



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

ORDER MO-1448

Appeal MA-000366-1

Hamilton Police Services Board



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NATURE OF THE APPEAL:

This is an appeal under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) from a decision of the Hamilton Police Services Board (the Police). The requester (now the appellant) sought access to information relating to a police inquiry into allegations of misconduct on the part of the appellant. In particular, the appellant requested a copy of:

- the complete statements of three named police officers that were provided to the Professional Standards Branch (the PSB)
- the statements of any other witnesses that were provided to the PSB
- notes or reports written by a named police sergeant or any other member of the PSB
- any notebook entries which relate to the appellant that were made by four named police officers for the years 1999 and 2000

The Police located records responsive to the request and denied access to all the records, relying on section 52(3) of the *Act* which states that the *Act* does not apply to certain records that relate to employment or labour relations matters.

The appellant appealed the decision of the Police. I initially sent a Notice of Inquiry that set out the facts and issues in this appeal to the Police who provided representations in response. I then sent the Notice to the appellant together with the non-confidential portions of the Police submissions. The appellant also provided representations.

RECORDS:

The records at issue consist of witness statements, e-mails, notebook entries, and commentaries.

DISCUSSION:

Application of the *Act*

The issue in this appeal is whether the records are excluded from the scope of the *Act* under sections 52(3) and (4).

These sections state:

- (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 an appeal, and none of the exceptions listed in section 52(4) are present, then the *Act* does not apply to the records.

Section 52(3)1

In order for the records to qualify under 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.

Requirements 1 and 2

I have examined the records and am satisfied that they were collected, prepared, maintained or used by the Police as part of an investigation, pursuant to the *Police Services Act* (the *PSA*), undertaken by the Police into the conduct of the appellant.

In Order M-835, Assistant Commissioner Tom Mitchinson made the following findings:

- A disciplinary hearing conducted under section 60 of the *PSA* is a dispute or complaint resolution process conducted by a court, tribunal or other entity that has, by law, the power to decide disciplinary matters. As such these hearings are properly described as “proceedings” for the purpose of section 52(3)1.
- The Chief of Police or his delegate have the authority to conduct “proceedings,” and the power, by law, to determine matters affecting legal rights and obligations, and is properly characterized as an “other entity” for the purposes of section 52(3)1.

I agree with the Assistant Commissioner’s reasoning and adopt it for the purposes of this appeal. I therefore find that the collection, preparation, maintenance or usage of the records was in relation to anticipated proceedings under the *PSA* before an “other entity,” the Chief of Police or his delegate. (Orders M-840, MO-1186, MO-1349). Accordingly, the first two requirements have been met.

Requirement 3

Orders of this office have concluded that proceedings under Part V of the *PSA* that deal with internal complaints against police officers “relate to the employment of a person by the institution” (Orders M-835, M-1347). I adopt this conclusion and find that the records relate to an internal Police inquiry into the conduct of the appellant, a police officer with the Police. As such, the records relate to the employment of a person by the Police.

Assistant Commissioner Mitchinson found in Order P-1618 that the requirements under section 65(6)1 [the provincial equivalent to section 52(3)1] are “time sensitive.” He concluded that in order to meet the requirements, 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:

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 an e-mail dated October 27, 2000, the sergeant in charge of the investigation informed the appellant that the inquiry was closed and that no further action would be taken. However, the Police in their representations submit that “Although there is no proceeding at this point, it is anticipated that the requester may make a complaint to the Human Rights Commission or possibly launch a civil litigation.” In contrast, the appellant states in his submission that:

I do not plan on wasting my retirement savings in the judicial system ...

...I repeat, I have no intention of further action in any court! I just want to know what allegations were made to properly respond and protect myself from further action.

Apart from the bare assertion by the Police, I have not been provided with evidence to show that the appellant intends to bring further proceedings with respect to this matter. Further, taking into consideration that no sanctions were imposed against the appellant as a result of the inquiry, I am satisfied that it is unlikely that the appellant will bring a civil action against the Police. Accordingly, I find that there are no “proceedings or anticipated proceedings before a court, tribunal or other entity” either existing or in the proximate past. The third requirement has therefore not been met and the records are not excluded under this 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 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 institution has an interest.

Requirement 1 and 2

I have found that the records were collected, prepared, maintained or used by the Police. It is clear that the Police engaged in an inquiry of the allegations against the appellant that involved meetings, discussions or communications. Based on my review of the records, I am satisfied that the collection, preparation, maintenance or use of the records was “in relation to” these meetings, discussions or communications. I therefore find that Requirements 1 and 2 have been met.

