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

FINAL ORDER MO-1433-F

Appeal MA-000253-2

Hamilton Police Services Board

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NATURE OF THE APPEAL:

The Hamilton Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for information concerning an individual (the affected person) who had previously been employed by the Police, and was currently employed by the requester, a public institution. The requester specified that it wanted access to any records relating to allegations and investigations of misconduct by the affected person. It also referred to its belief that disclosure of the documents would be in the public interest, and that public scrutiny and the promotion of health and safety were factors supporting the disclosure of the information in the circumstances.

The Police's response identified that the records at issue contained "personal information" as defined by the *Act*. The Police went on to refer to the wording and/or provisions of the following components of the mandatory personal information exemption claim outlined in section 14 of the *Act*:

- section 14(3)(b) - (presumed unjustified invasion - law enforcement)
- section 14(3)(d) - (employment or educational history)
- that certain identified factors - (section 14(2)(a) (public scrutiny) and 14(2)(b) (promote health and safety)) could not be taken into account where disclosure is presumed to constitute an unjustified invasion of privacy
- that no "compelling" circumstances outweighed the purpose of the section 14 exemption.

The requester (now the appellant) appealed the Police's decision.

A preliminary issue was whether the request was a valid request under Part 1 of the *Act*, and in Interim Order MO-1353-I, I found that it was. I allowed the appeal to proceed (subject to certain conditions which have been met), and I also determined that the Police could raise additional discretionary exemptions, if they chose to, within a limited time period.

The Police responded with a second decision letter within the specified time frame, and advised the appellant that "the information you requested is excluded under the [*Act*] pursuant to section 52(3)". The Police referred specifically to sections 52(3)1 and 52(3)3 in their decision letter.

Upon receipt of this decision, the current appeal was opened and immediately transferred to the inquiry stage. I sent a Notice of Inquiry to the Police and the affected person initially, and received representations in response. The affected person confirmed that he did not consent to disclosure of the record. I then sent a copy of the Notice of Inquiry, along with the Police's representations, to the appellant.

The appellant provided representations in response to the Notice. The representations identified the following:

- the appellant disputed the application of section 52(3) to the records;
- the appellant acknowledged that the records contain personal information as defined by section 2(1) of the *Act*;

- the appellant acknowledged that the personal information consists of the "employment history" of the affected person, and that the disclosure of this information would be presumed to constitute an unjustified invasion under section 14(3) of the *Act*;

- the appellant submitted extensive representations on the application of section 16 of the *Act*, to override the application of the section 14 exemption claim.

I then sent the non-confidential portions of the appellant's representations relating to section 16 to the Police and the affected person for reply. Both of these parties provided representations in response.

RECORDS:

The records at issue in this appeal consist of approximately 2,200 pages and include investigation reports, witness statements, correspondence, police officer's notes, exhibits, newspaper articles and various other related documentation.

DISCUSSION:

JURISDICTION

The Police take the position that the records fall within the parameters of paragraphs 52(3)1 and 3 of the *Act*.

Sections 52(3) and (4) read, in part, 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) are present, then the record is excluded from the scope of the *Act*.

In order for the record to fall within the scope of section 52(3)1, 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 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.

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 Police have an interest.

[Order P-1242]

Requirement one - sections 52(3)1 and 3

The Police's representations identify that the request is for records that relate to an investigation under the *Police Services Act* (*PSA*), and that "the records were collected, prepared, maintained or used by the Police in carrying out its statutory/administrative responsibilities under the *PSA*."

The records consist of material collected and prepared by the Police, and then maintained and used in the context of the investigation of the affected person's activities. I am satisfied that the records were prepared, collected, maintained and/or used by the Police, and I find that the first requirement of sections 52(3)1 and 3 has been established.

Requirements two and three - section 52(3)1

The Police submit that the records relate to an investigation pursuant to the *PSA*, and involves an identifiable individual (the affected person) who had been a member of the Police Service, and who has since resigned.

The Police then identify the process that is used to investigate and initiate disciplinary hearings under the *PSA*, and point out that investigations of this nature must result from complaints about the occupational requirements for a police officer or the reputation of the police force. In that regard, the Police submit that the complaints must, by nature, be "employment related". They also refer to Order M-835 to support this position.

The Police also identify the type of hearing that is initiated as a result of an investigation of this nature, and point out that, in the circumstances giving rise to this appeal, a hearing was scheduled.

