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

ORDER MO-1349

Appeal MA-000094-1

Brantford Police Services Board

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The appellant submitted a request to the Brantford Police Services Board (the Police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to copies of all police records relating to three incidents which occurred in 1996, to incident file #98-20785 and to Ontario Civilian Commission on Police Services (OCCPS) file #99-COM-0042.

The Police located responsive records and provided partial access to them. The Police denied access to portions of 26 pages on the basis of the following exemptions under the *Act*:

- law enforcement - sections 8(1)(a), (b), 8(2)(a) and (c);
- right to fair trial - section 8(1)(f); and
- invasion of privacy - section 14(1) with reference to sections 14(2)(e), (g), (i) and 14(3)(b).

The Police also withheld an additional 150 pages in full claiming that these records fall outside the scope of the *Act* on the basis of sections 52(3)1 and 3.

The appellant appealed this decision to the Commissioner's office.

During mediation, the Mediator raised the possible application of the discretionary exemptions in sections 38(a) (discretion to refuse requester's own information) and 38(b) (invasion of privacy). These sections may be applicable where the records at issue contain the requester's own personal information. The Police agreed that section 38(b) should have been claimed for the records to which section 14(1) had been applied.

The Police subsequently issued a revised decision in which they withdrew their reliance on sections 8(1)(a), (b) and (f) and added section 38(b) as a basis for exempting portions of 26 pages of records.

I sent a Notice of Inquiry to the Police and one individual referred to in the records (the affected person) initially. Although the Police did not claim the possible application of section 38(a) in either of their decision letters, it appears from a review of the records that it may be applicable. Therefore, I raised it as an issue in this appeal.

The Police submitted representations in response to the Notice. The copy of the Notice which was sent to the affected person was returned to this office as the individual had moved. I then sent the non-confidential representations of the Police along with a Notice of Inquiry to the appellant. The appellant was asked to explain why, in his view, the particular sections claimed by the Police for the identified records do not apply.

The appellant submitted representations in response. In his representations, the appellant submits that his rights under the *Canadian Charter of Rights and Freedoms* (the *Charter*) had been violated by the Police and that he was entitled under the *Charter* to obtain all information relating to his complaints. In general, the appellant's representations reflect his view that he is entitled to information contained in the records at issue in a very general and unsupported manner. I find that they do not raise *Charter* issues of substance and I will not address this issue.

The appellant's representations also deal with the complaint process under the *Police Services Act* (the *PSA*). However, they relate, contextually, to matters other than access under the *Act*. As such, they do not address the issues in this appeal as identified in the Notice of Inquiry.

Further, the appellant contends that there is a public interest in disclosure of the records. Although this issue was raised for the first time in the appellant's representations, I will address it below.

Finally, the appellant indicates that he is aware that I was attempting to locate the affected person. He indicates on the cover page to his representations that she is living at his address. In the Notice of Inquiry (which was sent to all parties), I raised the possible application of section 14(1)(a) (consent to disclosure) of the *Act* and asked the affected person to turn her mind to this issue and to indicate whether she consents to the disclosure of her personal information in the circumstances of this appeal.

Although the appellant states that this individual is living at his address, he does not provide any confirmation from her that this is the case. Nor does he address the issue of consent in his representations. In the absence of any information directly from the affected person, I am not prepared, based on the unsupported statement of the appellant, to make further efforts to contact this person that would involve disclosing her personal information to the appellant. As a result, my decision on the issues in this appeal will be made in the absence of representations from the affected person.

RECORDS:

The records consist, in part, of the withheld portions of 26 pages consisting of occurrence reports, property tags, investigative reports and witness statements. In addition, 150 pages taken from a named police officer's personnel file are at issue. The records relate to a complaint made against the police officer and contain correspondence, investigation reports, occurrence reports and related documentation as well as information pertaining to the officer's duty schedule.

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*.

Police submissions

The Police indicate that the information contained in the 150 pages was collected, prepared, maintained and used by their Complaints Bureau for the purpose of conducting an internal investigation into the conduct of a police officer in response to allegations of misconduct made against the officer by the appellant. The Police state that the investigation into the complaint was conducted pursuant to section 56 (Part V) of the *PSA*.

The Police submit further that:

> Because the Police Services Act establishes how investigations such as this one ... are conducted and the resulting records maintained, the employment-related matter in these pages is one in which we have an interest because an employee would have the legal right to challenge any record not maintained or created in accordance with the Act and the by-law. Such a challenge could result in a civil action against us.

