



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-2216

Appeal MA-060213-2

Kingston Police Services Board



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NATURE OF THE APPEAL:

The Kingston Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), for access to records relating to a police investigation involving the requester following a complaint that he filed against a police officer. The request specifically stated:

I am requesting a copy of the police report filed by Cst. [first named officer] in October/November 2003 in regards to a matter involving [named individual] and myself. I am also requesting any and all information included in subsequent reports/actions made by Cst. [first named officer] and/or Staff Sgt. [second named officer], including those related to a complaint I filed against [first named officer] in November/December 2003 (unresolved) and correspondence I sent to Staff Sgt. [second named officer] thereafter.

The Police located a number of records responsive to the request and denied access to them on the basis that they fall outside of the scope of the *Act* in accordance with the exclusionary provisions in sections 52(3)1 and 3 of the *Act*.

The requester, now the appellant, appealed the decision of the Police.

During the mediation process, the mediator contacted both the appellant and the Police to discuss the appeal. However, no issues were resolved during mediation. The file was then referred to the adjudication stage of the appeal process.

I began my inquiry into this appeal by sending a Notice of Inquiry to the Police. The Police provided representations in response. I then sent a Notice of Inquiry, along with a complete copy of the Police representations to the appellant. The appellant also responded with representations.

RECORDS:

The records at issue in this appeal are related to a specific public complaint. They are comprised of two reports: an Officer's Investigative Report, as well as a Professional Standards Investigation. The reports themselves include a number of supporting documents such as letters, police officer notes, call hardcopies as well as occurrence and incident reports.

DISCUSSION:

LABOUR RELATIONS AND EMPLOYMENT RECORDS

Section 52(3) states:

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.
2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.
3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

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

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 (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.)].

The term “employment of a person” refers to the relationship between an employer and an employee. 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].

If section 52(3) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date [*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].

Section 52(3) may apply where the institution that received the request is not the same institution that originally “collected, prepared, maintained or used” the records, even where the original institution is an institution under the *Municipal Freedom of Information and Protection of Privacy Act* [Orders P-1560, PO-2106].

The Police submit that the records at issue fall outside the scope of the *Act* due to the operation of sections 52(3)1 and 52(3)3.

Section 52(3)1: court or tribunal proceedings

For section 52(3)1 to apply, the Police must establish that:

1. the record was collected, prepared, maintained or used by an institution or on its behalf;
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.

Part 1: collected, prepared, maintained or used

The Police submit:

Both reports (the Officer's Investigative Report as well as the Professional Standards Investigation) were collected and prepared by officers in the employ of the Kingston Police in the execution of their respective duties. These reports were further maintained and used by the Kingston Police Professional Standards Office into an allegation by the appellant respecting the conduct of an investigation by a Kingston Police officer. It should be noted that at the time of the appellant's request for access both the investigative file and the complaint file were being retained and maintained by the Professional Standards office (that office physically retained possession of the file).

The appellant submits that "there are no 'proceedings or anticipated proceeding before a court, tribunal or other entity...' at this time." The appellant also submits:

The OCCPS is a quasi-judicial organization that may make rulings in regards to police actions and services, but does not have any legislated enforcement authority. More importantly, the OCCPS in their letter dated September 29 clearly stated that their decision regarding my appeal was "final and binding" under the Police Services Act (PSA) section 72(12) and that it "may not be reviewed." They go on to state "the file is now closed." It is therefore not an "active" OCCPS investigation as the police have argued...

I have carefully reviewed the records which the Police claim fall outside of the scope of the *Act* as a result of the operation of section 52(3)1. In my view, they were collected and prepared for the purpose of conducting investigation into the appellant's public complaint, about the conduct of a particular police officer. I am satisfied that both records at issue, along with all of their

attachments, were collected and/or prepared by the Police. Therefore, I find that the first part of the test under section 52(3)1 has been met.