With respect to the status of this type of proceeding, the Police submit:

> ... *Police Services Act* disciplinary charges and resulting dispositions "affect the employment" of an officer in that eligibility for the designation of Senior Constable and eligibility for promotion are influenced by the mode of procedure and by the penalty imposed on conviction. The effect on employment is ongoing. As such, though proceedings have been completed, they are in the reasonably proximate past in that there is a continuing affect upon the employment relationship between the parties. The subject officer in this case resigned before the ... hearing.

I have reviewed the Police's representations in detail, and I am satisfied that the records were prepared, collected, maintained and/or used in relation to anticipated proceedings before a tribunal, and that they are "employment related". However, my decision regarding the application of section 52(3)1 does not end there.

In previous orders this Office has given section 52(3) [and its equivalent provision, section 65(6), in the *Freedom of Information and Protection of Privacy Act* (the provincial *Act*)] an interpretation which accords with the wording and accommodates the purposes of both the *Act*s and the amendments which subsequently incorporated sections 52(3)/65(6) within the statutes (the Bill 7 amendments). The subject matter of the sections 52(3)/65(6) exclusions -

"proceedings or **anticipated** proceedings", "negotiations or **anticipated** negotiations" and "employment-related matters in which the institution **has** an interest" - demonstrates that the legislature intended to protect the confidentiality of records which have the capacity to affect the **current or future** conduct of an institution in the employment and labour relations context. This interpretation protects the confidentiality of past information about concluded proceedings, negotiations or other employment-related matters, provided: (1) the institution can establish that the information contained in the records reasonably relates to current or future anticipated proceedings or negotiations; or (2) that its labour relations or employment interests in the information are otherwise currently engaged, or there is a reasonable prospect that such interests will be engaged in the future (Order MO-1344).

In Order P-1618, I examined the general application of section 65(6) of the provincial *Act*, and outlined the approach that must be taken in applying this section in light of the stated intent and goal of the legislation which incorporated sections 65(6)/52(3) within the statutes. I found the following:

> 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.

I then went on to apply this approach to the specific provisions of section 65(6)1 of the provincial *Act*, which deals with "proceedings or anticipated proceedings", and determined that:

> 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.

My findings in Order P-1618 were 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.).

Accordingly, it is not sufficient for the Police to establish that proceedings were anticipated at the time the records were created or prepared. Applying the reasoning of Order P-1618, the Police must establish that any proceedings or anticipated proceedings in this regard are current, anticipated, or in the reasonably proximate past.

The Police maintain that the proceedings involving the affected person are in the reasonably proximate past. However, the Police also identify that the affected person, who was the subject officer in this case, resigned before the scheduled hearing date. This resignation occurred almost

one year ago, the affected person is no longer employed by the Police, and neither the Police nor the affected person has identified any ongoing matters between them. Consequently, I find that there is no longer any current or anticipated proceedings as between the Police and the affected person. Because these events occurred almost one year ago, I find that any anticipated proceedings that did exist are not within the reasonably proximate past, and therefore not captured by section 52(3)1.

The Police also refer to order MO-1346 in support of their view that, notwithstanding the resignation of the affected person, section 52(3)1 applies. They identify that the records at issue in that appeal included records relating to persons who may have resigned or retired prior to a *PSA* hearing, and refer to that Order in support of the view that section 52(3)1 should apply in this appeal.

In Order MO-1346 I found that records relating to *PSA* hearings, including hearings relating to persons who retired or resigned prior to the hearing, were excluded from the *Act* under section 52(3)3. The records requested in that appeal, however, were records that showed the results of all the *PSA* or *Police Act* hearings involving members of the Hamilton-Wentworth Police Service over a five year period of time. I referred to the general nature of those records as follows:

> 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. [emphasis added]

Because of the nature of the request in that appeal, I found that all records which could be used to accumulate the requested data were responsive to the request, and then reviewed whether section 52(3)3 applied. After finding that the records were excluded under section 52(3)3 of the *Act*, I went on to state:

> 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 ... As has been stated on a number of occasions in many past orders, section 52(3) is record and fact-specific.

The request in this appeal is for access to records involving a particular individual, not a group of records compiled for the records system and used to meet the statutory obligation to monitor

police conduct generally. Accordingly, I do not accept the Police's position, and find that the reasoning in Order MO-1346 is not applicable to the circumstances of this appeal.

