



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER MO-1634

Appeal MA-020260-1

Sudbury Regional Police Service



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NATURE OF THE APPEAL:

The Sudbury Regional Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to copies of the following:

all correspondence filed to the Chief of Police with regards to [four named officers], including any and all correspondence with regards to the Ontario Civilian Commission on Police Services; a copy of police occurrence report #7019297; a copy of investigation records relating to public complaint 016-02 undertaken by a named officer; and a copy of the video of the internal cellblock during the requester's incarceration in December 2001 relating to occurrence #6825202.

The Police located the responsive information and granted partial access to the records, applying the exemptions found in sections 8(2)(a) (law enforcement report), 14(1) and 38(b) (invasion of privacy) and 38(a) (discretion to refuse requester's own information) to the remaining information. The Police also relied upon the exclusionary provisions set out in sections 52(3)1 and 3 of the *Act* to deny access to some of the responsive records.

The requester, now the appellant, appealed the Police's decision. During the mediation stage of the appeal, the appellant removed the following records from the scope of the appeal:

- Records 12, 13 and 14 (occurrence summary, general occurrence report);
- Record 15, which had been disclosed in its entirety;
- Records 144, 148, 149, 150 and 151 (audio tapes)
- Record 152 (video tape)

The Police also determined that they were no longer relying on the exemption in section 8(2)(a) and this was removed as an issue in the appeal. As a result of the mediation efforts of the parties, the sole remaining records are those to which the Police have applied the exclusionary provisions in sections 52(3)1 and 3 of the *Act*. As further mediation was not possible, the appeal was moved to the adjudication stage of the process. The only issue to be addressed in this appeal is whether the remaining records fall within the ambit of section 52(3)1 and 3 of the *Act*. If the records fall within these sections, they are outside the scope of the *Act*.

I decided to seek the representations of the Police initially, as they bear the onus of establishing the application of the exclusions claimed. The Police made representations, a copy of which was shared, in its entirety, with the appellant, along with a copy of the Notice of Inquiry. The appellant also made submissions to me.

RECORDS:

The records remaining at issue in this appeal consist of the following:

- Records 1 to 11 inclusive (correspondence about officers);

- Records 16 to 143 inclusive (complaint investigation report);
- Records 145, 146 and 147 (audio tapes)

DISCUSSION:

JURISDICTION - APPLICATION OF THE ACT

Introduction

The Police have claimed the application of the exclusionary provisions in sections 52(3)1 and 3 of the *Act* for Records 16 to 143 inclusive and Records 145, 146 and 147 and section 52(3)3 for Records 1 to 11.

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.

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 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 institution.

Parts 1 and 2 of the Test Under Section 52(3)1

In order to establish the application of section 52(3)1, the Police must first demonstrate 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 submit that the records which form the subject matter of this request were prepared, collected and used by it as part of an investigation undertaken into a complaint against a police officer under Part V of the *Police Services Act* (the *PSA*). They indicate that following the receipt of the appellant’s complaint, a member of the Sudbury Police’s Professional Standards Branch, acting as a delegate of the Chief of Police, collected, prepared and used the records in connection with his investigation.

In addition, the Police indicate that the appellant has initiated a complaint with the Ontario Human Rights Commission (the OHRC). The records at issue are concerned with an incident involving the appellant and an off-duty police officer which occurred on April 30, 2002. The officer has been involved in a prior incident with the appellant on December 8, 2001. The Police take the position that because both the December 2001 incident, which is now the subject of the

OHRC complaint, and the April 2002 incident involve the appellant and the same officer, the records at issue in the present appeal “may be relevant in that resolution process.”

The appellant did not specifically address the issue of whether the records qualify for exclusion from the *Act* as a result of the operation of sections 52(3)1 and 3. Rather, he questions whether the Police are simply trying to avoid having to disclose records relating to what he feels was an improper investigation of his complaint.

Based on my review of the contents of the records and the submissions of the Police, I am satisfied that the Police have provided sufficient evidence to demonstrate that Records 16 to 143 inclusive and Records 145, 146 and 147 were collected, prepared and used by the Police in relation to proceedings under Part V of the *PSA*. As a result, I find that Parts 1 and 2 of the test under section 52(3)1 have been met.

