



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER MO-1434

Appeal MA-000377-1

Toronto Police Services Board



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NATURE OF THE APPEAL:

The Toronto Police Services Board (the TPSB) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for a legal opinion submitted by a named solicitor. The requester subsequently expanded his request to include a copy of all materials sent by the TPSB to the Solicitor General for Ontario on the issue of police associations endorsing political candidates.

The TPSB advised the requester that section 52(3)3 of the *Act* applies to all 39 pages of responsive records, thereby removing them from the scope of the *Act*.

The requester, now the appellant, appealed the TPSB's decision.

During mediation, the appellant confirmed that he is no longer seeking access to pages 32 to 39, which consist of a legal opinion prepared by the City of Toronto Solicitor and submitted to City Council. This document was provided to the appellant by the Chair of the TPSB on October 30, 2000.

Mediation of this appeal was not successful. Accordingly, I sent a Notice of Inquiry initially to the TPSB setting out the issues under appeal. The TPSB provided representations in response. I then sent the Notice to the appellant, together with the TPSB's representations in their entirety. The appellant also submitted representations.

RECORDS:

The records consist of:

- A two-page letter from the Chair of the TPSB to the Solicitor General for Ontario, dated September 29, 2000. The letter advises the Solicitor General of certain decisions made by the TPSB on the issue of police officers and the Toronto Police Association endorsing candidates in municipal elections, and asks the Solicitor General for his response. Attached to this letter are five pages of minutes of a September 27, 2000 closed meeting of the TPSB, together with an additional eight pages of attachments referred to in these minutes.
- A 10-page legal opinion dated September 13, 2000 prepared by a law firm and submitted to the TPSB. The opinion deals with political activities of police officers.
- A six-page second legal opinion dated September 26, 2000 prepared by a different law firm and submitted to the TPSB. The opinion deals with the endorsement of candidates by the Toronto Police Association.

DISCUSSION:

The sole issue in this appeal is whether or not the records fall within the jurisdiction of the *Act*.
JURISDICTION

The TPSB takes the position that the records fall within the parameters of section 52(3)3.

Sections 52(3)3 and 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:

...

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

Section 52(3)3

In order to fall within the scope of paragraph 3 of section 52(3), the TPSB must establish that:

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

Requirements 1 and 2

The TPSB submits:

The records at issue contain correspondence prepared by the Chair of the Toronto Police Services Board (TPSB) to the Solicitor General of Ontario, minutes of closed TPSB meeting as well as legal opinions sought from various lawyers. These records were collected, and are maintained by the TPSB in order to clarify a specific area of the Police Services Act (PSA) relating to its police officers engaging in political activity - specifically Section 46 and Ontario Regulation 554/91.

Pages 1-15 consist of a letter and various attachments. The letter is authored by the Chair of the TPSB and therefore “prepared” by him, and the attachments were “collected” and “used” by the Chair in support of his request to the Solicitor General. The collection, preparation and use of these records was in relation to “communications”, specifically written communications between the Chair and the Solicitor General. I therefore find that Requirements 1 and 2 of section 52(3)3 have been established for pages 1-15 of the records.

Pages 16-31 consist of two separate legal opinions prepared for the TPSB by two different law firms. These legal opinions deal with the same subject matter as the letter, and were considered by the TPSB prior to the transmittal of the letter by the Chair to the Solicitor General. The letter itself refers to the two legal opinions and indicates that they are attached for consideration by the Solicitor General. Accordingly, I find that pages 16-31 were “used” by the Chair of TPSB in support of his request to the Solicitor General, and that this use was in relation to “communications”. Therefore, Requirements 1 and 2 have also been established for pages 16-31 of the records.

Requirement 3

The TPSB submits that the communications with the Solicitor General are about labour relations or employment-related matters, and that the TPSB has an interest in these matters for the purposes of section 52(3)3.

The subject matter of the records relates to the legality of the Toronto Police Association endorsing or opposing specific candidates in a municipal election. The activity of police officers in this regard is regulated by sections 46 and 74(1)(b) of the *Police Services Act* (the *PSA*), which state:

46. No municipal police officer shall engage in political activity, except as the regulations permit.

74(1) A police officer is guilty of misconduct if he or she,
...