Part 2: proceedings before a court or tribunal

The word “proceedings” means a dispute or complaint resolution process conducted by a court, tribunal or other entity which has the power, by law, binding agreement or mutual consent, to decide the matters at issue [Orders P-1223, PO-2105-F].

For proceedings to be “anticipated”, they must be more than a vague or theoretical possibility. There must be a reasonable prospect of such proceedings at the time the record was collected, prepared, maintained or used [Orders P-1223, PO-2105-F].

The word “court” means a judicial body presided over by a judge [Order M-815].

A “tribunal” is a body that has a statutory mandate to adjudicate and resolve conflicts between parties and render a decision that affects the parties’ legal rights or obligations [Order M-815].

“Other entity” means a body or person that presides over proceedings distinct from, but in the same class as, those before a court or tribunal. To qualify as an “other entity”, the body or person must have the authority to conduct proceedings and the power, by law, binding agreement or mutual consent, to decide the matters at issue [Order M-815].

The Police submit:

The appellant’s allegations have caused the Kingston Police Professional Standards office to undertake an investigation under Part V of the *Police Services Act* [PSA] into the conduct of a Kingston Police officer. In its Orders, the [Office of the Information and Privacy Commissioner/Ontario] has consistently held that discipline under Part V meets the criteria of “proceedings before a tribunal or other entity.” In Order M-840, [former] Assistant Commissioner Tom Mitchinson makes the following finding:

- A disciplinary hearing conducted under section 60 of the [Public Services Act] is a dispute or complaint resolution process conducted by a court, tribunal or other entity which has, by law, the power to decide disciplinary matters. As such, these hearings are properly characterized as “proceedings” for the purpose of section 52(3)(1).
- The Chief of Police or delegate has the authority to conduct “proceedings”, and the power, by law, to determine matters affecting legal rights and obligations, and is properly

characterized as “other entity” for the purposes of section 52(3)(1).

In the Professional Standards Report, the investigating Professional Standards officer has documented the substance of the allegation, the Professional Standards officer’s interview of the appellant, an attempt by the Professional Standard’s officer to informally resolve the investigation, and correspondence between the Professional Standard’s officer and the appellant. Clearly, the Professional Standards complaint file is directly related to the conduct of the investigation from which might result in proceedings before a tribunal or other entity. The investigative report, as it directly relates to the conduct of the officer and documents the actions of the officer, clearly could have an impact on the outcome of the Professional Standards investigation. This report would, at the very least, be evidence in any “proceeding before a tribunal or other entity”.

I would direct the Adjudicator’s attention to page A4 of the documents. This document is titled “Public Complaint Determination of Chief of Police”. A copy of this document would have been forwarded to the officer whose conduct was being investigated. I would draw the Adjudicator’s attention to the paragraph numbered 2 (which has not been checked). Under this paragraph, the Chief (or designate) could choose not to proceed with an investigation for the enumerated reasons. In this case, paragraph 2 was not checked and an investigation was begun. As previously indicated, OCCPS [Ontario Civilian Commission on Police Services] has provided specific direction to the Kingston Police Professional Standards office “*that the original complaint be investigated and dealt with pursuant to Part V of the Police Services Act. Upon completion of the investigation, please ensure that the complainant received a decision letter.*” During this investigation, there was an attempt by the Professional Standards officer to informally resolve the matter between the appellant and the affected officer. This attempt at resolution appears to have been rejected by the appellant. These records would have been the subject of meetings, consultations and discussions between the Professional Standards officer and the appellant, the Professional Standards officer and the affected officer as well as between all of these parties.

Clearly this complaint has not been resolved – it has been judged by OCCPS to be an active investigation. The outcome of this investigation has not been resolved – a determination has not been made whether this complaint is found not to be substantiated. Any such outcome is further complicated by the intervention of OCCPS. As OCCPS has already done in this case, OCCPS may again intervene and provide further direction under section 73(1) of the *PSA*.

