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

ORDER MO-1650

Appeals MA-020142-1; MA-020143-1; MA-020144-1; and MA-020145-1

Hamilton 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:

These appeals are under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*).

A newspaper reporter submitted a four-part request to the Hamilton Police Services Board (the Police) for access to a broad range of records relating to civilian complaints against the Police made since 1999 (Request 1), as well as records relating to a specific complaint (Requests 2-4). The Police issued four separate but otherwise identical decisions in which they denied access to all of the records on the basis that the *Act* does not apply to these kinds of records by virtue of section 52(3) of the *Act*.

The records consist of 300-350 public complaint files including names of officers, charges and results or disposition of charges as well as the internal investigations relating to each complaint. There is also the public complaint file of a named officer including the complaint, charges and results or disposition of charges and all related information to the internal investigation.

The appeals could not be resolved through mediation and the matters moved to adjudication.

I asked the Police to provide representations first. I then asked the appellant to respond to the Police's non-confidential representations. I have carefully considered both sets of representations

CONCLUSION:

The *Act* does not apply to the records responsive to Requests 1, 2, 3 and 4.

ANALYSIS:

APPLICATION OF THE ACT

Introduction

If section 52(3) applies to the records, and none of the exceptions found in section 52(4) applies, section 52(3) has the effect of excluding the records from the scope of the *Act*.

Sections 52(3)1 and 3 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(4) states:

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.

In order for a record to fall within the scope of section 52(3)1, the Ministry 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.

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

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

Police's Representations

The Police argue that all of the requested records relate to public or civilian complaints that were dealt with under the *Police Services Act* (*PSA*). They assert that the records were collected, prepared, maintained or used by the Police

- in relation to proceedings before a tribunal relating to the employment of a person by the institution [section 52(3)1]
- in relation to communications about employment-related matters in which the institution has an interest [section 52(3)3]

The Police's summary of the complaint and disciplinary process essentially forms the basis of their position:

> . . . [T]he information sought by the appellant was collected, prepared, maintained and used by the Institution in carrying out its statutory disciplinary/administrative responsibilities under the [*PSA*]. Officers are charged with misconduct as a result of investigations conducted by the Chief or delegate into complaints about employment related conduct. At the direction of the Chief, charges proceed before a tribunal in accordance with the provisions of the *Statutory Powers Procedure Act* [*SPPA*]. Tribunals have the legislative mandate to adjudicate and resolve the issues between the parties, rendering decisions affecting legal rights and obligations, which include the imposition of significant penalties. The proceedings and the penalties both clearly relate to the employment of the officers by the Institution, the former being based on employment related behaviour and the latter involving, among other things, loss of pay or time off, demotion in rank and/or termination.
>
> . . . . .
>
> [*PSA*] disciplinary charges and resulting dispositions "affect the employment" of an officer in that eligibility for the designation of Senior Constable and eligibility for promotion are influenced by the mode of procedure and by the penalty imposed on conviction. The effect on employment is ongoing. As such, though proceedings have been completed, there is a continuing affect upon the employment relationship of parties.

In addition, and specifically related to their section 52(3)3 claim, the Police also assert that:

> The preparation, maintenance and use of the records are for the specific purpose of complying with an employment-related statutory duty; namely, the administration of the internal discipline system. The Police Service, as the employer, is legally required to administer the internal disciplinary process in accordance with Part V of the [*PSA*]…

> Furthermore, the Police Service, as employer, has an inherent interest in internal discipline and in the results thereof. A finding of guilt in relation to a disciplinary misconduct has the potential to subject the Institution to significant legal consequences, both civilly and otherwise.

Appellant's Representations

The appellant made numerous arguments in response to the representations of the Police. He made no specific representations related to Request 1. Instead, his representations concentrated on Requests 2, 3 and 4, those related to the specific complaint about a named officer. I have summarised the appellant's most significant arguments.

The appellant argues that none of the requirements of section 52(3) are met in the circumstances of these requests and appeals. He argues that beginning with the date of the named officer's acquittal in the criminal case, there was neither a matter related to employment before a court or tribunal of any kind, nor did the Police intend to pursue a disciplinary proceeding.

Moreover, he argues that the procedure for investigating police misconduct in the province of Ontario, and for punishing police officers, is not the labour relations or employment relations situation contemplated by the *Act*. This matter, in particular, does arise from an internal labour issue but rather from a public complaint about the named officer's misconduct. He states that Canadian courts have clearly found that police officers are not employees in the context of the *PSA*.

He says that if, as the Police assert, a disciplinary hearing is conducted under the *SPPA* then the hearing and resolution are open to the public by virtue of section 9 of the *SPPA*. He goes on to say that while a police disciplinary process may affect an officer's ability to make a living, it is not labour related if governed by the *SPPA*; it is public:

> Doctors and lawyers are held accountable to the public under the law. It's ridiculous to claim that police would not be held accountable to the public under the same law, when they claim to operate their disciplinary proceedings under that law. It's incorrect to claim there is no public interest in releasing this information. The public has an interest in everything the police do and it's time for the Hamilton Police Service to recognize that.

The appellant stresses the public interest argument. He insists that justice can only be seen to be done in this case if the information about the incident and the subsequent treatment of the named police officer is disclosed to the public. He claims that the *Canadian Charter of Rights and Freedoms* guarantee of freedom of the press overrides the *Act* and in cases such as these it is the press who ensures accountability.

The appellant also argues that the Police do not have an interest in the records beyond a mere concern. The Police's legal interests are not engaged because of the passage of time and because the charges were dealt with informally and a civil lawsuit discontinued.

Findings

Request 1

All of the records responsive to this request are outside the scope of the *Act*.

