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

RECONSIDERATION ORDER MO-1560-R

ORDER MO-1425

Appeal MA-000256-1
Appeal MA-000256-2

Niagara Regional Police Services Board

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NATURE OF THE APPEAL:

BACKGROUND

This order sets out my decision on the reconsideration of Order MO-1425 issued April 30, 2001, and the disposition of Appeal Number MA-000256-2.

The Niagara Regional Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) from the Niagara Regional Police Association (the appellant), on behalf of a named constable. The appellant sought access to records relating to an investigation by the Police under Part V of the *Police Services Act* (the *PSA*) into allegations of misconduct on the part of the named constable.

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

The appellant appealed the decision of the Police, and this office opened Appeal MA-000256-1 (the first appeal) to deal with that matter. Former Adjudicator Dawn Maruno issued Order MO-1425, in which she found that sections 52(3)1 and 3 did not apply, and thus the records were subject to the access provisions of the *Act*. The former adjudicator therefore ordered the Police to provide the appellant with a decision letter under the *Act* with respect to the records.

In compliance with Order MO-1425, the Police issued a decision granting partial access to the responsive records. The Police denied access to the remaining records under the exemptions provided by sections 6, 8, 9, 12, 14 and 38 of the *Act*. The Police also stated that no records exist with respect to a specific part of the request.

The appellant appealed the decision of the Police to deny access, and also took the position that additional records responsive to the request should exist. Upon receipt of this appeal, this office opened Appeal MA-000256-2 (the second appeal).

During the mediation stage of the second appeal, the Police provided the appellant with an explanation responding to the concern that additional records responsive to his request should exist. The appellant was satisfied with this explanation and this issue was therefore removed from the scope of the second appeal.

Former Adjudicator Irena Pascoe then sent a Notice of Inquiry to the Police seeking its representations in the second appeal.

In response to the Notice of Inquiry, the Police submitted:

> In my original decision letter to the requester I denied access to the information requested pursuant to section 52(3) of the *Act*. That decision was appealed and it was subsequently determined, by Adjudicator Dawn Maruno, that the records *were* subject to the access provisions of the *Act*. I was, therefore, ordered (Order MO-1425) to issue a new decision letter in accordance with section 19 and 22 of

> the *Act*. On May 30, 2001, a new decision letter was issued wherein I considered the records subject to the provisions of the *Act*.
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> In light of the recent Court of Appeal for Ontario decision in the matter of the [*Act*] [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner*], I wish to reassert my original position that these records are exempt from the access provisions of the *Act*, pursuant to section 52(3).

The Police later wrote to this office confirming that it was asking that this office reconsider Order MO-1425.

In response, former Adjudicator Pascoe wrote to the parties, stating:

> The Ontario Court of Appeal judgment referred to by the Police directly affects the issues raised in [the appellant's first and second appeals]. In that case [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355], the court found that the Commissioner's interpretation of section 65(6) (the provincial equivalent to section 52(3)) was incorrect. This office has applied to the Supreme Court of Canada for leave to appeal the Court of Appeal judgment.
>
> In light of the above, in a letter to you of today's date, Adjudicator Maruno advised you that she is placing the Request for Reconsideration concerning Order MO-1425 on hold until the Supreme Court's resolution of the leave application and, if leave is granted, the subsequent appeal.
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> Given that the records at issue in Appeal MA-000256-1 are the same as those that are subject to the Request for Reconsideration, and that any decision I make with respect to these records will be subject to Adjudicator Maruno's decision concerning the reconsideration of Order MO-1425, I have decided to place [the second appeal] on hold until the resolution of the Request for Reconsideration. We will be contacting you shortly after that time to advise you how we intend to proceed.

Former Adjudicator Maruno wrote a similar letter on the same day placing the reconsideration request for the first appeal on hold.

Subsequently, the Supreme Court of Canada denied this office's motion for leave to appeal. As a result, the judgement of the Court of Appeal now stands.

