



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-1744

Appeal MA-030053-1

Toronto 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/Téloc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

This appeal concerns a decision of the Toronto Police Services Board (the Police) made pursuant to the provisions of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The requester (now the appellant) had sought access to a copy of the records relating to an investigation conducted by the Police's Internal Affairs Unit (IAU) with respect to a telephone call about the appellant received by the Police shortly after September 11, 2001. The appellant is a civilian member of the Police. The Police determined through an investigation conducted by the IAU that a telephone voicemail message about the appellant had been left as a hoax by a named police officer.

The Police denied access to the responsive records in their entirety on the basis that the *Act* does not apply to them by virtue of the exclusion found in section 52(3) (labour relations and employment records). In their decision, the Police state that a review of the records was conducted and it was determined that the internal investigation is an employment related matter.

The appellant appealed the Police's decision.

No issues were resolved during the mediation stage of the appeal process, so the matter was streamed to the adjudication stage of the process.

I first sent a Notice of Inquiry to the Police and they submitted representations. The Police agreed to share their representations in their entirety with the appellant. I then sought representations from the appellant, who chose to not submit representations.

RECORDS:

The records at issue include a status report prepared by the IAU (synopsis), an investigation report, a series of internal memoranda, witness statements, cassette audio-tapes of interviews conducted with witnesses, transcripts of the audio-tapes, handwritten interview notes, documents relating to a human rights complaint, photographs, electronic photographs on CD disk and DECS printouts (payroll information).

DISCUSSION:

LABOUR RELATIONS AND EMPLOYMENT RECORDS

Introduction

As stated above, the Police have taken the position that section 52(3) applies to the records. The Police indicate in their representations that they are relying upon section 52(3)1 and/or 3. If section 52(3)1 or 3 applies to the records, and none of the exceptions found in section 52(4) applies, section 52(3)1 or 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.

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

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.

I will first consider the application of section 52(3)1.

Section 52(3)1

Requirement 1

The Police state:

As a result of events occurring in September 2001, an investigation was conducted by the Internal Affairs Unit into allegations of misconduct by [a named police officer]. During the course of the investigation, records were collected, prepared, maintained and used in order to thoroughly investigate the allegations of misconduct and to arrive at a proper conclusion. Such investigations include the gathering of information and records from various sources.

All of the prepared and collected records were used by the Internal Affairs Unit in the preparation of the report, known as "Synopsis", concerning this investigation. This Synopsis communicated the findings and recommendations of the Internal Affairs investigators to the Unit Commander of the Internal Affairs Unit and the [named police officer's] Unit Commander. Subsequently, decisions were made by those Unit Commanders as to what actions, if any, would be taken in respect of criminal charges and/or charges of misconduct under the Police Services Act (the 'PSA').

On my review of the records and the Police's representations, I am satisfied that the records were collected, prepared, maintained or used by the Police. I find that requirement 1 has been satisfied for all of the records under section 52(3)1.

Requirement 2

The Police submit that the records were collected, prepared, maintained and used in relation to an anticipated disciplinary proceeding under the *Police Services Act (PSA)*.

The Police state that this office "...has ruled in previous Orders (MO-1347, MO-1280, MO-1186, M-835) that [they] have the statutory responsibility under the PSA to investigate and conduct hearings in order to deal with complaints involving the Police..."

In describing their responsibilities under the *PSA*, the Police state:

...[S]ection 56(2) permits the Chief of Police to make a complaint under "Part V"[,] "Complaints" of the current *PSA*.

"The chief of police may also make a complaint under this Part about the conduct of a police officer."

Section 64(1) requires the Chief of Police to have every complaint of police conduct investigated.

"Subject to subsections 59(3), (4) and (5), the chief of police shall cause every complaint made about the conduct of a police officer, other than the chief of police or deputy chief of police, to be investigated and the investigation to be reported on in a written report."

When allegations of employee misconduct are raised by another employee, the Internal Affairs Unit, under the authority of the Chief of Police, conducts the investigation into the complaint to assist in determining whether or not misconduct was committed, and whether or not the matter should proceed to a disciplinary hearing.

