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

ORDER MO-1347

Appeal MA-000057-1

Niagara Regional Police Services Board

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NATURE OF THE APPEAL:

The Niagara Regional Police Services Board (the Police) received a request pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) from a member of the media for "all records that would tell me the results of all the *Police Act* hearings involving members of your service in the past five years". The requester made an identical request to the Halton Regional Police Services Board and the Hamilton-Wentworth Police Services Board.

The Police identified a number of hearings conducted under the *Police Services Act* (the *PSA*) and its predecessor, the *Police Act*, as being responsive to the request, and denied access to all relevant records on the basis that they fell outside the scope of the *Act* by virtue of section 52(3).

The requester (now the appellant) appealed the Police's decision, maintaining that the hearings themselves are open to the public and that the information relating to those hearings should also be available to the public. The appellant also raised the possible application of the public interest override in section 16 of the *Act*.

During mediation, the Police issued a revised decision to the appellant, claiming that only records relating to one disciplinary hearing fell within the scope of section 52(3), and that all other responsive records qualified for exemption under section 14(1) (personal privacy) of the *Act*. The Police raised the factors in sections 14(2)(e), (f) and (i) in support of this exemption claim.

Also during mediation, the Police agreed to prepare a chart listing the name and rank of the officer charged, the charges, and the disposition or sentence. The information on this chart is gathered from various records produced during the course of disciplinary hearings. The appellant agrees that the information contained on the chart constitutes all information responsive to her request.

Because mediation was not successful, the appeal moved to the inquiry stage. I sent a Notice of Inquiry initially to the Police and twenty individuals whose interests may be affected by the outcome of the appeal (the affected persons). I received representations from the Police and four affected persons. I also received representations from the Niagara Region Police Association. I then sent the Notice to the appellant, along with a copy of the Police's representations. The appellant advised this Office that she would not be providing any representations.

RECORDS:

The sole record at issue in this appeal is a chart prepared by the Police which sets out the name and rank of officers charged under the *PSA* for the time period covered by the appellant's request, together with the charges and the disposition or sentence imposed on the officers.

DISCUSSION:

JURISDICTION

The Police claim that sections 52(3)1 and 3 apply to one entry on the chart, removing this portion of the record from the jurisdiction of the *Act*. Because section 52(3) is a jurisdiction-limiting provision, my discussion of the application of section 52(3) will include all entries on the chart regardless of the position of the Police that some entries fall within the *Act*'s jurisdiction.

The representations provided by the Police concerning the application of section 52(3) consist of the following:

> The single entry in the ledger for which I have claimed this exemption, concerns a *Police Service Act* hearing which is pending. It is apparent, I believe, that the information in the ledger was collected solely for the purpose of the hearing. Previous orders have established that a disciplinary hearing is properly characterized as a "proceeding" for the purposes of Section 52(3)1, and that the Chief of Police or his/her delegate constitutes an "other entity". It has been further established that internal complaints relate to the employment of a person by the institution and that the penalties imposed are employment-related actions. That this matter is pending is proof, I believe, that the Niagara Regional Police Service has a legal interest in this matter. I refer you to Orders M-835, M-840 and M-931.

Sections 52(3) and 52(4) of the Act 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) is present, then the record is excluded from the scope of the *Act*.

Section 52(3)3

To qualify under section 52(3)3, 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 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 has an interest.

(Order P-1242)

Requirements 1 and 2

Having reviewed the record, I find that the information contained on the chart originated in records that were collected, prepared, maintained or used by the Police in hearings under the *PSA*.

I also find that the collection, preparation, maintenance or use of these records was in relation to meetings, consultations, discussions or communications. The Police have a statutory responsibility under the *PSA* to investigate and conduct hearings in order to deal with complaints involving police officers. Meetings,

discussions and communications take place in this context, and any records responsive to the appellant's request would fall within this category.

Therefore, I find that Requirements 1 and 2 of section 52(3) have been established for all entries on the chart.

Requirement 3

Section 52(3)3 requires that the activities listed in this section must be "about labour relations or employment-related matters in which the institution has an interest."

In Order M-835, I addressed the claim of a police service that disciplinary records related to *PSA* charges fell within the parameters of section 52(3)1 of the *Act*. In considering whether proceedings under the *PSA* "related to a person employed by the Police", for the purposes of section 52(3)1, I held:

> In the circumstances of this appeal, the disciplinary hearing was initiated as a result of an internal complaint under Part V of the *PSA*, not under the public complaints part of the statute (Part VI). Despite what I acknowledge to be a general public interest in policing matters, I find that these Part V 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 followed this same reasoning in Order M-840. Order M-835 was subsequently the subject of a request for reconsideration on the grounds that police officers are not "employees". In rejecting the request for reconsideration and confirming my findings in Order M-835, Adjudicator Laurel Cropley stated:

> 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". (Order M-899)

In Order M-922, former Adjudicator Anita Fineberg reviewed the findings in Orders M-835, M-840 and M-899 as they related to section 52(3)1, and applied them to the wording of section 52(3)3 as follows:

> The language of sections 52(3)1 and 3 on this point is slightly different. Section 52(3)1 refers to **the employment of a person by an institution** while section 52(3)3 includes the

> phrase **employment-related matters**. However, in my view, the finding in Orders M-835 and M-840, confirmed in Order M-899, also supports the view that records prepared, maintained etc. in relation to meetings, discussions and communications concerning *PSA* charges are about employment-related matters. [emphasis in original]

Applying this reasoning to the present appeal, I find that the record, which contains information collected, prepared, maintained or used in relation to meetings, discussions or communications about complaints under the *PSA* is about "employment-related matters" for the purpose of section 52(3)3 of the *Act*.

