



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

ORDER MO-1236

Appeal MA-990039-1

Toronto Police Services Board



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NATURE OF THE APPEAL:

The appellant made a request to the Toronto Police Services Board (the Police) under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for information regarding his application for the position of Police Constable.

The Police located 85 pages of responsive records and denied access to them on the basis that they fall outside the jurisdiction of the Act pursuant to section 52(3). The Police did not specify which paragraph of section 52(3) they are relying on.

The appellant appealed the denial of access.

During mediation, the appellant indicated that information which he provided to the police in support of his application is not at issue in this appeal. This information is found on 14 pages (pages 065-078). The appellant also indicated that the first paragraph of the letter found on page 032, which relates to another candidate, is not at issue as it is not responsive to his request. Similarly, pages 33 and 34 also relate to the other individual's GATB Individual Aptitude Scores and are not at issue.

Also during mediation, it was determined that the appellant's GATB score sheet could not be located. The appellant, therefore, raised the issue of whether the Police conducted a reasonable search for this record.

I sent a Notice of Inquiry to the appellant and the Police. Representations were received from the Police. In their representations, the Police clarified that they are relying on section 52(3)3 of the Act.

RECORDS:

The records at issue consist of checklists, a Background Investigation Form, letters, test results, Personal History Form, release and consent forms, evaluation forms, interview notes, an application form and a questionnaire.

DISCUSSION:

JURISDICTION

The first 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 sections read, in part:

- (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:

...

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

[IPC Order MO-1236/September 28, 1999]

- (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) applies, then the record is excluded from the scope of the Act.

In order for a record 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 Police or on their 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 have an interest.

[Order P-1242]

Requirements 1 and 2:

The Police submit that the records were collected, prepared and maintained for their use in the recruitment process. In particular, the Police submit that these records were collected and/or prepared by them to assess the appellant's suitability for employment as a police constable, and were then used by management personnel in relation to the final decision concerning the appellant's application for employment. The Police indicate that their decision regarding the appellant's application was communicated to him by letter dated December 24, 1998.

The records document the recruitment process and I am satisfied that they were collected, prepared or used by the Police as part of this process. Moreover, I find that they were collected, prepared or used in relation to meetings, discussions or communications which took place in relation to the appellant's application for employment. Therefore, I find that both of the first two requirements have been met.

Requirement 3:

The Police indicate that all of the records relate to the appellant's application for employment. The Police refer to a number of previous orders of this office (Orders M-1127 and MO-1193, for example) which have held that job competitions are employment-related matters and submit that an application for employment should be similarly characterized. I agree that the recruitment process which is initiated by an application for employment is an "employment-related matter".

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

In Order P-1242, Assistant Commissioner Tom Mitchinson stated the following regarding the meaning of the term "has an interest":

Taken together, these [previously referenced] authorities support the position that an "interest" is more than mere curiosity or concern. An "interest" must be a legal interest in the sense that the matter in which the Ministry has an interest must have the capacity to affect the Ministry's legal rights or obligations.

However, several recent orders of this office have considered the application of section 65(6)3 of the provincial Act (and its municipal equivalent in section 52(3)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 within the meaning of this section.

The Police submit that their legal interest in the employment-related matter is established by various provisions of the Police Services Act (the PSA).

In particular, the Police note that Part V, section 56(1) of the PSA sets out the nature of the complaints which can be lodged by the public. This section states:

Any member of the public may make a complaint under this part about the policies of or services provided by a police force or about the conduct of a police officer.

With respect to the appointment of an individual as a police officer in accordance with section 43(1) of the PSA, the Police state:

The complex demands of policing in a city of Toronto's size and cultural diversity require that candidates for the position of police constable be tested physically, intellectually and psychologically, and a thorough background check performed. Each candidate is carefully screened and meetings and/or consultations, discussions and communications are held concerning each applicant; only those candidates who meet the highest possible standards are appointed.

The Police state that the selection process for police constables is a province-wide policy developed by the Ministry of the Solicitor General and subsequently adopted by the Police. The Police assert that, as part of this policy, unsuccessful applicants must wait six months before reapplying for employment.

Further, the Police submit that they rendered a service to the appellant during the recruitment process in that he paid a fee for the testing, interview and other administrative requirements.

The Police submit that both the policy adopted by them and the services rendered by them to the appellant during the recruitment process could be the subject of a complaint as defined by section 56(1) of the PSA. The Police go on to detail the manner in which complaints are processed and the various directions they may take.

