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

ORDER MO-1615

Appeal MA-010313-1

Toronto Police Services Board

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NATURE OF THE APPEAL:

The appellant made a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Toronto Police Services Board (the Police) for access to any notes, memoranda or other reports of his discussions with various officers of the Police in connection with an assault on a named individual.

The Police denied access to the records in their entirety on the basis that the records fell outside of the scope of the *Act* by virtue of section 52(3) of the *Act*.

The appellant appealed the decision.

Mediation was unsuccessful and the matter moved to inquiry. I received representations from the Police and shared them in their entirety with the appellant. All of the appellant's responding representations were then shared with the Police. Finally, at my request, the Police provided brief reply representations.

RECORDS:

The records at issue total 12 pages and consist of excerpts from various police officers' notebooks and a two-page document entitled "Investigator's Significant Log Note Entries".

CONCLUSION:

The records at issue are excluded from the application of the *Act* by virtue of section 52(3).

DISCUSSION:

APPLICATION OF THE ACT

Introduction

Sections 52(3) and (4) of the *Act* provide:

> (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.

The Police rely on sections 52(3)1 and 3 to deny access to the records at issue. If any one of paragraphs 1, 2, or 3 of section 52(3) applies to the records, and none of the exceptions found in section 52(4) applies, then the records are excluded from the scope of the *Act*. Consequently, if I find that one of the paragraphs claimed by the Police applies, I need not go further to examine the applicability of the other.

Section 52(3)1

General

In order for a record to fall within the scope of section 52(3)1, the institution must establish that:

1. the record was collected, prepared, maintained or used by the institution 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 institution.

Parts 1 and 2

It is for the Police to show that the records at issue were "collected, prepared, maintained or used" by the Police "in relation to proceedings or anticipated proceedings before a court, tribunal or other entity".

The Police essentially argue that all of the records at issue in this appeal deal specifically and only with the appellant's efforts to complain about the handling of the original police investigation into the assault on a particular individual:

> By way of background, an adult family member of the appellant was involved in an event which resulted in a law enforcement investigation. The appellant's contact with police did not revolve around the determination of the facts of the events; but rather his contact with police focused on his perceptions on how the police officers conducted the investigation and his obvious displeasure with the results of that investigation. Subsequent to the original events, the appellant made a formal public compliant under the Police Services Act (PSA), the basis of which is his belief that the officers did not properly execute their duties in investigating the original event. The complainant later appealed the decision of the Toronto Police Service (TPS) to the Ontario Civilian Commission on Policing Services (OCCOPS).
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> . . . . . .
>
> The appellant made contact with various police officers, both before and during the public complaint investigation. The information recorded in the memorandum book notes was collected and used by various police officers to determine the validity of the complaint, and subsequent formal public complaint, made by the appellant concerning the conduct of a number of identified police officers. The information recorded in the public complaint notes was collected and used during the investigation of the appellant's formal public complaint against identified police officers.
>
> ……
>
> The records were prepared and used in relation to the interaction between the appellant and various police officers with whom he had contact during his efforts to complain about the original investigation. As well, several of the records document police investigations of the formal public complaint.

And, in the Police's reply:

> It should be noted that the appellant did not request any documents associated to [an identified individual's] arrest, i.e. an arrest report, memo book notes, etc. The

> entire focus of the request was on the records generated in relation to his complaint about service received by the officers….

With respect to the issue of the records being in relation to proceedings or anticipated proceedings, the Police state that:

> At the time that the notes were created, the only interaction the appellant had with police was in respect of this complaint regarding the conduct of several officers. Therefore, these records are properly characterized as being substantially related to the allegations made by the appellant and the subsequent investigation into the validity of the allegation that the original law enforcement investigation was improperly conducted.
>
> As well, the examination of the information was further required to make decisions regarding potential disciplinary action, such action could affect the employment of the subject officers of this public complaint investigation.
>
> As previously outlined, public complaints are dealt with under Part V of the [*Police Services Act*] and may result in a disciplinary hearing in accordance with section 64 (Part V of the PSA)

The appellant's main argument would appear to be that most of the records he requests are not excluded pursuant to section 52(3) because they consist of records produced in the ordinary course of business and not produced in the course of a complaints investigation or internal investigation. He references several orders of this office, most notably Order M-927 from which he takes the following excerpt:

> It is difficult to imagine any category of records which would be more integral to the basic mandate of a police force than the files kept in connection with day-to-day police investigations of incidents occurring within the force's jurisdictional boundaries, and related entries in officers' notebooks. Moreover, although some of them are prepared by employees of the Police, such records are not, in essence, related to employment or labour relations. Rather, they record the activities and conclusion of the investigating officers and, at times, others who conduct forensic analyses, etc. Generally speaking, such records are subject to the Act….