In the present circumstances, in light of the fact that the subject officer (the affected person) has retired and that the proceedings referred to are not in the reasonably proximate past, I am satisfied that section 52(3)1 does not apply to exclude the records from the scope of the *Act*.

Requirement two - section 52(3)3

The Police state that the records were used "in relation to communications about employment-related matters and statutory duties". They refer to the obligations of the Police as an employer under the *PSA*, and the Police's responsibility to investigate and review complaints.

I concur. In my view, the records at issue in this appeal were all prepared, collected, maintained and/or used in relation to meetings or communications, and I find that the second requirement of section 52(3)3 has been established.

Requirement three - section 52(3)3

Section 52(3)3, requires that the meetings, consultations, discussions or communications must be "about labour relations or employment-related matters". The Police submit:

> The preparation, maintenance and use of the records are 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.

The representations of the Police are similar to the ones provided to me in Order MO-1346. In that order, after considering the Police's representations, I went on to review a number of previous orders which had considered disciplinary records relating to *PSA* charges. I identified that Order M-835 determined that disciplinary proceedings under Part V of the *PSA* "related to a person employed by the Police", and also summarized Adjudicator Laurel Cropley's reconsideration of that order in Order M-899, where she confirmed that what police officers do for Police Services Boards constitutes "employment", and that proceedings under Part V of the *PSA* relate to "employment".

I also referred to Order M-922, where former Adjudicator Anita Fineberg reviewed 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 and/or used in relation to meetings 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 this is an employment-related matter in which the Police "have an interest".

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 Police have an interest must have the capacity to affect the Police's legal rights or obligations (see Orders M-1147 and P-1242). Furthermore, 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. (See Orders P-1618, P-1627 and PO-1658, all of which applied this reasoning and were the subject of judicial review by the Divisional Court and were upheld in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner*), [2000] O.J. 1974 (Div. Ct.), leave to appeal granted (June 29, 2000), Docs. M25698, M25699, M25700 (C.A.)).

The Police identify that they have an inherent interest in internal discipline and the results thereof, and that findings of guilt may subject the Police to other significant legal consequences. They then go on to state as follows:

> ... 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. The courts have supported the position of the Police Service that strict limitations are to be placed on the disclosure and use of the employment/disciplinary records of Police officers in the course of a criminal trial. It has been accepted that discipline and employment files constitute third party records which require production applications on notice to the Police Service. Before production is ordered it must be established that the records are of likely relevance. If likely relevance is established, a balancing is subsequently engaged in which weighs the benefits to

> be gained by production against the deleterious effects thereof. Only then are such records or parts thereof deemed producible ...
>
> 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.

The appellant's response submissions address the position of the Police as follows:

> ... the Police Service referred to a legal interest in the maintenance of its internal records, which may be improperly used if disseminated. However, it is submitted that, as observed in Order P-1586:
>
> > "The routine discharge of responsibilities imposed by statute is not, in and of itself, sufficient to constitute an ongoing legal interest. The statutory responsibility must be considered in context."
>
> Considering the responsibility in the present context, there is no question that the Police Service had a responsibility to investigate the complaints. However, there is no ongoing legal interest once that investigation is completed and no proceedings are held. The institution must identify a legal interest beyond a mere assertion of an interest in the non-dissemination of records.
>
> In the current situation, the Police Service asserts that a continuing interest is that "disciplinary information may be inappropriately tendered in court to attempt to challenge the credibility of, or discredit police officers". While such an interest may apply to a currently serving police officer, it is remote and speculative in relation to one who resigned over nine months ago.

I agree with the position of the appellant with respect to the speculative nature of any possible interest asserted by the Police. 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.

Furthermore, 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.
>
> The only relevant evidence before me in this appeal establishes that there is no reasonable prospect that the institution's legal interest will be engaged. Accordingly, I find that there is no ongoing dispute or other employment-related matter involving the [Criminal Injuries Compensation] Board that has the capacity to affect the Board's legal rights or obligations, and the Board has failed to establish a "legal interest" in the employment-related matters reflected in the records (see also Order M-1164).

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.

As they did in Order MO-1346, the Police also refer in their representations to 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 the records. The Police state:

> The information requested was collected and maintained as a result of the requirement that exists under Part V of the *PSA*. Part V of the *PSA* covers both internal and public complaints. The result of a public complaint inquiry pursuant to the old part VI of the *PSA*) 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 court 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 a 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:

> 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."