Part 3 of the Test Under Section 52(3)

Part 3 stipulates that the relevant proceedings relate to labour relations or to the employment of a person by the institution. In support of its contention that the proceedings under consideration relate to labour relations or to the employment of a person, the Police submit that:

The records that were collected, prepared and maintained as part of this investigation are used to inform the Chief of Police of the nature of the complaint against employee(s) of the Service and involves employment related matters of a discipline/counselling nature. The records are also used by the Chief when making his decision as to whether proceedings under the *Police Services Act* will take place. If the proceedings do take place, a tribunal is formed to hear the employee's case. This tribunal could impose penalties such as reduced rank or even dismissal.

In Order MO-1615, Adjudicator Rosemary Muzzi reviewed a similar set of circumstances to those in the present appeal. She found that:

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.

For the purposes of the present appeal, I adopt the rationale behind the decisions in Orders MO-1616, M-899 and M-835 and find that discipline proceedings under Part V of the *PSA* “relate to the employment of a person by the institution”. In the present appeal, an investigation under Part V of the *PSA* was undertaken by the Police following the receipt of the appellant’s complaint about the conduct of its’ officers. I find that the third part of the test under section 52(3)1 has, accordingly, been satisfied and that the exclusion from the *Act* in that section applies to Records 16 to 143 inclusive and Records 145, 146 and 147.

Section 52(3)3

The Police submit that Records 1 to 11 fall outside the ambit of the *Act* as a result of the operation of the exclusionary provision in section 52(3)3.

General

In order to fall within the scope of paragraph 3 of section 52(3), the Police must establish that:

1. the records were collected, prepared, maintained or used by the institution 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.

Parts 1 and 2 of the Test Under Section 52(3)3

The Police submit that they collected Records 1 to 11, which consist of correspondence received by the Police from members of the public which relate to the previous conduct of several police officers who were the subject of the investigation under Part V of the *PSA* referred to above. I find that the documents which comprise Records 1 to 11 were collected and used by the Police.

The Police indicate that these communications represent portions of the contents of the officers' personnel file and are referred to by its senior staff when "recommending promotion or reclassification of an employee." On this basis, I find that the collection and usage of Records 1 to 11 was in relation to communications or discussions about their contents within the Sudbury Police Service.

Accordingly, I find that both Parts 1 and 2 of the test for section 52(3)3 have been met.

Part 3 of the Test Under Section 52(3)3

The Police submit that Records 1 to 11 are "correspondence (communications) that relate to the conduct of employees of this institution, during the performance of his/her duties" and that the subject matter of the correspondence is "an employment-related matter".

Based on my review of the contents of Records 1 to 11, I am satisfied that they are concerned with the on-the-job performance of the officers who are referred to in these letters. As a result, I find that the communications reflected in the records at issue in this appeal are about "employment-related matters" concerning the police officers referred to therein.

A number of previous orders have addressed the issue of whether or not an institution "has an interest" in a matter for the purposes of section 52(3)3 of the *Act*. 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. 507, the Ontario Court of Appeal found that this office's interpretation of section 65(6)3 (the provincial equivalent of section 52(3)3) was incorrect, and stated the following with respect to the words "in which the institution has an interest" in that section:

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”.** [emphasis added] To import the word “legal” into the sub clause when it does not appear, introduces a concept there is no indication the legislature intended.

I have found above that the subject matter of Records 1 to 11 is related to matters involving the employment of the officers, who are employees of the Police. In my view, the Police have established that these records relate to employment-related matters involving its workforce as contemplated by the Court of Appeal in *Ontario (Solicitor General) supra*. Accordingly, I find that the Police have established an interest in the employment-related matter to which Records 1 to 11 relate.

On this basis, I conclude that all three requirements for the application of section 52(3)3 have been met, and Records 1 to 11 also fall outside the scope of the *Act*.

ORDER

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

Original signed by: _____
Donald Hale
Adjudicator

April 15, 2003