Section 64(7) under the current *PSA* outlines the authority for the holding of a disciplinary hearing.

"Subject to subsection (11), if, at the conclusion of the investigation and on review of the written report submitted to him or her, the chief of police is of the opinion that the police officer's conduct may constitute misconduct, as defined in section 74, or unsatisfactory work performance, he or she shall hold a hearing into the matter."

The Police submit that it is not necessary for a disciplinary hearing to occur in order to bring the records within the scope of section 52(3)1. In support of their position the Police state:

The test to be considered is whether or not a hearing could reasonably be "anticipated". An investigation into a complaint of misconduct pursuant to Part V of the *PSA* is similar to that of a law enforcement investigation in that the investigation must have a basis for an investigation to be commenced and that the complaint must be properly investigated and documented.

Investigators go to great lengths to document the investigation and to collect information and evidence. The investigator approaches his or her investigation with the expectation that a disciplinary hearing may reasonably result from their investigation. They do not consider it to be a vague or theoretical possibility.

It is clear that the Police have a statutory responsibility under the *PSA* to investigate and conduct hearings in order to deal with complaints involving police officers. In this case I am satisfied that the IAU conducted an investigation into allegations of misconduct by a named police officer. The records document the results of this investigation. While a hearing did not ultimately ensue, I am satisfied that the information contained in the records was collected, prepared, maintained or used as a result of this investigation for the purposes of an anticipated discipline proceeding under the *PSA*.

Accordingly, I find that requirement 2 has been satisfied for all of the records under section 52(3)1.

Requirement 3

The Police state:

In Order M-835, the Assistant Commissioner found that disciplinary hearings were proceedings which do, in fact, relate to the employment of a person by the institution.

“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 the 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.”

Order M-835 makes reference to Part V and Part VI of the (former) *PSA*. At that time Part V related to “disciplinary hearings” and Part VI related to “public complaints”. The current *PSA* deals with both “disciplinary hearings” and “complaints” (both public and internal) under Part V.

The position of this institution that hearings, and anticipated hearings, relate to the employment of a person by this institution is supported in Order M-835. Order

M-835 outlines the penalties available on conclusion of a disciplinary hearing which,

“...can only reasonably be characterized as employment-related actions,....”

In addition, Order PO-2038 by Senior Adjudicator David Goodis further supports the position that “anticipated proceedings” under the *PSA* relate to the employment of a person.

“In my view, following M-835, it is clear that the anticipated proceedings in question, under Part V of the *PSA*, relate to the employment of a person by the Ministry....”

It is the position of this institution that the records relate to the employment of [a named police officer], and due to the potential of disciplinary action, the institution’s interest stretches far beyond that of mere curiosity.

I concur with the analysis of Assistant Commissioner Mitchinson in Order M-835 and Senior Adjudicator Goodis in Order PO-2038. In my view, it is clear that the anticipated proceedings in question, under Part V of the *PSA*, relate to the employment of a police officer. While I note that the IAU investigation was precipitated by the contents of a voicemail message left about the appellant, the IAU’s focus shifted to a named police officer’s conduct once it was determined that he had left the message. In my view the investigation was conducted in anticipation of disciplinary proceedings as a result of the named police officer’s actions. In addition, requirement 3 applies, despite the fact that the proceedings are no longer anticipated. The judgment of the Court of Appeal for Ontario 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) makes it clear that section 65(6) [the provincial *Act* equivalent of section 52(3)] can apply, despite the passage of time or change of circumstances, as long as the requirements of the section are met at the time the records were collected or prepared.

Based on the above, I find that all three requirements of section 52(3) are met. In addition, I find that none of the section 52(4) exceptions applies. Therefore, the *Act* does not apply to the records. Accordingly, it is not necessary for me to make a finding on the application of section 52(3)3.

ORDER:

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

Original Signed By: _____

January 28, 2004

Bernard Morrow
Adjudicator