The only remaining issue is whether the Police have an interest in these employment-related matters.

The Divisional Court decision in *Duncanson v. Ontario (Information and Privacy Commissioner)* (1999) 175 D.L.R. (4th) 340 is relevant to the discussion of whether the Police have "an interest" in the record. In *Duncanson*, the Court dealt with a judicial review of Adjudicator Donald Hale's Order P-931, in which he upheld a claim by the Metropolitan Toronto Police Services Board that data collected on its Public Complaints System database between 1990 and 1996 fell within the scope of section 52(3)3 and outside the jurisdiction of the *Act*. The request in Order P-931 was for access to the name and rank of police officers charged under the *PSA* between 1990 and 1996, as well as information about charges or allegations made against these officers and the disposition of each charge.

In that case, Adjudicator Hale made the following findings relating to Requirement 3 of section 52(3)3, which are relevant to the current appeal:

> Sections 76(1) and (2) of the *PSA* requires that every Chief of Police establish and maintain a public complaints investigation bureau and that it be adequately staffed to perform its duties effectively. Sections 78 and 79 of the *PSA* oblige the Police to provide certain notices to the complainant and the officer who is the subject of the complaint at the commencement of an investigation. Similar reporting is required by section 86(2) on a monthly basis as an investigation is under way.
>
> In my view, Part VI of the *PSA* requires that a number of other statutory obligations be met by a police service, generally through its Chief of Police. I find, therefore, that Part VI investigations are matters in which the Police have certain legal obligations and that they have, accordingly, an interest in them within the meaning of section 52(3)3.
>
> Therefore, the third requirement of section 52(3)3 has also been established.

The Divisional Court in *Duncanson* quoted this passage from Order M-931, and dismissed the judicial review application, finding that Adjudicator Hale's decision was "eminently reasonable in both his reasons and his decision and there is no reason to elaborate."

In the present appeal, the request, as clarified during mediation, is for a record that bears a strong resemblance to the records which were at issue in Order M-931: the name and rank of the officers charged under the *PSA* over a five-year period, together with the results of all *PSA* hearings. The only apparent differences between the two cases is that Order M-931 dealt with a database in electronic rather than hardcopy format, and the fact that the *PSA* has been amended since Adjudicator Hale issued his decision in Order M-931. In my view, neither or these differences has any bearing on the issue of whether the Police has "an interest" in the employment-related matters concerning the various police officers who were charged under the *PSA* in the present appeal. The obligations of the Chief of Police to establish and maintain a complaints investigation process for police officers, which formerly existed under part VI of the *PSA*, has, as the Police point out, now been incorporated into Part V of the current *PSA*. Some Chiefs may choose to create, maintain and use records relating to the discharge of these responsibilities in electronic format, and others may not, for a variety of reasons including costs, numbers of complaints, and size of police force. However, the relevant "interest", for the purposes of section 52(3)3, relates to the statutory responsibilities and obligations themselves, not to the format of the records produced in discharging them. Whether these records exist in electronic or non-electronic format, collectively they comprise a records system for the complaints investigation process and disciplining of police officers across the entire Service.

I agree with the Police that the Chief has an obligation under Part V of the *PSA* to investigate internal and public complaints as part of a statutorily created disciplinary process. This provides the legal framework in which to consider whether an "interest" for the purposes of section 52(3)3 is present. In applying this framework to the factual context of the records and scope of the appellant's request, I find that the records which form the basis of the chart relate to more than just the individual circumstances of a specific disciplinary investigation and hearing. Rather, the maintenance and use of records compiled for the records system used for disciplinary investigations and hearings under the *PSA* relate to the Chief's statutory obligation to monitor police conduct across the entire Service. In my view, quite apart from the circumstances of any particular disciplinary investigation, the Chief has a continuing interest in the efficacy of this process and it is this factual context which gives the Police an ongoing interest in the employment-related matters to which the records relate, as required under section 52(3)3.

None of the exceptions contained in section 52(4) are present in the circumstances of this appeal. Therefore, I find that the entire chart falls within section 52(3)3 and is excluded from the scope of the *Act*.

To be clear, my finding in this order should not be read to mean that all records relating to police discipline hearings are automatically excluded from coverage by the *Act* under section 52(3). A request by an individual police officer for records relating to a disciplinary investigation or hearing involving that individual, or a request by any individual for access to specified records involving a particular hearing, may raise different considerations in applying the requirements of section 52(3), depending on the factual context (see, for example, Order MO-1618). As has been stated on a number of occasions in many past orders, section 52(3) is record and fact-specific. Regarding the "interest" component of Requirement 3 of section 52(3)3, an institution must first establish the legal framework for considering section 52(3)3 through the existence of a statutory or common law right or obligation. However, a right or obligation of this nature does not itself

comprise the factual context. To satisfy the requirement of an "interest", there must be both the requisite statutory or common law framework, as well as the factual context which gives life to the application of the exclusion.

Because of my finding, it is not necessary for me to consider sections 14(1) or 16 of the *Act*.

ORDER:

The record falls outside the scope of the *Act*, and I dismiss the appeal.

Original signed by: October 12, 2000
Tom Mitchinson
Assistant Commissioner