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

ORDER MO-1345

Appeal MA-000028-1

Halton Regional Police Services Board

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NATURE OF THE APPEAL:

The Halton Regional Police Services Board (the Police) received a request under 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 Hamilton-Wentworth Police Services Board and the Niagara Regional Police Services Board.

The Police identified two hearings 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.

During mediation, the Police explained that records relating to *Police Services Act* (*PSA*) hearings are only kept where the police officer is convicted, in which case the results of the hearing and disciplinary action are maintained in the officer's personnel file for a five-year period. The appellant did not accept this explanation, contending that there must be a record of:

- the total number of hearings held under the *PSA* for each year;
- which officers were charged and the rank of the officer;
- what charges were laid; and
- the results of all hearings (i.e. where the charges were upheld and the officer was convicted and where the charges were dropped).

As a result, the issue of whether the Police had conducted an adequate search for responsive records was added to the scope of the appeal.

Also during mediation, the appellant confirmed that she was seeking access to the names and ranks of the police officers charged under the *PSA*, the charges themselves, and the results of the hearings.

Because mediation was not successful, the appeal moved to the inquiry stage. I sent a Notice of Inquiry initially to the Police, who provided representations in response. I then sent the Notice to the appellant, along with a copy of the non-confidential portions of the Police's representations. The appellant advised this Office that she would not be providing any representations.

RECORDS:

The only responsive record identified by the Police is a one-page e-mail message from the Commander of the Professional Standards Unit to the Freedom of Information and Privacy Co-ordinator's office, describing the results of two *PSA* hearings where police officers were convicted.

PRELIMINARY MATTERS:

Scope of the Request/Reasonableness of Search

The appellant has indicated why she believes that additional responsive records should exist. It is my

responsibility to ensure that the Police have made a reasonable search to identify all responsive records. The *Act* does not require the Police to prove with absolute certainty that further records do not exist. However, in order to properly discharge its obligations under the *Act*, the Police must provide sufficient evidence to show that it has made a reasonable effort to identify and locate all responsive records (Orders M-282, P-458 and P-535). A reasonable search would be one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request (Order M-909).

In seeking to narrow the scope of the appellant's request, the Police submit:

> It is presumed that the requester seeks the results of disciplinary hearings conducted under the *Police Services Act* and not its predecessor, the *Police Act*. Disciplinary hearings are conducted under Part V of the current *Police Services Act* (enacted October 1997) consequent to an investigation into a "complaint". Complaints relating to the conduct of a police officer may be initiated by a member of the public or by the chief of police, and must be "employment related" in the sense that an officer cannot be found guilty of misconduct if there is no connection between the conduct complained of and the occupational requirements for a police officer or the reputation of the police force. (Reference: s. 74(2) *Police Services Act*)

I do not accept this position. Although the appellant did not provide representations clarifying her position on the scope of her request, I assume from the wording of the request itself and the fact that it covers a time period which pre-dates the 1997 amendments creating the new *PSA*, that she wanted access to the results of hearings held under both the current *PSA* and the former version of the *Police Services Act*, which was in force since 1990. There is no evidence before me to suggest that the Police discussed a narrowing of the scope of the request with the appellant, and I find that, in the absence of agreement from the appellant, it is not reasonable to interpret her request in the narrowed manner suggested by the Police. Therefore, I find records containing information which would reflect the results of hearings under both the current and former versions of the *PSA* for the five-year period stated in the request would be responsive.

The Police also submit:

> A request for records was issued to the present Commander of the Professional Standards Unit and the past Commander. The records are held secure in the Professional Standards Unit. They were subsequently identified, collected and turned over to the Freedom of Information Analyst. From the records, the information requested was extracted, carefully reviewed, balanced against disclosure and subsequently denied.

In response to my questions in the Notice regarding whether records exist that would reveal which officers were charged, either formally or informally, under the *PSA*, and where and for how long these records would be kept, the Police provided the following representations:

> The appellant requested access to all records which detail the results of [*PSA*] hearings for the past five years, therefore this institution only sought out and dealt with the records, which have had formal charges, laid under the *PSA* and hearings held. Documents relating to [*PSA*] trials are kept for a period of five years in the Professional Standards Bureau (reference: Records Retention Schedule enclosure). Informal disciplinary matters, which did not form part of the request, are subsequently filed in the officer's personnel file, with a retention dictated by the *PSA*.

And finally, the Police submit that records containing the following information would not be responsive to the appellant's request:

> Cases where officers subject to formal *PSA* charges have resigned or retired prior to the hearing. In that event, there is no result of a *PSA* hearing as no hearing has been proceeded with. The Notice of Hearing may or may not indicate the charges were adjourned or withdrawn - in some cases the hearing is not continued following the resignation/retirement due to the fact that jurisdiction over the incident/offence and officer is lost upon resignation/retirement. Part V of the legislation, which specifies that the disciplinary process applies to serving police officers only and not former members, mandates this result.
>
> Where formal charges have been withdrawn and informal discipline has been proceeded with. In this scenario, while the withdrawal is technically the result of a *PSA* hearing, and may be responsive, the fact of informal discipline is not the result of a hearing and is, thus, not responsive. Furthermore, as stated under section 52(4), any record of informal discipline must be purged pursuant to the legislative requirements after a discipline-free period of two years. As such, production is prohibited, as the record does not, in fact, exist, for all intents and purposes.

The issue of responsiveness of records was canvassed in detail by former Adjudicator Anita Fineberg in Order P-880. That order dealt with a redetermination regarding this issue which resulted from the decision of the Divisional Court in *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3rd) 197.