Requirement 3

Section 52(3)3 requires that the meetings, discussions or communications must be “about labour relations or employment-related matters in which the institution has an interest.”

Previous orders of this office have found that proceedings under Part V of the *PS A*, including an investigation of an internal complaint, relate to the employment of the police officer who was the subject of the investigation (Orders P-922, P-1583, PO-1796 and MO-1349). I agree with this reasoning and therefore find that the records relate to an employment-related matter within the meaning of section 52(3)3.

The only remaining issue to be determined is whether this matter is one in which the Police “have an interest.”

An interest is more than mere curiosity or concern. An “interest” for the purposes of section 52(3)3 must be a legal interest in the sense that the matter to be disclosed must have the capacity to affect the legal rights or obligations of the Police (Orders P-1242, M-1147). Other orders have concluded that for a “legal interest” to exist, 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 whether an institution has the requisite interest (Orders P-1575, P-1586, M-1128, P-1618 and M-1161).

The issue of whether the provisions of the *Act* require a “legal interest” to be ongoing for the exclusion in section 52(3)3 to apply was the subject of an application for judicial review to the Ontario Divisional Court. This court subsequently upheld the reasoning in the orders referred to above [*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.)]. Since no decision has yet been rendered by the Court of Appeal, I will follow the interpretation of the orders on this issue as they now stand.

Police Submissions

To support their submission that there is reasonable prospect of their legal interest being engaged in the future, the Police state that:

... 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.

... a Police Service has a legal interest in the maintenance of its internal administrative records, which may be improperly used if disseminated. For example, disciplinary information may be inappropriately tendered in court to attempt to challenge the credibility of, or discredit police officers...

By general publication of this information, the Police Service would be adversely effected, being placed in a position of having to attend court on a regular basis to:

- (a) correct inaccurate information, and
- (b) defend against, and/or attempt to correct damage caused by, uncontrolled inappropriate disclosure and use.

Accordingly, it is the position of the Police Service that it has a significant legal interest in the use and maintenance of disciplinary information relating to its employees.

In Order MO-1433-F, Assistant Commissioner Tom Mitchinson reviewed similar representations submitted by the Police as those in this appeal. He found that:

The interest referred to by the Police concerning their duty to appropriately administer the discipline process, and the possible ramifications of either making a finding of guilt, or failing to properly administer the process, relate to the Police's routine discharging of their statutory responsibilities, and do not apply to this appeal [to establish that a legal interest exists].

The Assistant Commissioner went on to state that:

... the Police's reference to the possibility that some of this material may be tendered in court at some later date is similar to situations where parties claim a legal interest in records because of possible legal action in the future. A number of previous orders have examined the application of section 52(3)3 in circumstances where an institution has expressed concerns about litigation or actions that might arise in the future. In Order PO-1718, Adjudicator Holly Big Canoe made the following statements regarding the treatment of audit reports under section 65(6)3 of the provincial *Act*:

The Ministry refers to the possibility of some legal action being taken as a result of the audit or disclosure of the audit, and relies on the due performance of its ongoing responsibilities to establish that its legal interests are engaged. In my view, the mere possibility of future legal action, which may be said to arise out of many kinds of audit or regulatory activities of government, is insufficient to engage a reasonable anticipation of such action actually occurring or, therefore, to engage an active legal interest. Further, the due performance of supervisory activities in setting clear standards and procedures, even with a view to avoiding exposure in possible future legal proceedings, is also insufficient to engage an active legal interest. In my view, unless there is something that arises to give reality to the prospect or anticipation of such action, government's "interest" in the record relates to the normal course of its affairs, and the requisite legal interest is not established.

I adopt the approach taken in Order PO-1718. I have not been provided with evidence or argument sufficient to satisfy me that there is any real or reasonably anticipated prospect that the records at issue in this appeal may be disseminated in the future, and I find that the “interest” required by section 52(3)3 has not been established by the Police.

I agree with the Assistant Commissioner’s reasoning in Order MO-1433-F. Given that the Police representations in that Order were essentially the same as in this appeal and I am satisfied that there is nothing on the facts of this case that would warrant a different outcome, I find that there is no reasonable prospect of the Police’s legal interest being engaged in the employment-related matter which would affect their legal rights or obligations.

Accordingly, I find that section 52(3) does not apply, and thus the records are subject to the access provisions of the *Act*.

ORDER:

1. I order the Police to issue a decision letter to the appellant with respect to all the records, in accordance with sections 19 and 22 of the *Act*, using the date of this order as the date of the request.
2. I order the Police to provide me with a copy of the letter referred to in Provision 1.

Original signed by: _____
Dawn Maruno
Adjudicator

_____ June 28, 2001