



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

# **ORDER MO-1249**

**Appeal MA-990086-1**

**Sudbury Regional Police**



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## **NATURE OF THE APPEAL:**

The appellant was an auxiliary member with the Sudbury Regional Police Service (the Police). She resigned from this position in February, 1996. She subsequently submitted a request to the Police pursuant to the Municipal Freedom of Information and Protection of Privacy Act (the Act) for her entire “personnel file”.

The Police denied access to the requested records on the basis that they fall outside the jurisdiction of the Act pursuant to paragraphs 1 and 3 of section 52(3).

The appellant appealed the denial of access.

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

## **RECORDS:**

There are 69 records at issue. They include the appellant's application form, testing and interview results, memoranda, statements and incidents summaries.

## **DISCUSSION:**

## **JURISDICTION**

The sole issue in this appeal is whether the records fall within the scope of sections 52(3)1 and 3 and 52(4) of the Act. These provisions read:

- (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.

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 52(4) are present, then the record is excluded from the scope of the Act.

### **Preliminary matter**

#### **“employment”**

As noted above, section 52(3)1 contains a requirement that the “proceedings or anticipated proceedings” relate to the “employment of a person by the institution”. Section 52(3)3 requires that “meetings, consultations, discussions or communications” be about an “employment-related matter”. In my view, a finding that either section applies in the circumstances of this appeal turns on whether the appellant is engaged in “employment”. In this regard, I note that auxiliary police officers are volunteers. However, the Police Services Act (the PSA) recognizes and refers to auxiliary officers in such a way as to raise a question as to whether they enjoy a certain status similar to police officers and other paid staff. The question I must decide is whether an auxiliary police officer is in an employment relationship with the Police such that there is the potential for engaging the section 52(3) interests.

In Order M-899, I addressed this issue with respect to full-time police officers as follows:

The appellant submits that a police officer is not an employee and that police discipline is a private matter between the Crown and the individual public officer. The appellant asserts that a PSA hearing “has nothing to do with ‘the **employment** of a person by an institution’” [emphasis added]. Therefore, any records documenting the disciplinary proceeding are also not in relation to “the employment of a person by the institution”.

In support of this position, the appellant refers to several court cases which have determined that there is no master-servant relationship between a police officer and a municipality or police board (see Appendix “A” for full citations of the cases referred to by

the appellant). The cases which the appellant cited are unanimous in finding that police officers are not considered to be employees.

The Police state that police officers receive salaries and benefits from the institution. They assert further that despite the special status provided by the PSA to police officers with respect to their authority and responsibilities, the Uniform Collective Agreement (section 3.01(a) - Article 3 - Management Rights) acknowledges that management has certain authority over police officers, and therefore, establishes an employer-employee relationship.

The Police also refer to a number of provisions of the PSA concerning employment-related activities and have submitted a number of recruitment and other Human Resources forms used by the Employment Unit of the Police. They note, in particular, the Application for Employment and Offer of Employment documents which contain specific references to the employment of the police officer by the institution. For example:

The acknowledgment at the end of the Application for Employment, which is signed by the applicant, states:

The information which I have provided is correct to the best of my knowledge and I understand that a misrepresentation may disqualify me from employment, or cause my dismissal if already employed with the Service.

The first paragraph of the Offer of Employment provides:

This is to confirm your employment as a Police Constable with the Metropolitan Toronto Police Service, subject to approval of the Police Services Board ... Your continued employment is contingent upon the successful completion of the training program at which time you will be reclassified to the position of Police Constable.

In my view, the rationale for a finding that a police officer is not an employee is aptly stated in Attorney-General for New South Wales v. Perpetual Trustee Co. (LD), [1955] A.C. 457 at 489:

... there is a fundamental difference between the domestic relation of servant and master and that of the holder of a public office and the State which he is said to serve. The constable falls within the latter category. His authority is original, not delegated, and is exercised at his own discretion by virtue of his office: he is a ministerial officer exercising statutory rights independently of contract.