This request is similar to one dealt with in Order MO-1346 and the analysis and findings are equally applicable here. In that case, the appellant wanted "all records that would tell [him] the results of all the *Police Act* hearings involving members of [the Hamilton-Wentworth Regional Police Services Board] in the past five years".

In concluding that all of the responsive records fell outside the scope of the *Act* by virtue of section 52(3)3, Assistant Commissioner Mitchinson made the following findings:

- Records related to two *PSA* hearings as well as those related to any informal hearings under the PSA were collected, prepared, maintained or used by Police.

- The collection, preparation, maintenance or use of the records was in relation to meetings, consultations, discussions or communications because meetings, discussions and communications take place while the Police carry out their statutory responsibility under the *PSA* to investigate and conduct hearings in order to deal with complaints involving police officers.

- All responsive records, which were collected, prepared, maintained or used in relation to meetings, discussions or communications about complaints under the *PSA*, are about employment-related matters because proceedings under Part V of the PSA relate to employment. [See also Orders M-899, M-922, MO-1491, MO-1523]

- The Police have an interest in the employment-related matters to which the records relate because of the statutory obligation to monitor police conduct across the entire Service.

These conclusions can be applied to the records responsive to the appellant's Request 1 with the result that the requirements of section 52(3)3 have been met and none of the exceptions in 52(4) apply. Therefore, these records are excluded from the scope of the *Act*.

Requests 2 and 4

The records responsive to these requests also fall outside the scope of the *Act*. All of these records relate to the public complaint made against a named police officer for some alleged misconduct.

I am satisfied on the evidence before me that all of the requirements of section 52(3)1 are met in these circumstances. The Police would have collected, prepared, maintained or used all of the records and information referred to in these requests in relation to proceedings before a tribunal related to the employment of the named officer. I am also satisfied that that none of the exceptions in section 52(4) applies because there is insufficient evidence before me to indicate the existence of any "agreement" between the named officer and the Police as contemplated by paragraphs 2 and 3 of section 52(4).

This office has ruled that proceedings resulting in informal discipline are nonetheless hearings under the *PSA* and therefore qualify as proceedings for the purpose of section 52(3)1. Records of this nature would identify that the officer was charged, that a hearing was or was not held, and that the ultimate result was informal discipline. [Order MO-1346]

Evidence and information such as

- the shift roster for the police station during the named officer's relevant shift
- the records of communications between police during that shift
- any reports or paperwork completed or produced by the named officer during that shift

would form part of the file into the investigation of his conduct during that shift. In Order PO-1905, Senior Adjudicator Goodis found that records could be collected, maintained and/or used in relation to proceedings, *regardless of the purpose for which they were originally created or prepared* (emphasis added). [See also Order MO-1523]

Many orders of this office have clearly found that proceedings of this nature under the *PSA* do relate to labour relations or to the employment of a person by the institution. [See Orders M-835, M-840, M-899, M-1347, MO-1280, M-1186]

Finally, and contrary to the appellant's representations, the Court of Appeal decision in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 does stand for the proposition that the conclusion of disciplinary and other proceedings has no impact on the continuing applicability of section 52(3)1; section 52(3)1 is the municipal equivalent to section 65(6), the subject matter of the Court's consideration.

Request 3

The records at issue here fall outside the scope of the *Act*.

For the reasons provided in reference to Requests 2 and 4, section 52(3)1 applies to the records specified in Request 3 related to the private investigation and surveillance of persons by Police for the purpose of gathering information about the complainant, the complainant's family and other potential witnesses. None of the exceptions in section 52(4) applies to these records.

Copies of any records related to the payment of the named officer's legal fees by the Police are caught by section 52(3)3 because they are communications about employment-related matters in which the Police have an interest. A reimbursement of this kind would not meet the requirements of paragraph 4 of section 52(4) because it is not an "expense account" as contemplated by that paragraph.

ADEQUACY OF DECISION LETTER

The appellant argues that the Police failed the meet the section 22 legislative requirements in their decision letters to provide a clear explanation of how section 52 applies to the records sought and to provide an index, list or general description of the records concerned. In Order M-913, former Adjudicator Anita Fineberg stated the following in respect of the provincial equivalent to section 22:

> The appellant submits that the decision letter of the Police was inadequate in that it failed to provide any reasons for denying access to the requested information. He states that the decision merely refers to sections of the *Act* and that it is insufficient "... to allow our client to make informed decisions and meaningful representations in this appeal".
>
> The decision letter issued by the Police stated that access was being denied to the listing of police officers pursuant to sections 13, 14(1)(f) and 14(3)(d) of the *Act*. The letter went on to note that "... These sections apply because ..." followed by a paragraph setting out the language of these sections.
>
> In my view, the purpose of the inclusion of the above information in a notice of refusal is to put the requester in a position to make a reasonably informed decision on whether to seek a review of the head's decision (Orders 158, P-235 and P-324). In this case, I agree with the appellant that the decision letter of the Police should have provided him with reasons for the denial of access. A restatement of the language of the legislation is not sufficient to satisfy the requirement in section 29(1)(b)(ii) of the *Act*. It does not provide an explanation of why the exemptions claimed by the Police apply to the record. Section 29(1)(b)(i) already requires that the notice contain the provision of the *Act* under which access is refused.
>
> Notwithstanding the inadequacy of the decision letter, the appellant has exercised his right of appeal and provided extensive representations, which I have referred to in my disposition of all the issues relating to the information in this order. In these circumstances, there would be no useful purpose served in requiring the Police to provide a new decision letter to the appellant.

I agree with and adopt former Adjudicator Fineberg's analysis and conclusion in the circumstances of this appeal.

ORDER:

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

Original signed by: May 21, 2003
Rosemary Muzzi
Adjudicator