



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

ORDER MO-1716

Appeal MA-030045-1

Toronto Police Services Board



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NATURE OF THE APPEAL:

On behalf of a media organization, a reporter asked the Toronto Police Services Board (the Board) for a copy of the formal agreement made between the Board and a named private individual. The reporter made the request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) and specified that the information she wanted included

- the terms of the agreement between the parties
- any admissions made by the Board
- the actual amount of the settlement

The Board refused to release the information to the reporter. The Board issued a decision letter explaining that the *Act* does not apply to the information by virtue of the provisions of section 52(3) because the records concerned an employment-related matter, that is, a complaint of misconduct by employees of the Toronto Police Service.

The reporter (now the appellant) appealed the decision.

The appeal proceeded to mediation where the appellant narrowed the scope of her request. She now seeks only the settlement amount found in the agreement between the Board and the named private individual.

The matter moved to the adjudication stage.

I initially sought representations from the Board, which the Board provided and agreed to share in their entirety with the appellant. Though given two opportunities to do so, the appellant declined to provide representations in this matter.

I have carefully considered the representations and all other information before me.

RECORD:

The record at issue is an agreement between the Board and the named private individual. The appellant seeks only the portion revealing the settlement amount.

CONCLUSION:

The record is not excluded from the scope of the *Act*.

DISCUSSION:

APPLICATION OF THE ACT

Introduction

Section 52(3) is record-specific and fact-specific. If section 52(3) applies to the record, and none of the exceptions found in section 52(4) applies, then the record falls outside the scope of the *Act*.

The Board relies on section 52(3)3 in particular to deny access to the information the appellant seeks. The Board asserts that the information at issue is contained within a record to which the *Act* does not apply.

Section 52(3)3

Section 52(3)3 of the *Act* states:

Subject to subsection (4), this *Act* does not apply to records collected, 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 Board must establish these three requirements:

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

Representations

The Board makes these representations:

The original basis for the litigation was an allegation of misconduct on the part of several police officers employed by the Toronto Police Service (the TPS) while

on duty. The litigation named both the TPS as well as specific members of the TPS.

The issue of legal representation for a TPS member who is being sued civilly is covered by the Collective Agreement between the Toronto Police Services Board (the TPSB) and the Toronto Police Service Association (the TPSA). This is covered by "Article 23 – Legal Indemnification" of the Collective Agreement.

Where a member is a defendant in a civil action for damages because of acts done in the attempted performance in good faith of his/her duties as a police officer he/she shall be indemnified for the necessary and reasonable legal costs incurred in the defence of such an action....

The issue of legal indemnification coverage and refusal on the part of the TPSB to grant representation or reimbursement for claims under the clause is an issue in which the TPS has a significant interest. A disagreement over the provision of legal representation recently resulted in a collective work action by members of the TPS, and was quite obviously of significant interest to the TPSB.

....

Requirement 1:

The record at issue is a 2-page document collected by the TPS from the lawyer representing the Insurance carrier whose responsibility it was to deal with civil litigation claims.

Requirement 2:

Upon settlement of this civil suit, the lawyer for the Insurance carrier communicated the results to the Service by way of the correspondence at issue.

Requirement 3:

....

As indicated above, there is a Collective Agreement between the TPSB and the TPSA, the organization who represents the interest of TPS members. This Collective Agreement provides for legal indemnification coverage for members of the TPS' which stems from allegations of misconduct. This legal indemnification coverage relates to, but not limited to, representation for civil litigation. The issue of who is responsible for paying for legal representation of the members is

outlined in the Collective Agreement, at Paragraph 23, know as “Article 23 – Legal Indemnification”.

The record at issue contains a settlement amount which is what the appellant has narrowed her request down to include. The very fact that a civil suit has been lodged against specific named officers brings this issue into the employment/labour related arena in which the Service has an interest. Therefore, it is reasonable to conclude that correspondence between legal representatives, and other records collected by the Service in relation to the civil suit, would also be subject to section 52(3)3 of MFIPPA.

It is therefore the position of this institution that all 3 requirements have been met. The record was collected by the TPS by way of communication from counsel for the Insurance carrier, and it relates to a labour/employment related matter, i.e., civil litigation based upon allegations of employee misconduct, in which this institution has a significant interest.