The appellant submits that he has “no interest in obtaining records that are kept for employment purposes only, and do not directly affect me.”

Again, based on my review of the records, I find that they meet the requirements of part 2 of the test. In accordance with prior orders issued by this office [Orders M-840, M-899], I find that a disciplinary hearing conducted under Part V of the *PSA* is properly characterized as a “proceeding” for the purposes of section 52(3)(1). Based on the Police representations, I also accept that the proceeding was “anticipated” and that there was a reasonable prospect of such proceeding taking place at the time the record was prepared.

Additionally, I find that the Police have the authority to conduct such “proceedings” and have the power to determine matters affecting legal rights and obligations, and, as such, constitute an “other entity” for the purposes of section 52(3)1.

Finally, in the circumstances of this appeal, I find that the records at issue are substantially connected to the disciplinary hearing, and are thus properly characterized as being “in relation to” it.

Therefore, I find that the second part of the test for section 52(3)1 has been met.

Part 3: labour relations or employment

The Police submit:

Clearly, these records relate to the conduct of an officer in the performance of his employment as a Kingston Police officer. As previously discussed, they relate to proceedings or anticipated proceedings before a tribunal or other entity. Further, these records related to employment related matters. In Order MO-1523, Adjudicator Donald Hale makes the following statement:

As far as the third requirement is concerned, previous orders of this office have determined that complaints filed under the *PSA* regarding the conduct of individual police officers, as well as appeals of any decisions made under the *PSA* to OCCOPS, qualify as “employment related matters” for the purpose of section 52(3)3 of the *Act*.

The appellant submits:

I am not requesting records that do not contain specific information about myself, nor are [not] directly related to me. I do realize that there are probably notes and other communications concerning [me] contained in the records that were located by the police, including those that reference my name. However, I am only interested in obtaining records I can ensure are accurate, and if not accurate, I have the possibility of correcting them in the future. I realize opinions from police personnel from internal meetings might not be included in this description.

In the circumstances of this appeal, I accept that the investigation of the appellant's complaint regarding the action of the police officer could reasonably be expected to lead to disciplinary proceedings against the officer. I agree with the Police and find that disciplinary hearings under *Part V* of the *PSA* relate to "the employment of a person by the institution" for the purposes of section 52(3)1. This finding is consistent with Order M-835 and M-899 of this office which established that proceedings under *Part V* of the *PSA* relate to the employment of a police officer.

Therefore, I find that part 3 of the test under section 52(3)1 has been satisfied, as the collection, preparation or maintenance of the records by the Police was in relation to proceedings or anticipated proceedings concerning the employment of the officer.

In conclusion, I find that section 52(3)1 applies to the records at issue in this appeal as the Police have established that :

1. The records were collected, prepared or maintained by the Police;
2. this collection, preparation or maintenance was in relation to proceedings or anticipated proceedings before a court, tribunal or other entity, and
3. these proceedings or anticipated proceedings relate to the employment of a police officer.

Section 52(3)1 applied at the time the records were collected, prepared or maintained. Accordingly, it did not cease to apply at a later date. As was indicated by the Court of Appeal in *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. 5067, "once effectively excluded from the operation of the *Act*, the records remain excluded". Therefore, the section 52(3)1 exclusionary provision still applies even if the Public Complaints Investigation that is the subject of the records has been concluded.

In summary, I find that all three parts of the test under section 52(3)1 of the *Act* have been met for the records at issue. I also find that the records do not fall within any of the exclusionary provisions of section 52(4). Accordingly, I uphold the decision of the Police that the records are excluded from the operation of the *Act* under section 52(3)1.

As I have found that the records are excluded from the operation of the *Act* under section 52(3)1, it is not necessary for me to determine whether they are also excluded under section 52(3)3.

ORDER:

I uphold the decision of the Police.

Original signed by: _____
Catherine Corban
Adjudicator

August 21, 2007 _____