



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-1649

Appeal MA-020323-1

Durham Regional Police Services Board



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

The Durham Regional Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act (Act)* for a copy of all records relating to the requester and her 2002 application for the position of Police Constable.

The Police advised the requester that all responsive records fell outside of the scope of the *Act* due to section 52(3) of the *Act*.

The requester (now the appellant) appealed the decision of the Police. Mediation was unsuccessful and the appeal was moved to the adjudication stage of the process.

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)1, 2 and/or 3 applied to the records. The Police provided representations supporting their position that section 52(3)3 applied to the records. The Notice of Inquiry was modified to reflect the Police's claim that only section 52(3)3 applied, and it was sent to the appellant along with a copy of the Police's representations. The appellant provided representations in response.

The records at issue consist of the entire file pertaining to the appellant's application for the position of Police Constable. They include the application for employment, interview notes, test results, correspondence regarding the application and information collected in relation to background checks.

DISCUSSION:

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

Introduction

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.

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

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

Parts One and Two of the Test Under Section 52(3)3

Concerning the first and second requirements of section 52(3)3, the Police state:

All of the responsive records were collected or generated as a result of the appellant's application for employment with this police service. They were maintained within our recruiting branch and used by members of this police service in determining the appellant's suitability for employment. ...

The application for employment, filed by the appellant, caused individuals of this institution to interview her, contact references and conduct testing. As a result of the recruiting process, the responsive records were collected and created. ...

The appellant does not address these parts of the test.

Based on both the Police's representations and my review of the records, I find that the records at issue were collected, prepared, maintained or used by the Police. I also accept that this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications about the appellant's application for employment.

Accordingly, I find that the first and second requirements of the section 52(3)3 test have been established.

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

Representations of the parties

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

All of the responsive records were collected or generated as a result of the appellant's application for employment and the subsequent recruitment process. In Order MO-1291, [adjudicator] Holly Big Canoe agreed that the recruitment process, which is initiated by an application for employment, is an employment-related matter.

All police services are legislatively required to ensure that any person appointed as a police officer meets the hiring criteria set out in section 43(1) of the *Police Services Act*. It is equally of interest to our institution to ensure the applicant is accurately assessed as denial of employment could lead to a grievance being launched. Therefore any document which assists us in assessing an applicant's suitability for employment is of critical interest to us.

In her representations the appellant focuses on this part of the test. She takes the position that she meets the hiring criteria referred to by the Police and set out in section 43(1) of the *Police Services Act*. She also identifies her concerns that she has not been accurately assessed, but that she has been unable to establish the inaccuracies as she has been denied access to the records. As well, she takes issue with the Police's position concerning their interest in the record. She states that unless she was not accurately assessed, or was denied employment for other invalid reasons, the Police have no reason to be concerned about possible legal action, and that therefore the information is not of "critical interest" to them.

Finally, the appellant identifies that she is interested in obtaining information relating to her application in order to find out the reasons for the decisions made concerning her application. She identifies that in other processes, individuals are entitled to obtain their own information, and that she should similarly have that right in this process.

Findings

I am sympathetic to the appellant's interest in accessing records relating to her application for the position of Police Constable. However, the issue I have to decide is not whether or not the appellant should have access to the records; rather, it is whether the *Act* applies to these records. As set out above, if section 52(3)3 applies to the records, and none of the exceptions found in section 52(4) apply, then the records fall outside the scope of the *Act*.

I have already found that the records were collected, prepared, maintained or used by the Police in relation to meetings, consultations, discussions or communications.

Employment-related matters

The Police submit that the records relate to the appellant's application for employment and, as such, are employment-related. Previous orders have consistently held that a job competition is an employment-related matter and that records created in the course of a job competition are about employment-related matters. Past orders have also established that the complete hiring process is considered to be an employment-related matter, and that records concerning recruitment, screening and interviewing satisfy the requirements of the term "employment-related matter", regardless of the fact that a requester may not ultimately be the successful candidate (See Orders P-1627, PO-1760, MO-1291, PO-2123).

Applying the reasoning from these past orders, I find that the records at issue in this appeal were collected, prepared, maintained or used by the Police in relation to meetings, discussions,

communications or consultations about an employment-related matter, specifically, the appellant's application for the position of Police Constable.

Has an interest

The only remaining issue is whether the Police "have an interest" in this employment-related matter.

A number of previous orders have addressed the issue of whether or not an institution "has an interest" in a matter for the purpose 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. 509), the Ontario Court of Appeal specifically addressed the meaning of the phrase "in which the institution has an interest" for the purpose of section 65(6) of the provincial *Act* (the equivalent of section 52(3) of the *Act*) as follows:

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". ...

It is interesting to note that one of the orders specifically before the Ontario Court of Appeal in the above case involved job competition records (Order PO-1627).

The Police have identified that they have an interest in employment-related records which are used in assessing an applicant's suitability for employment, both because of the requirements set out in section 43(1) of the *Police Services Act*, and because of their interest in ensuring that applicants are accurately assessed. I agree, and find that the Police had an interest in this employment-related matter, and that this interest was more than a mere curiosity or concern.

Furthermore, although it may be that the employment-related matter has now ended, this does not negate the application of section 52(3)3. The Court of Appeal in *Ontario (Solicitor*

General, (*supra*) stated the following with respect to the “time sensitive” element under section 65(6) (the provincial equivalent of section 52(3)):

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 sub clauses 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 sub clauses 1 to 3 cease to apply.

Therefore, because the Police had an interest in these employment-related records at one time, 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.

ORDER:

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

Original signed by: _____
Frank DeVries
Adjudicator

_____ May 16, 2003