Similarly, in St. Catharines Police Association and Board of Police Commissioners for the City of St. Catharines, [1971] 1.O.R. 430 (H.C.J.), the Court stated at page 435:

... the Board of Police Commissioners has certain rights and obligations by virtue of the Police Act, but do not have the latitude in prescribing the nature of police officers' duties which the general law considers incidental to the employer-employee relationship.

These cases and the others cited by the appellant turn on the issue of whether a police officer is an "employee" at common law. However, in this case, I must decide whether the proceedings under Part V of the PSA relate "to the employment of a person by the institution". This decision must, therefore, be made in the context of the provisions of the PSA itself, and in particular, must determine whether that statute characterizes the work of police officers as "employment".

A number of provisions of the PSA, including those found in Part V, refer to the "employment" of the individual police officer. The following are only a few examples.

Section 40(1) states (in part) that:

A board may terminate the **employment** of a member of the police force for the purpose of abolishing the police force or reducing its size... [emphasis added]

Section 44 of the PSA concerns probationary periods of police officers. Section 44(3) provides, in part:

A board may terminate a police officer's **employment** at any time during his or her probationary period... [emphasis added]

Sections 61(7) and 104 of the PSA concern a police officer's "**employment record**".

Section 49(1)(d) states:

A member of a police force shall not engage in any activity in which he or she has an advantage derived from **employment** as a member of a police force. [emphasis added]

While it appears that the Courts are clear that, generally speaking, police officers are not "employees", in the context of the PSA, the legislature has made it abundantly clear that what police officers do for Police Services Boards constitutes "employment". In my view, the statutory context of the PSA is the governing factor, and I find that proceedings under Part V of the PSA relate to "employment".

I have considered whether this analysis similarly applies to auxiliary officers.

A number of sections of the PSA apply to auxiliary officers. In section 2, a distinction is drawn between regular and auxiliary officers by virtue of the definition of “police officer”:

“Police officer” means a chief of police or any other police officer, **but does not include** a special constable, a First nations Constable, a municipal law enforcement officer or **an auxiliary member of a police force**; (emphasis added)

Section 25 of the PSA provides for investigations of the conduct of police officers and others, and states, in part:

The Commission may, at the Solicitor General’s request, at a board’s request, at a municipal council’s request or of its own motion, investigate, inquire into and report on,

- (a) the conduct or the performance of duties of a police officer, a municipal chief of police, an auxiliary member of a police force, a special constable
- ...

Section 24(4.1) adds that:

If the Commission concludes, after a hearing, that an auxiliary member of a police force, a special constable or a municipal law enforcement officer is not performing or is incapable of performing the duties of his or her position in a satisfactory manner, it may direct that,

- (a) the person be demoted as the Commission specifies, permanently or for a specified period;
- (b) the person be dismissed;
- (c) the person be retired, if the person is entitled to retire; or
- (d) the person’s appointment be suspended or revoked.

Section 52 of the PSA describes the process whereby a person becomes an auxiliary officer as an “appointment”:

- (1) With the Solicitor General’s approval, a board may appoint auxiliary members of the police force.
- (2) If the board suspends or terminates the appointment of an auxiliary

member of the police force, it shall promptly give the Solicitor General written notice of the suspension or termination.

- (3) The Commissioner may appoint auxiliary members of the Ontario Provincial Police.

In my view, there is nothing in the PSA to suggest a different conclusion than the one I reached about regular officers on the question of whether they are “employees”; my conclusion is that they are holders of an office and not employees.

As to whether they are engaged in “employment”, I note that section 25(4.1) of the PSA allows a group of office holders, including an auxiliary officer, to be “demoted”, “dismissed” or “retired”, which are terms normally related to “employment”. This factor would appear to favour a conclusion that the auxiliary officers are so engaged.

However, based on the foregoing discussion, there are also several factors favouring a view that auxiliary officers are not engaged in “employment”.

To begin, the definition of “police officer” in section 2 of the PSA excludes auxiliary officers, suggesting that the two offices are different in the eyes of the legislature. It is clear that when the term “member of a police force” (which does include auxiliary officers - who are in fact called “auxiliary members” in section 25(a)) is used, a broader meaning is intended than the term “police officer” (see for example section 108(1) of the PSA relating to confidentiality).

