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

RECONSIDERATION ORDER MO-1567-R

ORDER MO-1448

Appeal MA-000366-1
Appeal MA-000366-2

Hamilton Police Services Board

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NATURE OF THE APPEAL:

BACKGROUND

This order sets out my decision on the reconsideration of Order MO-1448 issued June 28, 2001, and the disposition of Appeal Number MA-000366-2.

The Hamilton Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) from the appellant. The appellant sought access to records relating to an investigation into allegations of misconduct made against him.

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

The appellant appealed the decision of the Police and this office opened Appeal MA-000366-1 (the first appeal) to deal with that matter.

Subsequently, former Adjudicator Dawn Maruno issued Order MO-1448 (the order), in which she found that section 52(3) does not apply, and thus the records are 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.

Accordingly, the Police issued a decision granting partial access to the responsive records. The Police denied access to the remaining records under the exemptions at section 38(a) in conjunction with section 8 (law enforcement), and section 38(b) in conjunction with section 14 (personal privacy).

The appellant appealed the decision of the Police to deny access to portions of the records. Upon receipt of this appeal, this office opened Appeal MA-000366-2 (the second appeal).

Later, during the mediation stage of the appeal, the Police wrote to this office requesting a reconsideration of the order. The Police stated:

> . . . I believe there has been a change in case law relating to employment records, in view of the recent Ontario Court of Appeal decision of August 8, 2001. I would therefore request that the order made to the [Police] be reconsidered.

After receiving this request, on consent of the parties, this office put the second appeal on hold, pending the outcome of the Police's reconsideration request.

Subsequently, I wrote to the parties and asked for representations on the reconsideration request, in light of the decisions of the Court of Appeal for Ontario in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355, leave to appeal refused [2001] S.C.C.A. No. 509. 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 appellant provided representations in response to my letter, but they do not address the specific issues raised by the reconsideration request. The Police did not provide representations.

DISCUSSION:

SHOULD ORDER MO-1448 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:
>
> (a) a fundamental defect in the adjudication process;
>
> (b) some other jurisdictional defect in the decision; or
>
> (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 the findings of Assistant Commissioner Tom Mitchinson in Order M-835, where he 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 affecting 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:
>
> > 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.

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.
>
> . . . . .
>
> 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 the Assistant Commissioner's interpretation of the provincial equivalent of section 52(3)1, the Court of Appeal thus determined that his interpretation of the "time sensitive" element of this provision was incorrect.

The finding in Order MO-1448 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 matter in question 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 appellant, 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-1448 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-1448 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-1448.

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-000366-2.

Original Signed By: September 5, 2002
David Goodis
Senior Adjudicator