



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

# **ORDER MO-2017**

**Appeal MA-050058-1**

**Halton Regional Police**



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## **BACKGROUND:**

The *Criminal Code* requires that breath samples taken pursuant to a demand under paragraph 254(3) be such that in the opinion of a “qualified technician” a proper analysis can be made. The term “qualified technician” in respect of breath samples is defined in section 254(1) of the *Criminal Code* as a person designated by the Attorney General as being qualified to operate an approved breath alcohol testing device.

Section 2 of the *Criminal Code* defines “Attorney General” as “the Attorney General or Solicitor General of a province and includes his lawful deputy.” In Ontario, on April 15, 2002, the Ministries of the Solicitor General and Correctional Services were joined to form the Ministry of Public Safety and Security (now the Ministry of Community Safety and Correctional Services).

The *Criminal Code* does not specify any particular designation or qualification for users of Approved Screening Devices other than they are peace officers (section 254(2)). However, in 1967 the Canadian Society of Forensic Science established a “Special Committee on Breath Testing” to develop recommended standards and procedures for the breath testing program. In 1985, the Committee was re-named the “Alcohol Test Committee” and it periodically issues publications outlining the recommended standards and procedures for matters such as the use of approved instruments and screening devices and includes comprehensive recommendations with respect to the qualification, training and designation of individuals responsible for the maintenance and operation of such devices.

The most recent *Recommended Standards and Procedures of the Canadian Society of Forensic Science Alcohol Test Committee* issued in 2003 describes, in detail, the recommended training of “Qualified Technicians” as well as for “Screening Device Users” and “Screening Device Calibration Technicians”. A “Screening Device Calibration Technician” must also be qualified as “Screening Device User” and a “Qualified Technician”. The document also recommends that “Qualified Technicians” be re-qualified on an annual basis.

## **NATURE OF THE APPEAL:**

The Halton Regional Police (the Police) received three requests under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to two named police officers and their qualifications to calibrate or operate a specific breath alcohol testing device. The Police created three files, assigning separate file numbers to each request.

Request #1 - Police file no. 04-684

This request concerns the first named officer. The request is for access to records to prove the officer qualified as a “Screening Device Calibration Technician”, and for access to records to prove the same officer has taken his annual re-qualification reviews as a calibration technician. The request describes the records sought as follows:

Photocopy of certificates designating [first named officer] of Halton Regional Police Force, [officer’s identification number] (on proof of completion of

training) and annual re-qualification reviews, as a Screening Device Calibration Technician to calibrate ASD-Drager Alcotest GLC 7410 Serial #ARHJ-0195

Request # 2 - File no. 04-685

This request concerns the second named officer. The request is for access to records to prove the officer qualified as a "Screening Device Calibration Technician", and for access to records to prove the same officer has taken his annual re-qualification reviews as a calibration technician. The request describes the records sought as follows:

Photocopy of certificates designating [second named officer] of Halton Regional Police Force, [officer's identification number] (or proof of completion of training) and annual re-qualification reviews, as a Screening Device Calibration Technician to calibrate ASD-Drager Alcotest GLC 7410 Serial #ARHJ-0195.

Request # 3 - File no. 04-0487

The request also relates to the second named officer. The request is for access to records to prove this officer was a qualified "Screening Device User" and for access to records to prove the same officer has taken his annual re-qualification reviews as a screening device user. This request describes the records sought as follows:

Photocopy of certificates of authorizations (or proof of completion of training) and annual re-qualification reviews designating [second named officer] of Halton Police Force [badge number] as a Screening Device User for ASD – Drager Alcotest GLC 7410 Serial #ARHJ-0195.

For each request, the Police issued a separate decision letter to the requester stating that the *Act* does not apply to any of the records by virtue of the exclusion of section 52(3)3 (labour relations or employment information). These decisions now form the basis for this appeal and are the subject of this inquiry.

The requester, now the appellant, appealed all three decisions.

During the mediation stage of the process, the mediator advised the Police that it appeared that the records identified as responsive to the request and provided to this office for the purposes of the appeal are incomplete. Specifically, the mediator questioned whether there should be records concerning the annual re-qualification reviews. The Police responded that their position is that all records are excluded from the scope of the *Act*.

As no issues were resolved through mediation, the file was transferred to adjudication.

