Police Complaints Bureau concluded its investigation of the appellant's complaint in April 1998. The appellant appealed to OCCPS. OCCPS was provided with a copy of the videotape in order to assist in its investigation of the appellant's complaint. The appellant decided to appeal the most recent decision and the matter is currently under review by the OCCPS.

The appellant has also commenced a civil action against the Police and six police officers involved in his arrest.

The appellant argues that when the tape was prepared it was not prepared in relation to proceedings or anticipated proceedings. He indicates that the Police have told him that the tapes are made for the protection of the officers and the accused.

Section 52(3) is not restricted to records originally prepared for the purposes listed therein. Records prepared for other purposes which are subsequently collected, maintained or used in relation to the circumstances listed are also included. The appellant acknowledges that the videotape was viewed and commented on in the formal report prepared by the detective assigned to investigate his complaint, and is currently in the possession of the OCCPS to aid in their review of the report. Accordingly, I am satisfied that the use of the videotape by the Police and the OCCPS was in relation to proceedings or anticipated proceedings under the Police Services Act (the PSA) before an "other entity", specifically the OCCPS and/or the Chief of Police or his delegate (Orders M-835 and M-840). The first two components of the test have, accordingly, been met.

Requirement 3

The appellant submits that part three of the test has not been met because any proceedings or anticipated proceedings could not possibly relate to labour relations or employment of a person by the Police with regard to the tape, and reiterates his view that the tape was not made for any such purpose.

In Order M-835, Assistant Commissioner Tom Mitchinson made the following findings with respect to whether proceedings under the PSA relate to either labour relations or the employment of a person by the Police:

Despite what I acknowledge to be a general public interest in policing matters, I find that these Part V [of the PSA] proceedings do in fact "relate to the employment of a person by the institution". The penalties outlined in section 61(1), which may be imposed after a finding of misconduct, involve dismissal, demotion, suspension, and the forfeiting of pay and time. In my view, these can only reasonably be characterized as employment-related actions, despite the fact that they are contained in a statute and applied to police officers.

I adopt the findings of the Assistant Commissioner for the purposes of this appeal and find that the records which relate to the investigation into the appellant's complaints against police officers may be characterized as "employment-related" for the purposes of section 52(3)1.

In Order P-1618, Assistant Commissioner Tom Mitchinson found that in order to meet the requirements of section 65(6)1 (the provincial equivalent to section 52(3)1), 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. He went on to find that:

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, anticipated, or in the reasonably proximate past, 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.

In the present situation, the proceedings under the PSA are currently underway. Accordingly, I find that the third part of the test under section 52(3)1 has been met and the records are excluded from the scope of the Act.

ORDER:

I dismiss the appeal.

Original signed by _____
Holly Big Canoe
Adjudicator

October 12, 1999