Analysis

Requirement Three

I have considered the representations of the Board. My analysis centers on Requirement 3 of section 52(3) because, even if both Requirements 1 and 2 have been met, I find that the Board has failed to establish that the meetings, consultations, discussions or communications are *about labour relations or employment-related matters*.

Section 52(3)3 requires that the activities listed in the section be “about labour relations or employment-related matters”.

The term “labour relations” in section 52(3) refers to the collective relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships [Order PO-2157, *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.)].

The term “employment-related matters” refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship [Order PO-2157].

The phrase “labour relations or employment-related matters” has been found *not* to apply in the context of litigation in which the institution may be found vicariously liable for the actions of its employee [Orders PO-1722, PO-1905]

The conclusions of Senior Adjudicator David Goodis in interpreting the provincial equivalent of section 52(3)3 are particularly helpful here:

In short, the fact that the records may have been collected, maintained, used and/or disclosed in relation to current and anticipated litigation in which the Ministry may be held vicariously liable for actions of its employees is not alone sufficient to qualify the records as arising in an employment or labour relations context. As the Assistant Commissioner indicated in Order PO-1772, if I were to find otherwise, then whenever a third party decides to commence a law suit and hold the Ministry vicariously liable for its employees' actions, all relevant records would automatically be excluded from the scope of the *Act*. I agree with the Assistant Commissioner that this could not have been the intent of the Legislature in enacting section 65(6).

The Ministry submits that I should follow Order P-1395 of this office. In my view, this order is distinguishable on its facts. In discussing the application of section 65(6)3, Inquiry Officer Higgins states that "several internal and external proceedings, with potential legal repercussions for the Ministry have ensued as a result of the alleged mistreatment of inmates by staff." These proceedings included an internal Ministry investigation (which was continuing at the time of the order), an employment-related Divisional Court application by a former Ministry employee and an employee grievance under the *Public Service Act*. Therefore, Inquiry Officer Higgins had ample evidence before him on which to base a finding that the Ministry had a current interest in the records at issue. To the extent that Order P-1395 could be construed as standing for the proposition that the civil suit alone was sufficient to bring the matter within the scope of section 65(6)3, I do not agree with the order and decline to follow it.

Similarly, the existence of a civil suit in this case, lodged against specific police officers, is insufficient to bring this information into the arena of labour relations or employment-related matters. After all, the information sought is simply the amount of money that the *Board* (or its insurance carrier) agreed to pay a private individual to settle the legal dispute between *them*. This agreement, or communication, if you will, was made in relation to the civil suit and did not arise in a labour relations or employment-related context because there is no labour relations or employment relationship between the Board and this private individual. Therefore, correspondence from the lawyer for the insurance carrier to the Board communicating the amount of the settlement of this civil suit is not about a labour relations or employment-related matter.

Indeed, there is scant evidence before me that the civil suit had any labour relations or employment-related implications whatsoever. Unless there is persuasive evidence of a labour relations or employment-related focus to the *meetings, consultations, discussions or communications* at issue, Requirement 3 cannot be met. In this regard, I agree with the approach taken by Adjudicator Bernard Morrow in Order PO-2136:

In my view, the reasoning in Orders PO-1772 and PO-1995 applies here. The proceedings, meetings, consultations and/or discussions do not arise in an

employment or labour relations context, and there is no indication that there is a dispute or disagreement between the Ministry and its employee who requested the CPIC search, or that the employee and the Ministry have different interests at stake. The Ministry states that it “conducted an internal investigation into the matter”, but does not elaborate. In the circumstances, there is insufficient evidence about this “investigation” for me to conclude that it had an employment focus, and that it was carried out for any purpose other than to respond to the privacy complaint. Moreover, the records do not shed any light on any such investigation.

I find, therefore, that the Board has failed to establish all three requirements of the test under section 52(3)3. Accordingly, I conclude that section 52(3)3 does not apply to the information at issue in this appeal and it is not excluded from the scope of the *Act*.

ORDER:

1. I do not uphold the Board’s decision that the *Act* does not apply to the information at issue.
2. I order the Board to provide the appellant with a decision on access to the responsive records under Part II of the *Act*, treating the date of this order as the date of the request.

Original signed by: _____
Rosemary Muzzi
Adjudicator

November 28, 2003