I have difficulty accepting the position taken by the Police. Based on an analysis of the ordinary meaning of section 56(1), I do not accept that a person objecting to his or her exclusion from being hired as a police employee would be complaining **about** a "policy" in the sense contemplated by this section. In my view, this would be an inaccurate characterization of such a complaint. I would expect that such a person would be complaining about the hiring process, not the policies underlying it. At best, the complaint would be that a policy wasn't followed rather than being a complaint "about" a policy or policies.

Further, I do not accept that the Police have provided any "services" to the appellant in receiving and considering his application for employment, notwithstanding that he has paid for this process. In my view, a "service" in the general sense contemplates that the appellant will receive something of value back for his consideration. In the current context, the application fee is to cover the administrative costs of processing the appellant's application and for no other reason. I find that it would not be reasonable to expect that an applicant might receive any further value for it by way of guaranteed employment or that it should be refunded if unsuccessful.

I have taken my analysis of this issue one step further, however, and have considered the manner in which Part V of the PSA should be read in light of the broader rules of statutory interpretation. In this regard, I have considered the purposes underlying the PSA. In my view, Part V of the PSA was intended by the legislature as a mechanism of public accountability in relation to the provision of policing services to members of the public. I do not accept that this would extend to its use as a forum for human resources

complaints by individuals who were unsuccessful candidates in a police job recruitment process. My view of this is based on the “declaration of principles” in section 1 of the PSA, which states:

Police services shall be provided throughout Ontario in accordance with the following principles:

1. The need to ensure the safety and security of all persons and property in Ontario.
2. The importance of safeguarding the fundamental rights guaranteed by the Canadian Charter of Rights and Freedoms and the Human Rights Code.
3. The need for co-operation between the providers of police services and the communities they serve.
4. The importance of respect for victims of crime and understanding of their needs.
5. The need for sensitivity to the pluralistic, multiracial and multicultural character of Ontario society.
6. The need to ensure that police forces are representative of the communities they serve.

In my view, this section underlines the focus of this statute on the provision of policing services (as they relate to the safety and security of the public), and the importance of Part V of the PSA as a public accountability tool in that regard. While item 6 clearly has an impact on human resources issues, it indicates, at most, that the policies of the police should attempt to achieve this objective, and for this reason it is appropriate that Part V should permit someone to complain about “policies” that do not support it. However, in my view, this is a very different thing from an allegation that a complaint about a job competition or the recruitment process was unfair. Moreover, in the event that the failure to hire contravenes the objectives of item 6 in a discriminatory way, a forum for making and deciding such a complaint, and providing a remedy, exists under the Ontario Human Rights Code.

Further, section 57(1) qualifies section 56(1) somewhat, stating that “a complaint may be made by a member of the public **only if the complainant was directly affected by the policy, service or conduct that is the subject of the complaint**” (emphasis added). In my view, this section restricts the ability of members of the public to file complaints, and contemplates that a “policy” would be the subject of a complaint rather than a “complaint under a policy”. In my view, this provides further evidence to support the view that it is the policies of the police, rather than a complaint under a policy, that is the target of the inclusion of the term “policies” in section 56(1).

Finally, it is clear that police officers are not “members of the public” for the purposes of section 56(1) and as such would be precluded from making complaints about “policies” or “services” or otherwise. This is confirmed by section 57(7) of the PSA which states, in part:

For the purposes of this Part, a member of the public does not include,

...

- (c) a member of a police force if that police force or another member of that police force is the subject of the complaint.

In my view, it would be inconsistent with the treatment of police officers seeking promotions, transfers to other areas of policing, relocation to another force or any other employment-related move, who would be precluded from making a Part V complaint, to put external job applicants on a different footing.

I also note that, although the Police have suggested that a person may make a complaint about the recruitment process under Part V, they have provided no evidence that this has, in fact, occurred in any case.

For all these reasons, I have concluded that Part V of the PSA is not intended to provide a forum for human resources complaints and would not be available to an unsuccessful applicant for employment with the Police who wishes to complain about the hiring process.

However, even if I were to find that Part V of the PSA does establish a legal interest, I must also be satisfied that there is a reasonable prospect of the institution's "legal interest" in the matter being engaged. The Police submit that the matter remains current. They rely on Order MO-1193, in which Adjudicator Big Canoe states:

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.