(b) contravenes section 46 (political activity);

Regulation 554/91 made under the *Police Services Act* provides in part:

1. A municipal police officer may,

(a) vote in an election;

(b) a member of or hold office in a political party or other organization engaged in political activity;

(c) make contributions of money or goods to,

(i) a political party or other organization engaged in political activity, or

(ii) a candidate in an election.

2.(1) A municipal police officer who is not on duty and who is not in uniform may engage in the following political activities:

1. Expressing views on any issue not directly related to the police officer's responsibilities as a police officer, as long as the police officer does not,

(i) associate his or her position as a police officer with the issue, or

(ii) represent the views as those of a police force.

2. Attending and participating in a public meeting, including,

(i) a meeting with elected representatives or government officials, or

(ii) a meeting with candidates in an election.

3. Attending and participating in a meeting or convention of a political party or other organization engaged in political activity.

4. Canvassing on behalf of a political party or other organization engaged in political activity, or on behalf of a candidate in an election, as long as the police officer does not solicit or receive funds on behalf of the party, organization or candidate.
 5. Acting as a scrutineer for a candidate in an election.
 6. On the polling day of an election, transporting electors to a polling place on behalf of a candidate.
 7. Engaging in any other political activity, other than,
 - (i) soliciting or receiving funds, or
 - (ii) political activity that places or is likely to place the police officer in a position of conflict of interest.
- (2) The expression of views in the course of an activity referred to in paragraphs 2 to 7 of subsection (1) is subject to paragraph 1 of that subsection.

The TPSB submits the following in support of its argument that the communications between the Chair and the Solicitor General were about labour relations and employment-related matters:

The issue regarding the status of police officers as employees of Police Services Board was addressed at length in Order M-899 (a reconsideration of Order M-835). Specifically, the Order states:

“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 the Police Services Boards constitutes “employment”.

It is important to note that certain records at issue in this appeal refer to members of the Police Association, and they too qualify as employees under the above definition. Section 2 of the PSA defines “association” as:

“... an association whose members belong to one police force and whose objects include the improvement of their working conditions and remuneration;”

Section 74 of the PSA states “A police officer is guilty of misconduct if he or she, contravenes section 46 (political activity)”.

Section 46 mandates that “No municipal police officer shall engage in political activity, except as the regulations permit”.

IPC Order MO-1288 acknowledged the purpose of the PSA as being the governing statute surrounding the establishment and operation of regional and local police services in Ontario. The records at issue concern the legal interpretation of a PSA Regulation which, as stated above, governs the members of the Toronto Police Service. It is the position of this Institution that this matter, and the associated records, clearly involves a subject related to the employment and management of police officers which if not adhered to, would result in a member being disciplined.

Order M-899 was a reconsideration of my earlier decision in Order M-835. In that order, I considered whether proceedings under the *PSA* “related to a person employed by the Police” for the purposes of section 52(3)1. I found:

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.

Although the records at issue in the present appeal were not created in the context of a disciplinary hearing, I find that they nonetheless deal with the issues of the propriety of police conduct and possible misconduct of police officers under Part V of the *Police Services Act*, and as such they “relate to the employment of a person by the institution” (Order M-899).

In my view, it necessarily follows that these records also deal with “employment related matters” as the term is used in section 52(3)3 of the *Act*. In Order M-922, former Adjudicator Anita Fineberg drew the linkage between the wording of sections 52(3)1 and 53(3)3 in this context, where she stated:

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 matter**. 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 meeting, 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 communications between the Chair of the TPSB and the Solicitor General are about employment-related matters for the purpose of section 52(3)3.