I began my inquiry by sending a Notice of Inquiry to the Police, setting out the facts and issues on appeal. In addition to requesting representations from the Police, I stated:

From my review of the records, I agree with the mediator that the records appear to be incomplete. In addition to providing no records related to annual re-qualification reviews, it also appears that the Police have not provided records related to the two named officers designations as "Screening Device Calibration Technicians" and, in the case of the second named officer, designation as a "Screening Device User". Accordingly, I request that the Police provide me with any additional responsive records and provide them to me along with their representations addressing the issues outlined below.

The records previously sent by the Police in response to the appeal dealt specifically with the designation "Qualified Technicians" but did not address "Screening Device Calibration Technicians" or "Screening Device Users".

The Police then responded to the Notice of Inquiry. In their representations, they first addressed my request for any additional responsive records by explaining that during the mediation process, additional records were requested and a secondary thorough search was conducted. They explained that they sought additional records through the officers involved, the training bureau and also consulted with the Sergeant in charge of the Regional Traffic Bureau as well as a Reconstruction Officer who is extremely knowledgeable and familiar with the approved breath alcohol testing devices. Internal emails were provided to me, in confidence, to confirm the additional searches and queries made. The Police advised that the Freedom of Information Officer was informed by these individuals that no further records exist because officers who attend the annual re-qualification course within the Police service and who meet the course objective do not receive a certificate of any sort, they are immediately advised verbally of the results; the training bureau receives no written re-qualification certification or notice, it is simply advised that officers have re-qualified. Only if the officer attends a re-qualification course outside of the service must the officer provide a certificate issued by the institution that provided the course or, in some circumstances, a course attendance sheet, to the training bureau. Given the nature of the appeal submitted to this office by the appellant, the issue properly before me is whether the records at issue fall outside of the scope of the *Act* by virtue of section 52(3)3. The question of whether the Police have conducted a reasonable search under the *Act* is not within the scope of this appeal. The records at issue are those that have been provided to me by the Police.

Following receipt of the Police's representations but before I prepared the Notice of Inquiry to the appellant, the appellant sent a brief letter representing his position and provided me with a copy of the *Recommended Standards and Procedures of the Canadian Society of Forensic Science Alcohol Test Committee* in which he had identified certain portions as relevant.

I then sent a copy of the Notice of Inquiry to the appellant, together with a copy of the Police's representations, without the internal emails about the searches, inviting him to submit representations on the application of section 52(3)3. The appellant provided representations. In this appeal, I will consider both the appellant's representations in response to the Notice of Inquiry as well as the brief letter and attached recommended standards mentioned above, which were sent to me prior to the Notice of Inquiry being issued to the appellant.

## **RECORDS:**

The records at issue consist of four pages. Two pages relate to the first named officer and the other two relate to the second named officer. The records about the first officer consist of a 1-page cover letter on Ministry of Public Safety and Security, Centre of Forensic Sciences, letterhead and a 1-page document entitled "Designation of Qualified Technicians (Breath Samples)", also on Ministry of Public Safety and Security letterhead. The records about the second officer consist of a 1-page document entitled "Designation of Qualified Technicians (Breath Samples) issued on Ministry of the Solicitor General (former name of the Ministry of Public Safety and Security) letterhead, and a 1-page document on Ministry of the Solicitor General letterhead.

## **DISCUSSION:**

### **ARE THE RECORDS EXCLUDED FROM THE APPLICATION OF THE ACT UNDER SECTION 52(3)(3)?**

#### **General Principles**

As stated above, the Police have taken the position that section 52(3)3 applies to the records. If section 52(3)3 applies, and none of the exceptions found in section 52(4) applies, section 52(3)3 has the effect of excluding the records from the scope of the *Act*. If that is the case, I do not have jurisdiction to consider the issue of the denial of access by the Police and whether the records qualify or do not qualify for exemption under any of the other provisions of the *Act*.

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

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.

Section 52(4) which lists the exceptions to section 52(3) provides:

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 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 reimbursements for expenses incurred by the employee in his or her employment.

In the circumstances in this appeal, the exceptions listed in sections 52(4) have no application.

Some of the terms used in section 52(3) have previously been defined:

- The term “in relation to” in section 52(3) means “for the purpose of, as a result of, or substantially connected to” [Order P-1223].
- The term “labour relations” refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships [Order PO-2157, *Ontario (Ministry 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].