In the *Fineberg* case, the Divisional Court characterized the issue of the responsiveness of a record to a request as one of relevance. In her discussion of this issue in Order P-880, former Adjudicator Fineberg stated:

> In my view, the need for an institution to determine which documents are relevant to a request is a fundamental first step in responding to the request. It is an integral part of any decision by a head. The request itself sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as being responsive to the request. I am of the view that, in the context of freedom of information legislation, "relevancy" must mean "responsiveness". That is, by asking whether information is "relevant" to a request, one is really asking whether it is "responsive" to a request. While it is admittedly difficult to provide a precise definition of "relevancy" or "responsiveness", I believe that the term describes anything that is reasonably related to the request.

I agree with these conclusions.

In the present appeal, the request was 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". In my view, the one-page e-mail message identified by the Police is clearly not the only record responsive to the appellant's request. The Police state that records from the Professional Standards Unit were "identified, collected and turned over to the Freedom of Information Analyst", who then extracted information and made a decision under the *Act*. Clearly, at a minimum, all records provided to the Analyst by the Professional Standards Unit are responsive to the request, not simply the e-mail summary.

I also find that all records produced in the context of hearings under the *PSA*, regardless of whether the officers who are the subject of these hearings resigned or retired either before, during or after the hearing, are reasonably related to the appellant's request, and therefore responsive. This would include records which reflect the scheduling of the hearing, any hearing dates which took place, and any records which contain statements or descriptions of whether the hearing was conducted and how and why it was concluded.

Finally, I do not accept the position of the Police regarding the distinction between hearings which resulted in formal and informal discipline. Hearings resulting in informal discipline are nonetheless hearings under the *PSA*, and any records containing information pertaining to officers who were informally disciplined would be responsive to the appellant's request. Records of this nature would identify that the officer was charged, that a hearing was or was not held, and that the ultimate result was informal discipline. This type of information is reasonably related to the appellant's request and is therefore responsive. The fact that the Police may be required to purge records of informal discipline after two years has no bearing on the issue of whether records of this nature would be responsive to the appellant's request.

For all of these reasons, I find that the Police have too narrowly defined the scope of the request, and failed to take reasonable steps to identify all responsive records.

DISCUSSION:

Jurisdiction

The Police claim that sections 52(3)1 and 3 apply in the circumstances of this appeal, removing any

responsive records from the jurisdiction of the *Act*. Although only one responsive record was identified by the Police, the submissions made on this jurisdictional issue appear to cover other responsive records, specifically those associated with the two discipline hearings referred to in the e-mail record. Pursuant to the preceding section of this order, my discussion of the jurisdictional issue will cover all responsive records, whether or not they have been identified as such by the Police.

Sections 52(3)1 and 3 and section 52(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.
>
> 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

The Police submit that the records were collected, prepared, maintained or used by the Police in the context of the two *PSA* hearings. I concur. I find that Requirement 1 is present for the record identified by the Police, as well as any records collected, prepared, maintained or used by the Police in any informal hearings under the *PSA* and any hearings where a police officer resigned or retired prior to the completion of the hearing after charges were laid under the *PSA*.

I also accept the Police's position 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 responsive records.

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."

The Police submit:

> The preparation, maintenance and use of the records is for the specific purpose of complying with an employment-related statutory duty; namely, the administration of the internal discipline system. The Police Service, as the employer, is legally required to administer the internal disciplinary process in accordance with Part V of the *PSA*. Failure by the employer to appropriately administer the discipline process could lead to sanctions against the Chief of Police also in accordance with Part V of the *PSA* and/or sanctions against the Police Services Board should a review be requested under Part II of the *PSA*.
>
> Furthermore, the Police Service, as employer, has an inherent interest in internal discipline and in the results thereof. A finding of guilt in relation to a disciplinary misconduct has the potential to subject the Institution to significant legal consequences, both civilly and otherwise. For example, a finding of misconduct may form the basis for a civil lawsuit or a Human Rights claim against the officer and the Institution. Recent arbitral jurisprudence has also held that disciplinary action under the *PSA* may form the basis of a grievance under the applicable collective agreement if the essential character of the dispute arises out of the collective agreement.
>
> Finally, a Police Service has a legal interest in the maintenance of its internal administrative records, which may be improperly used if disseminated.

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 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 all responsive records, which were collected, prepared, maintained or used in relation to meetings, discussions or communications about complaints under the *PSA*, are 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 Police cite the Divisional Court decision in *Duncanson v. Ontario (Information and Privacy Commissioner)* (1999) 175 D.L.R. (4th) 340 in support of the position that the Police have "an interest" in any responsive records. The Police state:

> It is submitted that the public complaint information sought in *Duncanson* is clearly analogous to the discipline information sought in this case. The information was collected and maintained, as a result of a similar statutory requirement as now exists under Part V of the *PSA*. Part V of the current *PSA* covers both internal and public complaints, whereas previously, Part VI of the *PSA* covered public complaints. The result of a public complaint inquiry was comparable to the result of a complaint investigation now conducted under Part V of the *PSA*. As such, the same reasoning as applied by [Adjudicator Donald] Hale, and as upheld by the Divisional Court, is applicable in this scenario. With respect to the issue of "legal interest", the Divisional Court in *Duncanson* held that then Part VI of the *PSA*, which has now been assimilated into Part V of the *PSA*, imposed statutory obligations on a Chief of Police to establish and maintain an investigation process. As such, public complaint, and now disciplinary, investigations are matters with respect to which the Police Service has

> certain legal obligations and thus in which it has an interest within the meaning of section 52(3)3.

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 records that bear 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 responsive records 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 any responsive records, including those identified by the Police and those which I have determined would be responsive and identified through proper and adequate searches, fall within section 52(3)3 and are 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 PO-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.

ORDER:

All responsive records fall outside the scope of the *Act*, and I dismiss the appeal.

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