



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-1656

Appeal MA-020276-1

Toronto Police Services Board



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NATURE OF THE APPEAL:

The Toronto 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 identified complaint investigation, including polygraph test results and related information. The Police contacted the requester to clarify the request, and the requester clarified that his request was for the following:

1. All available records of [an identified investigation]... In this investigation I was listed as a suspect in [two occurrences].
2. All available records of the investigation ... into my [identified] complaint. ... Please include results and all available information regarding the polygraph test conducted by [identified individual and location].

The Police responded to the clarified request by providing partial access to certain records responsive to item 1, and denying access to portions of them on the basis of the exemptions at sections 14 and 38(b) (invasion of privacy).

Concerning item 2, the Police identified that the requested records were denied on the basis that the *Act* does not apply to them by virtue of the exclusion at section 52(3). The response stated:

... a portion of your request dealt with records concerning [an identified file number], which is the file number assigned to the public complaint you lodged regarding the conduct of a police officer employed with the Toronto Police Service.

. . . [T]he records relate to an employment-related matter; that being the complaint process regulated under the Police Services Act; and therefore, the access provisions of the [*Act*] do not apply.

The appellant appealed the decision of the Police.

During the mediation stage of the appeal, the appellant narrowed his appeal to include only the records relating to the investigation into his complaint against a police officer (item 2). As a result, the only remaining issue in this appeal is whether or not section 52(3) applies to the records responsive to item 2.

A Notice of Inquiry was initially sent to the Police, setting out the facts and issues in the appeal, and seeking representations on whether section 52(3) applied to the records. The Police provided representations supporting their position that section 52(3)1 and 3 applied. The Notice of Inquiry was then sent to the appellant, along with a copy of the non-confidential portions of the Police's representations. The appellant provided brief representations in response.

RECORDS:

At issue in this appeal are records contained in the *Police Services Act* (PSA) complaint investigation file, including police officers' memo books, polygraph test tapes and a videotape of the polygraph.

DISCUSSION:

ARE THE RECORDS EXCLUDED FROM THE ACT DUE TO SECTION 52(3)1 OR 52(3)3?

Introduction

Section 52(3) is record-specific and fact-specific. If section 52(3) applies to the records, and none of the exceptions found in section 52(4) apply, section 52(3) has the effect of excluding records from the scope of the *Act*.

The Police claim that the records fall within the scope of both section 52(3)1 and 52(3)3.

I will examine the application of section 52(3)3, initially.

Section 52(3)3

Section 52(3)3 reads:

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:

Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

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 Police or on their 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.

The Police provided representations on the application of section 52(3)3. The appellant's brief representations focus on the polygraph test. He states:

I believe that section 52(3) does not apply to the records at issue, as the polygraph test was a continuation of the [earlier investigation].

Section 52(4) has no application in the circumstances of this appeal.

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

Concerning the first part of the test, the Police submit that the records were collected, prepared maintained and used by the Police in the course of dealing with the complaint against a named police officer and the matters arising from the investigation into the complaint. They then identify how the records were collected and used by the Police.

Concerning the specifics of the polygraph test, the Police state:

The Report of Investigation prepared by the Complaint Investigator, at page 5, clearly indicates that the records relating to the Polygraph examination were specifically prepared and collected to assist in the investigation of the public complaint. In addition, the results of that polygraph test were used by the Complaint Investigator in formulating his recommendations on the investigation.

The Police then quote from the Report of Investigation, which states "... the complaint investigator took steps to have a polygraph authorized for the complainant". The Police take the position that the records were clearly collected, prepared and used by the institution.

I agree, and find that the records at issue were collected, prepared and used by the Police, and that the first part of the test under section 52(3)3 has been satisfied.

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

The Police state that the records were collected, prepared and used by the Police to formulate recommendations on the complaint investigation and to otherwise deal with the issues, and that the collection, preparation and usage was in relation to communications concerning the complaint.

I accept the Police's position that the records were collected, prepared or used by the Police in relation to communications about the complaint made against an officer. As a result, the second part of the section 52(3)3 test has been met.

