



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

ORDER MO-1425

Appeal MA-000256-1

Niagara Regional 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 Niagara Regional Police Service (the Police). The requester (now the appellant) sought access to information relating to an investigation into allegations of misconduct on the part of the appellant. In particular, he requested a copy of:

- all reports concerning the allegations
- all statements taken and provided to the investigators
- the initial complaint regarding the allegations
- all Chief's Complaint forms completed in this matter
- the names of all individuals involved in this investigation (ie. investigators, witnesses, complainants)
- the final investigator's report
- a letter written by the solicitor for the Police recommending denial of access.

The Niagara Regional Police Association (the Association) is acting as the appellant's representative in this appeal.

The Police located the 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 in the employment or labour relations context.

The appellant appealed the decision of the Police. I initially sent a Notice of Inquiry to the Police who provided representations in response. I then sent the Notice to the appellant together with the Police submissions in their entirety. The appellant also provided representations.

RECORDS:

The records at issue are contained in two files. The first file was compiled by the office of the Chief of Police and is reproduced on pages 3a-3yy. The second file is from the Professional Standards Unit of the Police and is reproduced on pages 4a- 4zz.

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.

The records at issue include internal letters and memoranda, correspondence from the appellant's solicitor and the Police's solicitor, legal opinions, correspondence to the appellant, his solicitor and the Police solicitor, file notes, witness statements, investigation reports and updates, and a chronology of events.

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 investigation 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.

The appellant indicated that the investigation by the Police into possible misconduct by the appellant was concluded by January 2000, more than 15 months ago. I have not been provided with other evidence to show that any further action has been contemplated with respect to the investigation. 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 investigation 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 Police Services Act, 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.

The Police submit that:

It has been established in previous orders that records relating to investigations of internal and public complaints which are compiled for disciplinary investigations and hearings under the PSA are matters in which the police (through the Chief) have certain statutory responsibilities and legal obligations and the police have, accordingly, an interest in them within the meaning of section 52(3)3 of the Act (Order M-931, Order P-1481, Order MO-1347).

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

The Niagara Regional Police Association has made this request for information on behalf of [the appellant]. In the Direction of Authorization signed by [the appellant] giving the Association authority and permission to receive the requested information on his behalf, [the appellant] states:

The Niagara Regional Police Association will be acting on my behalf in regards [sic] to any issues that may be in dispute and also with respect to any hearing that may be necessary to resolve the issues in dispute.

I think it is evident from this statement that there is a reasonable prospect of the legal interest of the Niagara Regional Police Service being engaged in the future.

The Association, in its representations, indicates that the appellant was advised that a complaint of alleged misconduct had been made against him in 1996. From that time onward, the Police conducted inquiries and an investigation into the complaint. On January 5, 2000, the Deputy Chief of Police advised the appellant that:

... based on the inquires to date, [two named sergeants] are of the opinion that there is insufficient information available upon which to base the laying of criminal charges arising out of the allegations made against you. In the circumstances, therefore, I consider this matter closed [Association's emphasis].

In reply to the Police submission that the Direction of Authorization is evidence that the legal interest of the Police in the investigation is current, the Association states that the Direction of Authorization was requested by and prepared for this office. The Association further submits that:

The phrase on this form [Direction of Authorization] "with respect to any hearing that may be necessary to resolve the issues in dispute" refers to an appeal such as the one that we are undertaking [under the *Act*].

The Direction of Authorization gives the Association the authority to act on behalf of the appellant in the dispute between the Police and the appellant concerning the appellant's request for access to records held by the Police. Any legal interest of the Police that might be invoked from the Direction of Authorization would relate to the appeal for access to information, and not to the investigation by the Police into possible wrongdoing by the appellant which is the employment-related matter within the meaning of section 52(3)3 being considered. In Order MO-1270, Adjudicator Laurel Cropley, stated:

... the filing of an access request is not, in and of itself, sufficient to automatically trigger a "legal interest" on the part of an institution, although in the context of a particular appeal, it may be relevant.

I agree with her conclusions and, accordingly, find that in the circumstances of this appeal, the Direction of Authorization does not support the proposition that there is a reasonable prospect that the legal interest of the Police will be engaged.

The investigation by the Police under the *PSA* into allegations of misconduct by the appellant was completed more than a year ago. I am not satisfied that there is sufficient evidence in the

submissions or in the records that indicate the Police have considered this matter anything but closed.

Based on my review of the records and the submissions of the parties, I find that there was 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

_____ April 30, 2001