In addition, apart from incidental provisions such as the confidentiality requirement in section 108, the substance of Part V of the PSA, relating to discipline matters, applies only to “police officers”, which by its definition in section 2 of the PSA excludes auxiliary officers.

Further, as part of my overall analysis of this issue, I have reviewed several dictionary definitions of the term “employment”.

The Oxford Concise Dictionary, 6<sup>th</sup> ed. (Oxford: Clarendon Press, 1976) defines it thus:

One’s regular trade or profession.

The Dictionary of Canadian Law (Toronto: Carswell, 1991) defines it as:

1. The performance of services under an express or implied contract of service or apprenticeship, and includes the tenure of an office.
2. Any activity for which a person receives or might reasonably be expected to receive valuable consideration.
3. The position of an individual in the service of some other person, including Her Majesty or a foreign state or sovereign.
4. The act of employing or the state of being employed.

Black's Law Dictionary (6<sup>th</sup> ed.) defines it thus:

An act of employing or state of being employed; that which engages or occupies; that which consumes time or attention; also an occupation, profession, trade, post or business.

In my view, both Oxford and the Dictionary of Canadian Law support the view that auxiliary officers are not engaged in "employment" because they are volunteers. Moreover, I would argue that this is consistent with the sense in which "employment" is commonly used in Canada, i.e. "having a job". "Employment" is not generally used to denote non-remunerative activities except in the sense that one is "employed" in some non-remunerative activity such as knitting a sweater, which I would argue is a distinct meaning and not the one the legislature intended here. The second and third items in the definition from Black's embodies this latter meaning, while the first and (even more clearly) fourth items relate to what I believe is the primary meaning, namely an activity for which one is paid.

Further support for the view that section 52(3) is only intended to apply to remunerated activities may also be drawn from the fact that the other threshold in this section refers to "labour relations" - a clear reference to remunerated activity. It was also enacted as part of a statute whose title states its purpose: "An act to restore balance and stability to labour relations in Ontario and to promote economic prosperity and to make consequential changes to statutes concerning labour relations" (S.O. 1995, c. 1). Arguably, this title provides further support for a finding that the target of these amendments is remunerated activity. It is difficult to imagine that, in the context of a statute concerning labour relations, a reference to "employment" would be seen as capturing the activities of volunteers.

I note that the records themselves indicate that, similar to police officers, auxiliary members fill out a form entitled "Employment Application" and much of the other application and assessment documentation relating to this position makes reference to "employment". At first blush this would appear to favour a conclusion that auxiliary officers are so engaged. Order M-899 also referred to a number of Human Resources documents used by the Police. For example, the acknowledgement at the end of the Application for Employment which was signed by the applicant police officer in order M-899 made specific reference to disqualification or dismissal from "employment".

I note that the acknowledgement at the end of the Application for Employment for the auxiliary member in this case does not make reference to "employment". Rather, the acknowledgement provides:

I understand that if any of these statements are untrue, this application may be rejected or any appointment to a position be nullified.

While it is apparent that auxiliary officers go through a selection process which may, in fact, be testing for similar aptitudes and abilities as police officers, in my view, this is not determinative of the issue.

In this regard, I note that my conclusion that police officers were engaged in employment in Order M-899 was not based on Human Resources documentation, but rather, the statutory context of the PSA which



made it abundantly clear that what police officers do for the Police Services Boards constitutes “employment”.

I have already concluded that the PSA demonstrates an intention to treat auxiliary officers differently from full time officers, particularly in the area of discipline. In my view, this factor, combined with the fact that auxiliary officers are volunteers, supports a finding that their activities with the Police do not constitute “employment”.

Based on the above discussion, I find that auxiliary members of the Police are not engaged in “employment”, and, therefore, a necessary prerequisite for the application of section 52(3) does not exist. Consequently, the section 52(3) interests are not engaged and the records fall within the jurisdiction of the Act.

**ORDER:**

1. I order the Police to issue a decision letter to the appellant in accordance with the provisions of sections 19, 20 and 21 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: \_\_\_\_\_  
Laurel Cropley  
Adjudicator

\_\_\_\_\_ November 8, 1999