



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

# **ORDER MO-1280**

**Appeal MA-990148-1**

**Chatham-Kent 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 Chatham-Kent Police Services Board (the Police). The request was for access to information relating to the appellant's complaint against three members of the Amherstburg Police Service and the related investigation which was conducted by the Police at the request of the Ontario Civilian Commission on Police Services (the OCCPS). Included was a request for a copy of the summary of the appellant's meeting with the Police Inspector who carried out the investigation of her complaint.

The Police informed the appellant that pursuant to the provisions found in sections 52(3)1 and 52(3)3, the requested records were excluded from the scope of the Act.

The appellant appealed the decision of the Police, claiming that the records are not excluded from the scope of the Act.

During the mediation of the appeal, the Police advised this office that any notes taken by the Police Inspector at the time of his interview with the appellant no longer exist. The appellant indicated that she believes that these records should exist and that she wished to have this issue addressed in the Inquiry.

This office provided a Notice of Inquiry to the appellant and the Police setting out the issues in this appeal. Representations were received from the appellant only.

## **RECORDS:**

The records at issue consist of documentation addressing the appellant's police complaint, including correspondence, memoranda, statements from various individuals, reports and an e-mail message. The appellant is not seeking access to records which she provided to the Police, and such records are, therefore, not at issue in this appeal.

## **DISCUSSION:**

### **JURISDICTION**

Sections 52(3) and (4) 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.

### **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 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.

### **Parts One and Two of the Test**

[IPC Order MO-1280/February 29, 2000]

Based on my review of the records to which the Police have applied section 52(3)1, I am satisfied that they were collected, prepared, maintained and used by the Police. I further find that this collection, preparation, maintenance and usage was in relation to anticipated proceedings under the Police Services Act (the PSA) before an “other entity”, specifically the Chief of the Amherstburg Police (the Chief) or his delegate (Orders M-835, M-840 and MO-1186). The report prepared by the Police Inspector was submitted to the Chief and any discipline proceedings or other action pursuant to the provisions of the PSA would lie not with the Chatham-Kent Police, but with the Chief. The first two components of the test have, accordingly, been met.

### **Part Three of the Test**

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 statements of the Assistant Commissioner for the purposes of this appeal and find that because the records relate to the investigation into the appellant’s complaints against police officers, they may be characterized as “employment-related” for the purposes of section 52(3)1.

In Order P-1618, Assistant Commissioner 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 against the police officers under the PSA were completed in early 1999 following the report of the Chief to the Amherstburg Police Services Board. I have not been provided with any evidence to demonstrate that any further action is contemplated or now underway with respect to the appellant's complaints against the police officers. Accordingly, I find that there are no "proceedings or anticipated proceedings before a court, tribunal or other entity", either existing or in the reasonably proximate past. Therefore, the third part of the test under section 52(3)1 has not been met and the records are not excluded from the ambit of the Act under that section.

### **Section 52(3)3**

In order for the records to qualify under section 52(3)3, the Police must establish that:

1. the records were collected, prepared, maintained or used by an 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.

[Order P-1242]

### **Parts One and Two of the Test**

I have found above that the records were collected, prepared, maintained and used by the Police. In addition, based on my review of the records, I find that this collection, preparation, maintenance and use was in relation to various discussions, meetings, communications and consultations which took place as part of the investigation of the appellant's complaints. As a result, I find that the first two parts of the test under section 52(3)3 have been satisfied.

### **Part Three of the Test**

In Order M-931, I held that an investigation of a public complaint under Part VI of the PSA by a police force is about an employment-related matter. Similarly, I find in the present appeal that the investigation by the Police of the appellant's complaint about police officers employed by the Amherstburg Police Service is about an employment-related matter.

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

[IPC Order MO-1280/February 29, 2000]

Taken together, these [previously discussed] 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.

The appellant submits that the police officers who were the subject of her complaint were not employees of the Chatham-Kent Police Service, the institution which conducted the investigation. For this reason, she argues that the Police do not have a legal interest in this matter. The appellant also indicates that she is not involved in any litigation with the Chatham-Kent Police, the Amherstburg Police or the OCCPS, at whose request the Chatham-Kent Police conducted the investigation. The appellant further submits that the investigation concluded with the submission of a report by the Chief to the Amherstburg Police Services Board in February 1999.

As noted above, the Police have not provided any representations in response to the Notice of Inquiry.

In Order P-1618, in a situation where the Ontario Provincial Police (the OPP) conducted an investigation into the conduct of two of its officers, Assistant Commissioner Mitchinson held that the OPP had an obligation under the PSA to commence an investigation, and that this constituted a legal interest in an employment-related matter at the time of the investigation. However, he went on to find that six years had passed since the OPP’s investigation and the subsequent complaint to the Police Complaints Commission. The Assistant Commissioner found that he had been provided with no evidence to suggest that there existed an outstanding interest in the investigation that had the capacity to affect the OPP’s legal rights or obligations.

In the present circumstances, I also find that I have not been provided with any evidence to suggest that the Police have a continued interest in the investigation which would affect its legal rights or obligations. The investigation has now been concluded for over a year.

As I noted above, section 52(3)3 is record specific and fact specific. In the circumstances of this case, there is no matter pending or reasonably foreseeable which has the capacity to affect the Police’s legal rights or obligations. Therefore, I find that the Police have not demonstrated that it has a sufficient legal interest in the investigation records to bring them within the ambit of section 52(3)3.

Accordingly, I find that the third requirement of section 52(3)3 has not been established and the records are not excluded from the ambit of the Act under that section.

Because of the manner in which I have addressed the application of sections 52(3)1 and 3 to the records, I will require that the Police provide the appellant with a decision respecting access to the responsive records in accordance with sections 19 and 22 of the Act.

## **REASONABLENESS OF SEARCH**

In cases where a requester provides sufficient details about the records which he or she is seeking and the institution indicates that records do not exist, it is my responsibility to insure that the institution has made a reasonable search to identify any records that are responsive to the request. The Act does not require the institution 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 institution must provide me with sufficient evidence to show that it has 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.

As indicated above, the appellant believes that additional records responsive to her request should exist. Specifically, she is seeking access to any notes which may have been taken by the Police Inspector who interviewed her in relation to her complaint.

Again, the Police have not provided me with any submissions as to the nature and extent of the searches which it may have undertaken to identify and locate records which are responsive to the request. In my view, the Police have failed to provide me with sufficient evidence to demonstrate that it made a reasonable effort to identify and locate all records which are responsive to the request.

## **ORDER:**

1. I order the Police to provide the appellant with a decision letter with respect to those records which it has identified as responsive to the request in accordance with the time frames set forth in sections 19 and 22 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.
2. I order the Police to conduct a further search for records responsive to the request and to advise the appellant in writing of the results of this search, within twenty-one (21) days of the date of this order.
3. In the event that additional responsive records are located during the search referred to in Provision 2, I order the Police to render a final decision on access to such records in accordance with the provisions of sections 19 and 22 of the Act, treating the date of this order as the date of the request, without recourse to a time extension under section 20.
4. I order the Police to provide me with a copy of the correspondence referred to in Provisions 1, 2 and 3 (if applicable), within thirty-five (35) days of the date of this order. This should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

Original signed by: \_\_\_\_\_ February 29, 2000

Donald Hale  
Adjudicator