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

Reconsideration Order MO-1589-R

Appeal MA-010023-1

Order MO-1447

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NATURE OF THE APPEAL:

The London Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to an investigation into the requester's allegations of misconduct on the part of a London Police officer.

The Police located the records responsive to the request and initially 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-010023-1 to deal with that matter.

Subsequently, I issued Order MO-1447 (the order), in which I found that section 52(3) does not apply, and thus the records are subject to the access provisions of the *Act*. I therefore ordered the Police to provide the appellant with a decision letter under the *Act* with respect to the records. The Police initiated an application for the judicial review of my decision and the order was stayed by the Court.

Prior to the adjudication of the application for judicial review by the Divisional Court, the Ontario Court of Appeal issued a decision in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 in which it overturned several of the Commissioner's decisions with respect to the interpretation of the provincial equivalent provisions to sections 52(3)1 and 3. The Commissioner's office then sought leave to appeal the decision of the Court of Appeal to the Supreme Court of Canada. On June 13, 2002, the Supreme Court denied this motion. As a result, the judgment of the Court of Appeal now stands. I am, accordingly, bound by the reasoning contained in that decision in my interpretation of the provisions of sections 52(3)1 and 3.

In a letter to the appellant from IPC Legal counsel dated October 4, 2002, the appellant was advised of the unfavourable outcome of the IPC's application for leave to appeal the decision of the Ontario Court of Appeal to the Supreme Court of Canada. By letter dated October 15, 2002, I sought the representations of the parties on the proper disposition of these matters, in light of this recent ruling from the Supreme Court of Canada. The Police provided me with submissions in favour of a decision to reconsider the decision in Order MO-1447 on the basis that, in keeping with the decision of the Court of Appeal in *Ontario (Solicitor General),* the *Act* does not apply to the responsive records.

Because of the decision by the Supreme Court on the leave application, I am required to re-evaluate my decision in Order MO-1447. At my own initiative, therefore, a reconsideration of that decision must be undertaken.

Should I reconsider my decision in Order MO-1447?

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

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

> 18.01 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
>
> (c) a clerical error, accidental error or omission or other similar error in the decision.

For the reasons set out below, I have reached a conclusion that there is a jurisdictional defect in the order within the meaning of section 18.01(b) of the *Code*.

As noted above, the Police claimed the application of sections 52(3)1 and 3 to the records at issue in this appeal. These sections state:

> 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.

Section 52(3)1

In my order, I found that the Police had established the first two parts of the three-part test for section 52(3)1. However, I also 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.

The Police state that the investigation into the appellant's complaint by the delegate of the Police Chief was concluded on October 19, 2000. The appellant indicates that the investigation into his complaint by the Ontario Civilian Commission on Police Services (OCCPS) was concluded on January 23, 2001, some six months ago. I have not been provided with any evidence to demonstrate that any further action has been contemplated with respect to the appellant's complaint. 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 record is not excluded under section 52(3)1.

In *Ontario (Solicitor General)*, above, 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 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 the Assistant Commissioner's interpretation of the provincial equivalent of section 52(3)1, the Court of Appeal thus determined that this office's interpretation of the "time sensitive" element of this provision was incorrect.

The finding in Order MO-1447 that section 52(3)1 does not apply is based solely on the application of this "time sensitive" approach. In other words, it appears that I would have found that section 52(3)1 applies, but for the passage of time. Because this approach was explicitly rejected by the Court of Appeal, I have reached the conclusion that this finding constitutes a jurisdictional defect in the order, and that the order should be reconsidered for this reason.

Section 52(3)3

In Order MO-1447, I also found that the Police had established the first two parts of the three-part test for section 52(3)3. However, I found that the third part of the test was not met, for the following reasons:

> As noted above in my discussion of section 52(3)1, the investigations by the Police and OCCPS under the *PSA* into the appellant's allegations of misconduct by an officer were completed some six months ago. I find that I have not been provided with sufficient evidence by the Police to lead me to the conclusion that the Police and OCCPS consider their investigations of the allegations of wrongdoing by the officer to be ongoing. Similarly, the appellant makes it clear in his submissions that he too considers the investigation of his complaint to be completed.
>
> Based on my review of the records and the submissions of the parties, I find that due to the passage of time, there is no reasonable prospect of the legal interests of the Police being engaged in this employment-related matter in such a way as would affect their legal rights or obligations. Specifically, as six months have elapsed since the conclusion of the OCCPS investigation, I find that the Police no longer have the requisite legal interest as these events are no longer in the reasonably proximate past. In my view, there no longer exists a reasonable prospect that the legal interests of the Police will be engaged.
>
> Accordingly, I find that section 52(3)3 also does not apply and that the records are subject to the access provisions of the *Act*.