Finally, the Police maintain that they have an interest in the employment-related matter by virtue of Article 2.04 of the Memorandum of Agreement between the Police and the Police Association. This provision relates to the grievance procedures relevant to disciplinary matters.

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

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 *PSA* before an "other entity", specifically the Chief of the Brantford Police (the Chief) or his delegate (Orders M-835, M-840 and MO-1186). The records also indicate that the appellant requested a review of the Chief's decision by OCCPS and a decision confirming the Chief's decision was issued on May 5, 1999. 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 a police officer, 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 officer under the *PSA* were fully completed in May 1999 following the decision of OCCPS confirming the Chief's decision. It appears that the appellant communicated his dissatisfaction with the manner in which his complaint was dealt with by the Police to them as late as February 2000, approximately a year after the OCCPS decision. The records clearly indicate, however, that the Police consider this matter to be closed . I have not been provided with any other evidence to demonstrate that any further action is contemplated or now underway with respect to the appellant's complaint against the police officer. 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 complaint. 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

Previous orders of this office have found that proceedings under Part V of the *PSA*, including the investigation of the complaint, relate to the employment of the police officer who was the subject of the investigation (Orders P-922, P-1583 and PO-1796). I adopt these conclusions and find that they similarly apply in the current appeal. Accordingly, I find that the records relate to an employment-related matter within the meaning of section 52(3)3.

I must now determine if this employment-related matter is one "in which the Police have an interest".

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

> 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.

A number of recent orders have considered the application of section 52(3)3 of the *Act* (and its provincial equivalent in section 65(6)3) in circumstances where there is no reasonable prospect of the institution's "legal interest" being engaged (Orders P-1575, P-1586, M-1128, P-1618 and M-1161). Specifically, this line of orders has held that an institution must establish an interest, in the sense that the matter 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 the requisite interest. Orders P-1618, P-1627 and PO-1658, all of which applied this reasoning, were the subject of judicial review by the Divisional Court and were upheld in Ontario (Attorney General) v. Ontario (Assistant Information and Privacy Commissioner), [2000] O.J. No. 1974 (Div. Ct.), leave to appeal granted (June 29, 2000), Docs. M25698, M25699, M25700 (C.A.)

The Chief investigated the appellant's allegations of misconduct and issued his decision to the appellant in January 1999. The OCCPS confirmed this decision in May 1999. As I noted above, the appellant communicated his dissatisfaction with the manner in which his complaint was dealt with by the Police to them in February 2000, approximately a year after the OCCPS decision. In this correspondence, the appellant asserts that the Police did not fully investigate his complaint. The response by the Police clearly indicates that, from their perspective, all aspects of the complaint were fully disposed of by the Chief and the OCCPS and that they considered it closed.

I have been provided with no evidence to suggest that the appellant has taken any further action relating to the original complaint in the almost year and a half since the OCCPS decision or in the seven months since his last correspondence with the Police. In my view, in the absence of any evidence that the appellant has actively taken steps to pursue his complaints against the police officer or that any further steps are even available to him at this point, the appellant's persistence in attempting to re-open a clearly completed and closed matter is not sufficient to raise a legal interest in this employment-related matter.

With respect to the other concerns raised by the Police, there is nothing in their submissions, in the records themselves, or in the circumstances that would lead me to conclude that there is a reasonable or even remote prospect that their interests in the grievance procedures relevant to disciplinary matters as set out in the Memorandum of Agreement referred to above will be engaged. Further, I am not persuaded that the legal interests of the Police would be engaged by virtue of the fact that records maintained by them are subject to the *Act*. The submissions of the Police regarding potential civil liability resulting from the maintenance and creation of the records are speculative at best. Moreover, in my view, these submissions do not relate to labour relations or employment-related matters, but rather to their administrative responsibilities.

In the present circumstances, I am not satisfied that the Police have a continued interest in the employment-related matter which would affect their legal rights or obligations.

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 150 pages of records in accordance with sections 19 and 22 of the *Act*.

PERSONAL INFORMATION

The Police claim that portions of 26 pages of records are exempt from disclosure under section 38(b) of the *Act*. Before section 38(b) can be considered, I must make a preliminary determination as to whether the records contain personal information.

Under section 2(1) of the *Act*, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including any identifying number assigned to the individual and the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

The records all relate to a police investigation into a matter in which the appellant was involved. In this case, I find that the records contain information about the appellant as they document his involvement. The records also contain the information of other identifiable individuals as involved parties or witnesses, including the police officer against whom the appellant made his complaint under the *PSA* and the affected person. The information about these individuals consists of their names, addresses, dates of birth and other identifying information as well as their observations and their actions and/or involvement in the matter.