As discussed above, in Order MO-1346 the request was for records that bore a strong resemblance to the records which were at issue in *Duncanson*: 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 appeals was the format of the records. In MO-1346, I found that these differences had no bearing on the issue of whether the Police have "an interest" in the employment-related matters concerning the various police officers. I found that there existed obligations on the Chief of Police to establish and maintain a complaints investigation process for police officers, and the relevant "interest", for the purposes of section 52(3)3, relates to the statutory responsibilities and obligations themselves, relating to maintaining a records system for the complaints investigation process and disciplining of police officers across the entire Service.

However, both the *Duncanson* case and Order MO-1346 related to the record-keeping obligations of the Police, and not to the records relating to a particular matter. I will again refer to my decision in MO-1346 where I stated:

> 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 ... As has been stated on a number of occasions in many past orders, section 52(3) is record and fact-specific.

In the circumstances of this appeal, the request is for access to specified records involving a particular scheduled hearing under the *PSA*. This hearing did not take place, because the affected person retired prior to the hearing date. These circumstances raise different considerations in applying the requirements of section 52(3)3. In this appeal, there is nothing in the Police's submissions, or in the circumstances, that would lead me to conclude that the Police have a continued interest in the employment-related matter which would affect their rights or obligations.

As they did under section 52(3)1 above, the Police refer to Order MO-1346 in support of their view that the Police maintain an interest in disciplinary records relating to individuals who have resigned or retired from the Police. I addressed this issue in detail in my discussion of section 52(3)1, and I find that the same considerations apply to section 52(3)3. The request for records in Order MO-1346 was different (in kind) from the ones requested in this appeal, and I find that the considerations in that appeal do not apply here.

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.

PERSONAL INFORMATION/INVASION OF PRIVACY

Under section 2(1) of the *Act*, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including the employment history of the individual (section 2(1)(b)) the individual's name if it appears with other personal information relating to the individual (section 2(1)(h)).

As set out above, the Police submit and the appellant accepts that the records contain personal information. I agree, and find that the records contain the personal information of the affected person and that a number of the records also contain the personal information of other individuals (the complainants).

Furthermore, the Police submit, and the appellant accepts, that the information qualifies as the sort of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy under section 14(3)(d), as it contains the employment history of identifiable individuals. I concur, and find that section 14(3)(d) applies to the information in the records.

The Police have also referred to the presumption in section 14(3)(b), and state that the records were compiled and are identifiable as part of an investigation into a possible violation of law, specifically the Code of Conduct in Regulation 123/98 under the *PSA*.

Many previous orders have held that a complaint investigation undertaken by police services in this context is a law enforcement investigation, because such an investigation can lead to charges against the subject officer, and a hearing before a board of inquiry under the *PSA* (Orders P-1250, P-932, M-757 and MO-1288). I agree with the Police's position that the records at issue in this appeal should be treated similarly, and I find that the records are identifiable as part of an investigation into a possible violation of law, specifically an alleged breach of the *PSA*. As such, the records satisfy the requirements of the presumption under section 14(3)(b).

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 section 14(2) (*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767), and the Police refer to this case in this appeal. The Police then identify that, because the information in the records is covered by a presumption against disclosure, there is no need to refer to the factors which may apply under section 14(2) of the *Act*.

I agree with the position of the parties, and find that the disclosure of the information contained in the records is presumed to constitute an unjustified invasion of personal privacy under sections 14(3)(b) and (d) of the *Act*.

The Police also identify that much of the information in the records consists of the personal information of the complainants. They identify that, in the event that it were necessary to review the factors under section 14(2), a number of factors would weigh against disclosing the information. Among other factors, the Police refer especially to the highly sensitive nature of the information in the records, and the fact that the information was provided by the complainants in confidence. The Police point out that disclosure of this information could reasonably be expected to cause excessive personal distress to not only the subject officer but also to the complainants. I accept that the personal information at issue is highly sensitive (section 14(2)(f)) and that the information provided by the complainants was done with a reasonably held expectation that it would be treated confidentially by the Police (section 21(2)(h)).

PUBLIC INTEREST IN DISCLOSURE

Section 16 of the *Act* reads:

> 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.