### **Section 52(3)3: matters in which the institution has an interest**

For section 52(3)3 to apply, the Police must establish that:

1. the records were collected prepared, maintained or used by an institution or on its behalf;
2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and
3. these meetings, consultation, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

**Part 1: collected, prepared, maintained or used**

The Police submit:

The preparation, maintenance and use of the records is for the specific purpose of complying with an employment-related statutory duty, namely, the officer's qualification as a Screening Device Calibration Technician and as a Screening Device User for the ASD – Drager Alcotest GLC 7410 Serial #ARHJ-0195.

In the appellant's letter to me, which I received before the representations of the Police (see above), the appellant states that the information in the records at issue was collected to comply with the recommended standards and procedures for the use of breath alcohol devices established by the Canadian Society of Forensic Science, Alcohol Test Committee. Apart from this statement, nothing provided to me by the appellant, including his subsequent representations, specifically addresses whether the records were collected, prepared, maintained or used by the Police within the meaning of part one of the section 52(3)3 test.

On my review of the records, the representations of the Police, and of the appellant, and bearing in mind the surrounding circumstances of this appeal, I agree that the records at issue were "collected", "maintained" and "used" by the Police. The Police did so to ensure that they had designated "qualified technicians" on staff and that those officers performing duties of "qualified technicians" were indeed designated as such. Although I do not agree that the information contained in the records at issue was "prepared" by the Police as all of the records are on letterhead belonging to either the then Ministry of Public Safety and Security or its former incarnation, the Ministry of the Solicitor General, the first part of the section 52(3)(3) test has been established as the information was clearly "collected", "maintained" and/or "used" by the Police. Accordingly, I am satisfied that part one of the test has been met.

**Part 2: meetings, consultations, discussions or communications**

The Police submit generally that the information at issue was collected, maintained and used by the Police in relation to communications about employment-related matters in which the Police have an interest, namely to ensure officer qualifications. This addresses both parts 2 and 3 of the test.

The appellant responds:

Were the records collected as a result of a meeting, consultation, discussion, or communication? Or were the records collected as a result of an interview or perhaps a test or exam?

Given the nature of the information and the fact that the information appears on letterhead that is not of the Police, the very existence of the records reveals that communications have passed between the Police and the former Ministry of Public Safety and Security or the former Ministry of the Solicitor General. I am therefore satisfied that the Police collected, maintained and used

the records “in relation to [...] communications” between those institutions about officers’ designations as “qualified technician” under section 254(1) of the *Criminal Code*.

As a result, I find that part two of the test under section 52(3)3 has been satisfied.

### **Part 3: labour relations or employment related matters in which the Police have an interest**

I must now determine, first, whether the communications in the records are about “labour relations or employment-related matters”, and, if so, whether these are matters in which the Police “have an interest”.

With respect to the first component of part three, the Police take the position that the records are “for the specific purpose of complying with an employment-related statutory duty, namely, the officer’s qualification as a Device Calibration Technician and as a Screening Device User for a [qualified breath alcohol testing device]”. Later in their representations, the Police state that the fact that the records are collected, maintained and used by the Police to ensure an officer’s qualification “directly relates to the employment of the named officers” and that the information “becomes part of the officer’s employment history with the institution”.

The appellant disagrees with the Police’s position and questions whether the records relate to either labour relations or employment-related matters. He submits:

“Labour relations” refers to the collective bargaining relationship between an institution and its employees. (Order PO-2157)

My requests are for proof of qualifications, not for information of human resources or staff relation issues.

The phrase “labour relations or employment-related matters” has been found not to apply in the context of:

- an organizational or operational review (Orders M-941, P-1369)

The collecting of qualification records and the yearly re-qualification reviews would be considered an organization or operational review.

As “labour relations” has been established as referring to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships [Order PO-2157, *Ontario (Ministry of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.)], I agree with the appellant and do not find the communications about the records at issue in this appeal can be said to be about “labour relations”. I must therefore determine whether they address “employment-related” matters.



From my review of the records, as well as the submissions of the parties, I accept that the information at issue relates to the qualification or re-qualification of technicians designated as “qualified technicians” under section 254(1) of the *Criminal Code* who are authorized to perform such duties related to that equipment as designated by the *Criminal Code* in the context of their employment. Accordingly, I am satisfied that the communications between the Ministries and the Police with respect to information contained in the records at issue was “about employment-related matters”, namely to determine or to establish whether certain police officers were designated as “qualified technicians” authorized to use breath alcohol testing devices in the context of their employment. I do not agree that the collection of these records would be considered an organization or operational review.