It has been established by this office in previous orders that information provided by or about individuals in and as part of their professional capacities does not qualify as personal information (see Reconsideration Order R-980015 for a complete discussion on this issue). Previous orders have also recognized that even though information may pertain to an individual in that person's professional capacity, where that information relates to an investigation into or assessment of the performance or improper conduct of an individual, the characterization of the information changes and becomes personal information (Orders 165, P-447 and M-122).

In the circumstances of this appeal, I find that all references to the police officer in these records relate to the appellant's allegations of misconduct and are, therefore, about the police officer personally. Accordingly, I find that the records all contain the personal information of individuals other than the appellant.

The appellant has been provided with the information pertaining only to himself that is contained in these records. The personal information that has been withheld either relates only to the other individuals referred to in the records or is so intertwined with that of the appellant that it cannot be severed.

INVASION OF PRIVACY

Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by a government body. Section 38 provides a number of exceptions to this general right of access.

Under section 38(b) of the *Act*, where a record contains the personal information of both the appellant and other individuals and the institution determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the institution has the discretion to deny the requester access to that information.

Sections 14(2) and (3) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 14(2) provides some criteria for the institution to consider in making this determination. Section 14(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. Section 14(4) refers to certain types of information the disclosure of which does not constitute an unjustified invasion of personal privacy. The Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 14(2) [Order P-1456, citing John Doe v. Ontario (Information and Privacy Commissioner) (1993), 13 O.R. (3d) 767].

The Divisional Court has stated that the only way in which a section 14(3) presumption can be overcome is if the personal information at issue falls under section 14(4) of the *Act* or where a finding is made under section 16 of the *Act* that a compelling public interest exists in the disclosure of the record in which the personal information is contained which clearly outweighs the purpose of the section 14 exemption.

In this case, the Police have cited the presumption in section 14(3)(b) and the factors in sections 14(2)(e), (g) and (i) in conjunction with section 38(b). These sections read:

> 38. A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > if the disclosure would constitute an unjustified invasion of another individual's personal privacy;

> 14.(2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
>
> (g) the personal information is unlikely to be accurate or reliable;
>
> (i) the disclosure may unfairly damage the reputation of any person referred to in the record.
>
> 14.(3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> (b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation.

Section 14(3)(b)

The records all relate to the investigation that was commenced by the Police in response to the appellant's complaint to them regarding harassing telephone calls. The investigation appears to go off in several directions as it progresses. However, I am satisfied that it originated as an investigation into a possible violation of law (the *Criminal Code*) and that the investigating officer ultimately wound it up as such. Therefore, I find that the personal information contained in the records was compiled and is identifiable as part of an investigation into a possible violation of law pursuant to section 14(3)(b).

The Police explain that the records identify a number of individuals who were drawn into a police investigation into events arising from what was essentially a personal dispute between the appellant and another individual. In these circumstances, I am satisfied that the Police properly exercised their discretion in balancing the privacy rights of these individuals as being greater than the appellant's right of access.

Compelling Public Interest

In his representations, the appellant states:

> I would suggest that, where a member of the public has been systematically harassed by members of the local police, it is in the public interest that all evidence in relation to the

> allegations raised by the citizen be disclosed. To do otherwise would, as I have suggested, allow the police free rein in their relationship to members of the public, to, in effect, disregard the law. Such a position would lead to serious undermining in the public confidence in our system of justice.

Section 16 may operate to permit disclosure of a record even if a provision in section 14 would otherwise prohibit such disclosure. Section 16 states:

> An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

In Order P-984, Adjudicator Holly Big Canoe discussed the meaning of section 16, as follows:

> In my view, the public interest in disclosure of a record should be measured in terms of the relationship of the record to the *Act*'s central purpose of shedding light on the operations of government. In order to find that there is a compelling public interest in disclosure, the information contained in a record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.

There is nothing in the material before me demonstrating a compelling **public** interest which outweighs the protection of personal privacy. Rather, it is apparent from the records that this is essentially a private matter.

Accordingly, I find that the Police have properly exercised their discretion in applying section 38(b) to the withheld portions of the 26 pages of records at issue in this discussion.

Because of this finding, it is not necessary for me to consider the other exemptions raised by the Police.

ORDER:

1. I order the Police to issue a decision on access to the appellant with respect to the 150 pages to which section 52(3) had been applied in accordance with sections 19 and 22 of the *Act*.

2. I uphold the decision of the Police to withhold the remaining portions of the records from disclosure.

Original Signed By: October 13, 2000
Laurel Cropley
Adjudicator