In *Ontario (Solicitor General)*, above, the Court of Appeal stated the following with respect to the words "in which the institution has an interest" in the provincial equivalent of section 52(3)3:

> In arriving at the conclusion that the words "in which the institution has an interest" in s. 65(6) 3 must be referring to "a legal interest" in the sense of having the capacity to affect an institution's "legal rights or obligations", the Assistant Privacy Commissioner stated that various authorities support the proposition that an interest must refer to more than mere curiosity or concern. I have no difficulty with the latter proposition. It does not however lead to the inevitable conclusion that "interest" means "legal interest" as defined by the Assistant Privacy Commissioner.
>
> As already noted, section 65 of the *Act* contains a miscellaneous list of records to which the *Act* does not apply. Subsection 6 deals exclusively with labour relations and employment related matters. Subsection 7 provides certain exceptions to the exclusions set out in subsection 6. Examined in the general context of subsection 6, the words "in which the institution has an interest" appear on their face to relate simply to matters involving the institution's own workforce. Sub clause 1 deals with records relating to "proceedings or anticipated proceedings relating to labour relations or to the employment of a person **by the institution**" [emphasis added]. Sub clause 2 deals with records relating to "negotiations or anticipated negotiations relating to labour relations or to the employment of a person **by the institution**" [emphasis added]. Sub clause 3 deals with records relating to a miscellaneous category of events "about labour-relations or employment related matters in which the institution has an interest". Having regard to the purpose for which the section was enacted, and the wording of the subsection as a whole, the words "in which the institution has an interest" in sub clause 3 operate simply to restrict the categories of excluded records to those records relating to the institutions' own workforce where the focus has shifted from "employment of a person" to "employment-related matters". To import the word "legal" into the sub clause when it does not appear, introduces a concept there is no indication the legislature intended.

Applying a "correctness" standard of review to Assistant Commissioner Mitchinson's interpretation of the provincial equivalent of section 52(3)3, the Court of Appeal thus determined that this office's interpretation of the words "in which the institution has an interest" to mean a "legal interest" was incorrect.

Similarly, the Court of Appeal determined that this office's interpretation of the "time sensitive" element of the provincial equivalent of section 52(3)3 was incorrect. (See discussion under section 52(3)1, above).

The finding in Order MO-1447 that section 52(3)3 does not apply is based on both the previous interpretation of "in which the institution has an interest" described above and the application of a "time sensitive" approach. Because both these interpretations were explicitly rejected by the

Court of Appeal, I have reached the conclusion that this finding constitutes a jurisdictional defect in the order, and that the order should be reconsidered for this reason.

Based on the Court of Appeal's direction in *Ontario (Solicitor General)*, the fact that there are no on-going proceedings relating to the employment of the named police officer and the passage of time do not negate the application of both sections 52(3)1 and 3. I find that the Police have established the requisite "interest" in the subject matter to bring the records within the ambit of section 52(3)3. Accordingly, I find that sections 52(3) 1 and 3 apply and my findings in Order MO-1447 constitute a jurisdictional defect under section 18.01(b) of the IPC's *Code of Procedure*. Therefore, the order must be reconsidered.

What is the appropriate remedy in the circumstances?

The order provisions of Order MO-1447 read as follows:

1. I order the Police to issue a decision letter to the appellant with respect to the record in accordance with sections 19 and 22 of the *Act*, using the date of this order as the date of the request.

2. I reserve the right to require the Police to provide me with a copy of the letter referred to in Provision 1.

The Police did not comply with Order Provision 1 as they initiated an application for the judicial review of my decision, which was then stayed by the Court pending the outcome of the judicial review. In the circumstances, the appropriate remedy is for me to permanently stay provisions 1 and 2 of Order MO-1447.

ORDER:

I hereby permanently stay provisions 1 and 2 of Order MO-1447.

Original Signed By: November 27, 2002
Donald Hale
Adjudicator