It has been established in a number of previous orders that, for section 16 to apply, two requirements must be met. First, there must exist a compelling public interest in the disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption [Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and*

Privacy Commissioner) (1999), 118 O.A.C. 108 (C.A.), leave to appeal refused (January 20, 2000), Doc. 27191 (S.C.C.)].

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 (Order P-984).

If a compelling public interest is established, it must then be balanced against the purpose of any exemptions which have been found to apply, in this case, section 14. Section 16 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information which has been requested. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption (Order P-1398).

The appellant has provided extensive representations on the application of section 16. The appellant begins by identifying that the "ordinary meaning" approach to the phrase "compelling public interest" is an appropriate one. The appellant then refers to Order P-984, and contends that although the public interest was described in that order in relation to the purpose of shedding light on the operations of government, that order did not confine the "compelling public interest" test to only that purpose.

Turning to the circumstances of this appeal, the appellant submits that the public interest engaged is the protection of the public against inappropriate behaviour of senior public officials. In this appeal, the "public" would include subordinates of senior public officials, that is, employees in the public service who may be subject to misconduct on the part of senior officials. The appellant confirms that no misconduct on the part of senior public officials has been found, but submits:

> ... the interest of [the appellant], as a public institution, is to be able to review the appropriate information to assess whether there is sufficient evidence of misconduct for administrative purposes and what, if any, action is required to prevent any undue risk of sexual harassment or other misconduct in respect of members of the public.

The appellant identifies that it has been made aware, primarily through the media, that the affected person was the subject of harassment complaints in his position with the Police. The appellant then identifies its interest in knowing about the past conduct of the affected person, and identifies the policy in place relating to its employees generally. The appellant then identifies its interest in the records, and refers to an event involving the Police and the appellant that took place prior to the affected person's resignation from employment with the Police.

The appellant sums up its position as follows:

> In making the request for information, [the appellant] is not acting in a private interest. It is acting as a public, federal government institution that wishes to

> ensure that it does not invest certain powers and authorities in an individual in whom it would be inappropriate to do so ...
>
> As a general principle, it is submitted that where a public officer, with authority over both subordinates and interaction with the public at large, may have demonstrated serious misconduct in relation to co-workers or subordinates, it is in the public interest that the public institution concerned be able to review those allegations to ensure that there is not an undue risk of similar behaviour by the individual in a different capacity as a public officer.
>
> It is further submitted that this public interest is a "compelling" one as it concerns the safety and well-being of members of the public. This is, the interest in personal safety and freedom from sexual harassment is an interest worthy of "rousing strong interest or attention".
>
> While interest by the public or media in a matter do not, of course, automatically cause a matter to be one in the "public interest", it is nevertheless worthy to note that the public and the media have expressed concern about the situation.

The Police provided representations in response to the appellant's position on the public interest in these records. The Police argue that the interest of the appellant in obtaining this information is not "public". They refer to a number of previous orders which acknowledge that organizations which are public bodies also operate in a private capacity when dealing with certain issues such as employment-related matters.

The Police go on to submit:

> It is the position of [the Police], based on the information provided by [the appellant] that the "interest" of the appellant in this case is not properly classified as "public". The purpose for which the records are sought is for use by the [appellant] in its capacity as employer. While [the appellant] states that the [the affected person] will have "interaction with the public at large", it is the understanding of [the Police] that, in fact, [the affected person] is an investigator of **internal** complaints of sexual harassment for [the appellant]. ... As such, it is the submission of [the Police] that:
>
> 1. neither the position occupied by, nor the duties performed by [the affected person] are public in nature. Rather, it is his responsibility to investigate internal employment-related sexual harassment complaints for his employer; and
>
> 2. the interest of [the appellant] in obtaining/using the information is clearly private and not public. [The appellant] is acting in its capacity as an employer to investigate and assess the suitability of its current employee to perform his internal employment functions. With all due

> respect, given that [the appellant] was aware of the allegations against [the affected person], and the associated concerns of the Police Service, well prior to the date upon which it hired him, this exercise should appropriately have been engaged in prior to the hiring of the employee. One would expect that [the appellant] would have obtained a release from [the affected person], directed to the Police Service as his former employer, which would have permitted the Police Service to provide the information [the appellant] now seeks.

> Accordingly, "the primary purpose of the appellant's request for access" is to further the employment interests of [the appellant], which is essentially a private, not a public interest. (Reference Order PO-1715). It is inappropriate to attempt to categorize what is in essence a "private employment interest" as a public interest simply because the employer is a government agency, particularly where the duties being performed by the subject are also of a private nature, internal to the organization.