Shortly after, I wrote to the parties and asked for representations on the reconsideration request, in light of the decisions of the Court of Appeal and the Supreme Court of Canada in *Ontario (Solicitor General)*. Specifically, I asked the parties to respond to the following questions:

1. Does the reconsideration request fit within any of the grounds for reconsideration set out in the IPC's *Code of Procedure*?

2. If the reconsideration request is granted, what is the appropriate remedy?

The Police provided brief representations in response to my letter, stating that, based on the Court of Appeal's decision, the appeals should be dismissed because the *Act* does not apply to the requested records. At the appellant's request, I reviewed its previous representations and other information submitted in the context of the two related appeals.

DISCUSSION:

SHOULD ORDER MO-1425 BE RECONSIDERED?

Introduction

The reconsideration procedures are set out in section 18 of the *Code of Procedure*. In particular, section 18.01 of the *Code* states:

> The IPC [Office of the Information and Privacy Commissioner] may reconsider an order or other decision where it is established that there is:
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> (a) a fundamental defect in the adjudication process;
>
> (b) some other jurisdictional defect in the decision; or
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> (c) a clerical error, accidental error or omission or other similar error in the decision.

Section 52(3)1

Section 52(3)1 reads as follows:

> 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:
>
> > 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.

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.

In her order, former Adjudicator Maruno found that the Police had established the first two parts of the three-part test for section 52(3)1. She relied on my findings in Order M-835, where I found:

- 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 purposes of section 52(3); and

- the Chief of Police or his delegate have the authority to conduct "proceedings", and the power, by law, to determine matters affected legal rights and obligations, and is properly characterized as an "other entity" for the purposes of section 52(3)1.

I concur with former Adjudicator Maruno's findings regarding the first two parts of the section 52(3)1 test.

However, the former adjudicator found that the third part of the test was not met, for the following reasons:

> 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 [Tom] 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:
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> > 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.

In *Ontario (Solicitor General)*, the Court of Appeal stated the following with respect to the "time sensitive" element under the provincial equivalent of section 52(3)1:

> In my view, the time sensitive element of subsection [65(6)] is contained in its preamble. The Act "does not apply" to particular records if the criteria set out in any of subclauses 1 to 3 are present when the relevant action described in the preamble takes place, *i.e.* when the records are collected, prepared, maintained or used. Once effectively excluded from the operation of the Act, the records remain excluded. The subsection makes no provision for the Act to become applicable at some later point in time in the event the criteria set out in any of subclauses 1 to 3 cease to apply.
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> . . . . .
>
> In my view, therefore, [Assistant Commissioner Mitchinson] was wrong to limit the scope of the exclusions in the way that he did.

Applying a "correctness" standard of review to my interpretation of the provincial equivalent of section 52(3)1, the Court of Appeal thus determined that my interpretation of the "time sensitive" element of this provision was incorrect.

The finding in Order MO-1425 that section 52(3)1 does not apply is based solely on the application of this "time sensitive" approach. Based on the court's direction in *Ontario (Solicitor General)*, the fact that the Police investigation concluded some time before the access request, and the fact that there are no on-going or anticipated proceedings relating to the employment of the named constable, do not negate the application of section 52(3)1. Accordingly, I find that section 52(3)1 applies, and the former adjudicator's finding constitutes a jurisdictional defect under section 18.01(b) of the IPC's *Code of Procedure*. Therefore, the order should be reconsidered. In the circumstances, it is not necessary for me to determine whether or not the former adjudicator erred in concluding that section 52(3)3 does not apply.

WHAT IS THE APPROPRIATE REMEDY?

The two order provisions in Order MO-1425 read as follows:

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.

The Police have already complied with both of these provisions. In the circumstances, despite my finding that Order MO-1425 contains a jurisdictional defect, my staying or rescinding that order would have no practical effect, and I therefore will not make any further order with respect to Order MO-1425.

However, for the reasons set out above, the second appeal has no jurisdictional basis and, therefore, the appropriate remedy in this regard is to dismiss it for lack of jurisdiction.

ORDER:

I dismiss Appeal Number MA-000256-2.

Original signed by: July 30, 2002
Tom Mitchinson
Assistant Commissioner