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

The Police submit that the communications all relate to an employment-related matter in which the Police have an interest. They state:

In Order MO-1523 Adjudicator Hale dealt with a similar matter, in that records were collected and used by [Police] personnel to investigate a complaint of conduct and then make a determination as to the propriety of the police officer's actions. He also referred to the fact that the matter had been appealed to OCCOPS.

The Police then refer to the following quotes from that Order:

The Police rely on the findings in Orders M-899 and M-835 where it was held that proceedings under Part V of the *PSA* relate to employment.

...

As far as the third requirement is concerned, previous orders of this office have determined that complaints filed under the *PSA* regarding the conduct of individual police officers, as well as appeals of any decisions made under the *PSA* to OCCOPS, qualify as "employment-related matters" for the purpose of section 52(3)3 of the *Act* (Orders M-922, MO-1346 and MO-1491). Applying the reasoning in these previous orders, I find that the communications reflected in the records at issue in this appeal are about "employment-related matters" concerning the police officer who is the subject of the appellants' *PSA* complaint and OCCOPS appeal.

Accordingly, I find that the Police have established an interest in the employment-related matter to which the records relate.

The Police refer to the above in support of their position that the communications in this appeal relate to "an employment-related" matter, and also that the Police have established an interest in the employment-related matter.

As set out above, the appellant takes the position that polygraph test, which is included in the records at issue, should not be covered by section 52(3), as it was a continuation of the earlier investigation.

Adjudicator Hale dealt with a similar argument in the Order referred to by the Police. The relevant portion reads:

The appellants argue that I ought to examine the original purpose for which the records were created. If the records were prepared in the course of an investigation into a possible crime, they ought not to be excluded from the scope of the *Act* on the basis that they have some labour relations purpose. However, I have found above that the records were in fact used by the Police in their investigation and public inquiry under Part V of the *PSA* into the allegations by the appellants. The fact that they were originally created for some other purpose does not preclude their use for some other purpose, such as a public inquiry into the police officer's handling of the criminal investigation.

I agree with the position taken by Adjudicator Hale. In fact, in the circumstances of this appeal, there is additional support for the position that the records requested by the appellant, including the polygraph test results, were collected and used in relation to communications about an employment-related matter. The portion of the appellant's request that resulted in the section 52(3) decision and this appeal was for "... all available records of the investigation ... into **my complaint**... Please include results and all available information regarding the **polygraph test**...". [emphasis added] The appellant appears to recognize that the polygraph test arises from the complaint, rather than from the earlier investigations. The Police's representations support this position, stating that the polygraph records were specifically prepared and collected to assist in the investigation of the complaint. Based on the information provided to me, it is clear that the records, including the polygraph test, were prepared by the Police in relation to communications about the complaint. Notwithstanding that the subject matter of the polygraph test may also relate to the earlier investigation, I am satisfied that the records relate to the employment-related matter regarding the conduct of a police officer.

Accordingly, I am satisfied that these records concern an employment-related matter.

I also agree with the Police's position that they had an interest in this employment-related matter involving their employee, and that this interest was more than a mere curiosity or concern. Although it may be that the investigation has now ended, based on the decision in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), this does not negate the application of section 52(3)3. Therefore, the third part of the section 52(3)3 test has been met.

I have found that all three parts of the section 52(3)3 test have been met. As a result, I conclude that the records are excluded from the scope of the *Act* by virtue of section 52(3)3.

Having found that section 52(3)3 applies, it is not necessary for me to determine whether section 52(3)1 applies.

ORDER:

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

Original signed by: _____
Frank DeVries
Adjudicator

_____ May 29, 2003

POSTSCRIPT

As indicated, it is my view that the requested records were prepared by the Police in relation to communications about an employment-related matter in which the Police have an interest. The records are therefore not covered by the *Act*. However, I wish to point out that this finding in no way precludes the Police from disclosing information in these records in accordance with the principles and spirit of the *Act*.