I accept the position of the Police on this issue. Although the appellant is a public institution and the subject matter of the request relates to the conduct of one of its employees, that is not sufficient to constitute a "public interest" for the purpose of section 16. The appellant in this instance is seeking information in order to assess the suitability of one of its employees to hold a particular position with its organization. As the Police point out, the position in question is internal to the appellant's organization and does not involve members of the public generally. In this regard, in my view, the appellant is in no different position than any other employer, public or otherwise. The prior event identified by the appellant also has no bearing on this finding.

The appellant has also referred to the media attention surrounding the circumstances of this matter, and states:

> While interest by the public or media in a matter do not, of course, automatically cause a matter to be one in the "public interest", it is nevertheless worthy to note that the public and the media have expressed concern about the situation.

The appellant then refers to articles written concerning the matter.

I accept that there has been some interest in the local media concerning the activities of the affected person, both while employed by the Police and in his subsequent position with the appellant's organization. Although newspaper articles express an interest in the nature of the complaints made against the affected person by various other employees of the Police, and the records created in the context of the investigations that stemmed from these complaints, in my view, the public interest in these articles focuses primarily on other related issues, such as the investigation process set out in the *PSA*, the availability of in-camera hearings, and the fact that the affected person's retirement rendered the *PSA* hearing unnecessary. It is also relevant to note that it is not the media that is seeking access to the records at issue in this appeal, and the appellant has not indicated any intention to disseminate the information received as a result of

making its access request to the public generally. The appellant's stated intention in seeking access to the records, which is a relevant factor in considering the application of section 16, is to obtain information which would assist it in assessing the affected person's suitability to perform his employment responsibilities. That is not sufficient to bring the matter within the scope of a "public interest". For the purpose of section 16 of the *Act*, the "public interest" must relate to the disclosure of the record.

For all of these reasons, I find that there is no compelling public interest in disclosure of the records, and I find that the requirements of section 16 of the *Act* have not been established.

Even if I had determined that there was a compelling public interest in disclosure, that alone would not be sufficient to establish the requirements of section 16. Any such compelling public interest would also have to outweigh the purpose of the mandatory section 14 personal information exemption.

In Order PO-1705, I identified the balancing that must be done when reviewing the purpose of the personal information exemption:

> It is important to note that section 21 [the equivalent to section 14 found in the provincial *Freedom of Information and Protection of Privacy Act*] is a mandatory exemption whose fundamental purpose is to ensure that the personal privacy of individuals is maintained except where infringements on this interest are justified. In my view, where the issue of public interest is raised, one must necessarily weigh the costs and benefits of disclosure to the public. As part of this balancing, I must determine whether a compelling public interest exists which outweighs the purpose of the exemption.

Adjudicator Laurel Cropley elaborated on this question in Order MO-1254, where she stated:

> Under section 1 of the *Act*, the protection of personal privacy is identified as one of the central purposes of the *Act*. It is important to note that section 14 is a mandatory exemption whose fundamental purpose is to ensure that the personal privacy of individuals is maintained except where infringements on this interest are justified.
>
> Commenting generally on the personal privacy exemption under the Freedom of Information scheme, the drafters of *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy/1980*, vols. 2 and 3 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) indicated that the legislation must take into account situations where there is an undeniably compelling interest in access, situations where there should be a balancing of privacy interests, and situations which would generally be regarded as particularly sensitive in which case the information should be made the subject of a presumption of confidentiality. In this regard, the Williams Commission Report recommended that "[a]s the personal information subject to the request becomes more sensitive in nature ...

> the effect of the proposed exemption is to tip the scale in favour of non-disclosure".

The personal information at issue in this appeal, including that of both the affected person and the other individuals identified in the records, is covered by presumptions in favour of non-disclosure. The records also contain highly sensitive personal information, some of which was provided to the Police in confidence. Even if the appellant had satisfied me that there was a compelling public interest in disclosure of the records, which is not the case, in my view, any such public interest would not outweigh the purpose of the mandatory personal information exemption claim in the circumstances.

FINAL ORDER:

I uphold the decision of the Police to deny access to the records under section 14 of the *Act* in this Final order.

Original signed by: May 31, 2001
Tom Mitchinson
Assistant Commissioner