The second component of part three of the section 52(3)3 test which must be established is whether these employment-related matters can be characterized as matters “in which the institution has an interest”.

It has been established that the phrase “in which the institution has an interest” means more than a “mere curiosity or concern” [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355(C.A.), leave to appeal refused [2001] S.C.C.A. No. 507].

In this regard, the Police submit:

The Police Service, as the employer, is legally required to ensure that each and every officer that performs the function is qualified and then re-qualified in order to properly administer his employment duties, therefore meeting the requirements of the *Police Services Act (PSA)*. Failure by the employer to meet requirements set out in the *PSA* could lead to sanctions against the Chief of Police also in accordance with Part V of the *PSA* and/or sanctions against the Police Services Board should a review be requested under Part II of the *PSA*.

The appellant makes no specific representations on this part of the test.

In this case, the officers about whom information is being sought are employed by the Police. In their capacity as employer, the Police must ensure that those individuals, if they are using approved breath alcohol screening devices, are designated as “qualified technicians” under section 254(1) of the *Criminal Code*. In my view, in light of this employment relationship and the duty imposed by the *Criminal Code*, the Police have an interest that is far more than a mere curiosity or concern within the meaning of section 52(3)3. I therefore conclude that the Police “have an interest” in the “employment-related matter” of the qualification and re-qualification of Police officers authorized to use breath alcohol testing devices, designated by the Attorney General under section 254(2) of the *Criminal Code* as “qualified technicians”.

Accordingly, I find that part three of the section 52(3)3 test has been met.

In summary, I find that Police have established all of the requirements of section 52(3)3; the records were collected, maintained and used by the Police in relation to meetings, discussions or communications about employment-related matters in which the Police have an interest. Also, it is clear that none of the exceptions in section 52(4) applies. Accordingly, I find that the records fall within the parameters of section 52(3)3 and are, therefore, excluded from the scope of the *Act*.

**ADDITIONAL NOTES:**

In his representations, the appellant cites a number of provisions of the *Act* that might apply to permit the disclosure of the records at issue. However, as stated earlier in this order, as I have found that section 52(3)3 applies to exclude the information at issue from the scope of the *Act*, none of those provisions are therefore applicable. It is beyond my jurisdiction to consider whether any of the exemptions or other provisions of the *Act* may or may not apply [see Orders P-1223, M-815, P-1243 and P-1257].

Additionally, at the outset of the appellant's representations he states:

The purpose of my requests is to ascertain the qualifications of the two named police officers. The intentions of my request are for proof or qualifications, specifically, a dated copy of a certificate or proof of training to identify the date when officers were trained, therefore becoming qualified. Also, a dated copy of the officer's yearly re-qualification reviews, showing that the officers remained qualified or if they did not meet re-qualification standards, dated copies of their completed training to show their becoming re-qualified.

In that regard, the appellant should note that despite the fact that training and standards are recommended for "Screening Device Calibration Technicians" and "Screening Device Users" by the Canadian Society of Forensic Science Alcohol Test Committee, the *Criminal Code* does not specify any particular designation or qualifications for users of Approved Screening Devices other than that they must be peace officers (section 254(2)). The *Criminal Code* does, however, specify that "Qualified Technicians" must be designated by the Attorney General (section 254(1)). In Ontario, this designation has previously been performed by the Solicitor General and subsequently by the Minister of Public Safety and Security, and is now performed by the Minister of Community Safety and Correctional Services (see section 2 of the *Criminal Code* definition of "Attorney General").

The appellant also states that he believes that information on the qualifications of police officers was available to the public prior to the *Act*, and should still be available to the public. It may assist the appellant to know that the Ontario Gazette publishes lists of all individuals designated by the Minister of Community Safety and Correctional Services as "qualified technicians" under section 254(1) of the *Criminal Code*. Back issues of the Ontario Gazette from January 2000 to the present are available on-line at [www.ontariogazette.gov.on.ca](http://www.ontariogazette.gov.on.ca). Hard copies of past Gazettes are available in libraries and through Publications Ontario, Ministry of Government Services, Government of Ontario.

**ORDER:**

I uphold the Police's decision that the information at issue falls outside of the scope of the *Act* and dismiss the appeal.

Original Signed by: \_\_\_\_\_  
Catherine Corban  
Adjudicator

\_\_\_\_\_ January 31, 2006