By way of elaboration, the appellant states:

> It is my belief that not all of the records in my FOI request were "collected, prepared, maintained or used" in either the complaint investigation or subsequent adjudication. The Report of Investigation does not provide an inventory of records collected, but it indicates that notes of [two named police officers] (for example) were not collected or used. It is my belief that, similarly, some of the

> date-specific notes requested were like wise not collected or used in the report of investigation.
>
> If the records were not collected or used in the report of investigation, they were definitely not used in any subsequent proceedings. The Report was submitted to [named Superintendent (the "Superintendent")] who declined to any action. No Part 1 records were included in the Report itself. [The Superintendent] did not read or use any Part 1 records, other than as they perhaps contributed to the Report, or for that matter, even read the underlying complaint. In August 2001, I submitted an appeal to the Ontario Civilian Commission on Police Services. Case Officer [named individual] prepared a Case Summary, but to my knowledge, did not collect or use any Part 1 records. The appeal panel of the Ontario Civilian Commission on Police Services likewise did not collect or use any Part 1 records, or that matter, read my complaint or my subsequent submission.

Having examined the records and considered the representations of the parties, I find that all of the records at issue were collected, prepared, maintained or used by the Police in relation to proceedings or anticipated proceedings before a court, tribunal or other entity. I find that there is persuasive evidence before me that these records were created as a result of the appellant's contacts with police made in his efforts to inquire into the conduct of police during their investigation of a criminal matter. Furthermore, it is clear to me based on the information before me that the Police used these records in its investigation into the conduct of the particular officers.

The appellant's reliance on the conclusions in Order M-927 to assert that the records he seeks are not captured by section 52(3) is misguided. The records at issue in Order M-927 can be distinguished from those relevant to the appeal at bar precisely on the basis claimed by the Police in the instant case. In Order M-927, Inquiry Officer Higgins specifically finds that:

> In my view, in assessing the possible application of section 52(3) in this case, it is important to note that *the request was essentially directed at the contents of the police investigation file concerning the accident, and any related entries in officers' notebooks. It was not a request for information relating to the allegations against the investigating officers*. (emphasis added)

In this appeal, the records sought by the appellant are those related to his inquiries with the Police in relation to his complaints about the conduct of officers.

Part 3

Part 3 stipulates that the relevant proceedings relate to labour relations or to the employment of a person by the institution. The Police take the position that disciplinary hearings relate to the employment of a person by the institution:

> It is incumbent upon the Chief [of Police] to ensure that all members adhere to the rules, regulations, and procedures of the TPS, which include the PSA as well as the Criminal Code of Canada. When an officer is deemed not to have fulfilled his or her employment duties/responsibilities by failing to comply with the above-noted regulations, it therefore follows that any ensuing public complaints investigation clearly relates to the employment by the institution of the police officer who is the subject of the investigation. As such, these records no longer fall under the release provisions of the Act.

In this regard, the Police rely on Orders M-835 and M-899, the latter of which clarifies the nature of policing duties:

> While it appears that the courts are clear that, generally speaking, police officers are not 'employees', in the context of the *PSA*, the legislature has made it abundantly clear that what police officers do for Police Services Boards constitutes 'employment'. In my view, the statutory context of the PSA is the governing factor, and I find that proceedings under Part V of the PSA relate to 'employment'.

The appellant contends that disciplinary matters in the context of the police must be distinguished from "employment matters" as understood in the *Act* and supports his argument referring to both Ontario Court of Appeal and Supreme Court of Canada jurisprudence. The appellant concludes in this manner:

> The primary purpose of the *Labour Relations and Employment Statute Amendment Act, 1995* (which contained s 52/65(6) amendments to FOIA) was to amend the *Labour Relations Act* and *Employment Standards Act* – acts which do **not** apply to police. There is little reason to believe that these amendments intentionally planned to make major changes in access to information in connection with police disciplinary matters or to lead to the absurd results that a person's access to his own information (otherwise permitted by legislation) is made unavailable by police misconduct or police investigations into their own misconduct. The interpretation made available by the Supreme Court enables the elimination of these absurd results and is consistent with consistent court and legislative references to a strong public interest in police complaint proceedings.

It is clear that the proceedings in question relate to the employment of a person by the Police. In Order M-899, Adjudicator Cropley carefully reviewed and analyzed various court decisions as well as provisions of the *PSA* to reach her conclusion that proceedings such as those relevant in this appeal, under Part V of the *PSA*, do "relate to 'employment'". This reasoning continues to be consistently applied by this office.

Furthermore, Order M-835 speaks directly to the issue of whether disciplinary proceedings under the *PSA* relate to the employment of a person by the institution for the purposes of section 52(3)1:

> In the circumstances of this appeal, the disciplinary hearing was initiated as a result of an internal complaint under Part V of the *PSA*, not under the public complaints part of the statute (Part VI). Despite what I acknowledge to be a general public interest in policing matters, I find that these Part V proceedings do in fact "relate to employment of a person by the institution". The penalties outlined in section 61(1), which may be imposed after a finding of misconduct, involve dismissal, demotion, suspension, and the forfeiting of pay and time. In my view, these can only reasonably be characterized as employment-related actions, despite the fact that they are contained in a statute and applied to police officers.

Therefore, I find that all three requirements of section 52(3)1 are met. In addition, I find that none of the section 52(4) exceptions applies. Therefore, the *Act* does not apply to any of the records at issue. Accordingly, it is not necessary for me to make a finding on the application of section 52(3)3.

ORDER:

I uphold the decision of the Police that the *Act* does not apply to the records.

Original signed by: February 24, 2003
Rosemary Muzzi
Adjudicator