The Police submit that although there is no evidence at this time that the appellant has initiated a complaint pursuant to section 56(1) of the PSA, he currently has an avenue to do so, thus "fulfilling the requirement referred to by Holly Big Canoe in Order MO-1193".

As I indicated above, I do not believe that Part V of the PSA provides the appellant with an avenue to initiate a human resources complaint. However, even if it does, I do not accept that Order MO-1193 stands for the proposition that this is sufficient. In my view, Adjudicator Big Canoe simply did not turn her mind to the "passage of time" or any other similar consideration as her decision was based on other grounds.

In a recent decision issued by Adjudicator Big Canoe, she makes the following comments on the "possibility of legal action arising in a matter" (Order PO-1718). She states:

The Ministry refers to the possibility of some legal action being taken as a result of the audit or disclosure of the audit, and relies on the due performance of its on-going responsibilities to establish that its legal interests are engaged. In my view, the mere possibility of future legal action, which may be said to arise out of many kinds of audit or regulatory activities of government, is insufficient to engage a reasonable anticipation of such action actually occurring or, therefore, to engage an active legal interest ... In my view, unless there is something that arises to give reality to the prospect or anticipation of such action, government's "interest" in the record relates to the normal course of its affairs, and the requisite legal interest is not established.

In my view, this decision is consistent with the line of orders referred to above. In the circumstances of the current appeal, I am not persuaded that there is any reasonable prospect or anticipation of any action being taken by the appellant under the PSA in the event that Act provides a legal avenue.

Further, there is no evidence before me that the appellant has questioned the adherence of the Police to the Ontario Human Rights Code or that he has made or is contemplating making a complaint in that forum.

In conclusion, I find that the Police have failed to establish a legal interest in this employment-related matter that is reasonably capable of being engaged. Therefore, I find that the third requirement has not been met and the records are, accordingly, subject to the Act.

REASONABLENESS OF SEARCH

As I indicated above, it was determined that the appellant's GATB score could not be located. The appellant, therefore, believes there should be more records responsive to his request.

In cases where a requester provides sufficient details about the records which he or she is seeking and the Police indicate that records do not exist, it is my responsibility to insure that the Police have made a reasonable search to identify any records that are responsive to the request. The Act does not require the Police to prove with absolute certainty that records do not exist. However, in my view, in order to properly discharge its obligations under the Act, the Police must provide me with sufficient evidence to show that they have made a **reasonable** effort to identify and locate responsive records.

A reasonable search is one in which an experienced employee expends a reasonable effort to locate records which are reasonably related to the request.

The Police indicate that a Staff Sergeant in their Employment Office was contacted upon receipt of the request and subsequently forwarded the appellant's application file to the Freedom of Information Office. The Police note that the issue of the missing "GATB Individual Aptitude Scores Sheet for External Users" arose during mediation. At this time further inquiries were made to the Employment Office to determine the location of this record. As a result of these inquiries it was determined that the appellant was given a GATB test in July 1996 and the score he received was documented in his application file. The Police indicate that the test sheet was no longer in the file sometime prior to March 20, 1998.

The Police indicate that in accordance with their records retention schedule, a retention period of one year plus current is maintained for rejected applicant records. However, they retain computerized results of tests recorded on the Applicant Tracking System for two years plus current. Consequently, the Police state that the appellant's actual GATB test was purged in early 1998.

A simple calculation would indicate that the record should not have been purged prior to July 1998 if it was to be done in accordance with the records retention schedule (as opposed to early in 1998, or at least prior to March of that year). However, I am satisfied that the search conducted by Police for this record establishes that it has been missing since at least March 20, 1998. I am also satisfied that the individual conducting the search was knowledgeable about the location and types of files to be searched and that she made reasonable efforts to attempt to locate the record. Therefore, I find that the search conducted by the Police was reasonable in the circumstances.

ORDER:

1. The search conducted by the Police for responsive records was reasonable and this part of the appeal is dismissed.
2. I order the Police to provide the appellant with a decision letter with respect to the records at issue in accordance with the time frames set forth in section 19 of the Act, using the date of this order as the date of the request, and without recourse to a time extension under section 20 of the Act.
3. I further order the Police to provide me with a copy of the letter referred to in Provision 2 by forwarding a copy to my attention c/o the Office of the Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario M5S 2V1.

Original signed by: _____
Laurel Cropley
Adjudicator

September 28, 1999