I also find that the communications between the Chair and the Solicitor General are about labour relations. In Order P-1223, I defined “labour relations” as “the collective relationship between an employer and its employees”. In Order M-840, I concluded that labour relations matters involving police services is not restricted to those activities dealt with in Part VIII of the *PSA*, but extend to other activities which take place in the operation of police forces. I find that the propriety of police conduct and possible misconduct on the part of the police officers by engaging in certain types of political activities endorsed by the Toronto Police Association fits within this category, and is accurately characterized as a “labour relations” matter within the meaning of section 52(3)3.

The only remaining issue is whether the TPSB has an interest in these labour relations and employment-related matters.

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 institution has an interest must have the capacity to affect the institution’s legal rights or obligations. [Orders M-1147 and P-1242, PO-1658 (upheld on judicial review 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.))]

Several orders of this Office have considered the application of section 52(3)3 in circumstances where there is no reasonable prospect of the institution’s “legal interest” in the matter being engaged. The conclusion in these line of orders is that an institution must establish an interest that 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 a legal interest in the records. Orders P-1618, P-1627 and PO-1658, cited above, all applied this reasoning.

The Police submit:

Although this matter arose as a result of activities of the Toronto Police Association and its membership in last year’s municipal election in the City of Toronto, this matter is of continued interest and concern to the TPSB. Issues respecting the scope of the limitations on police officers’ political activities have frequently arisen and will continue to. As the body charged with managing the members of the Toronto Police Service, the TPSB has to interpret and apply the legislation regarding the political activities of police officers on an ongoing basis. Application of the legislation, or dealing with its possible amendment to ensure continued effective management of police officers and other employees, is not a matter which arises once and is permanently resolved. It is a matter of continuing

practical concern for the TPSB in carrying out its mandate to manage its employees.

I accept the TPSB's representations that it has a legal responsibility pursuant to the *PSA* to regulate the conduct of its officers and that the records are related to the due performance of those responsibilities.

The records at issue involve the legality of police officers and the Toronto Police Association engaging in political activity under section 46 and Regulation 554/91 of the *PSA*. In particular, the records detail discussions around the ambiguity in Regulation 554/91 regarding the political activities of police associations. Moreover, the records were created in response to specific concerns that arose in the last municipal election about the prospect that the Toronto Police Association and/or its members might engage in political activities that would bring into play active consideration of the allowable limits on political activities under the regulations. While there is nothing before me to indicate that the TPSB's concerns ever progressed beyond this stage into an active dispute with the Toronto Police Association or its members, or resulted in a proceeding under the *PSA*, I am satisfied that the TPSB's interest in the matter extends beyond the routine performance of its responsibilities under the *PSA* and engages the requisite legal interest. The nature of this interest is analogous to other circumstances where section 52(3)3 has been found to apply by this Office, such as during the currency of a job classification process (Order P-1518), or a workforce restructuring and downsizing (Order P-1530), where the institution must make decisions and take actions having immediate implications for the proper discharge of its obligations under a statute and/or collective agreement, but the subject matter cannot be characterized as an actual dispute or conflict.

I also accept that, while the municipal election for which the records were created has already been held, the issue of political activity and participation by police officers and/or the Toronto Police Association is an ongoing matter which has a reasonable prospect of being engaged in future elections or on other occasions where the Toronto Police Association or its members become involved in some form of political activity that would again bring into play active consideration of the allowable limits under Regulation 554/91. I find that the TPSB has established that it has an ongoing legal interest in the subject matter of the records that has the capacity to affect its legal rights or obligations, and that there is a reasonable prospect that this interest will be engaged in future. In the case of the two legal opinions, these records are not time-sensitive in nature and deal with a subject matter that is of ongoing relevance. In my view, should the TPSB become concerned about the potential participation of the Toronto Police Association or its members in future election campaigns, it is reasonable to expect that these legal opinions could be used in that context for similar purposes. The same could be said for the other records at issue in this appeal, all of which are closely associated with the same subject matter and therefore also engage the TPSB's ongoing legal interest.

Accordingly, I find that the third requirement of section 52(3)3 has been established.

Because the TPSB has met all the requirements for section 52(3)3, I find that the records at issue in this appeal fall outside the scope of the *Act*.

ORDER:

I uphold the decision of the TPSB.

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

_____ May 31, 2001