



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER MO-2328**

**Appeal MA07-363-2**

**York Regional Police Services Board**



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## **NATURE OF THE APPEAL:**

The York Regional Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to “all documents and notes concerning [the requester], along with, but not limited to,” an identified complaint the requester made under the *Police Services Act* (*PSA*). The complaint alleged misconduct against police officers who attended at the requester’s home to investigate an incident.

The requester (now the appellant) filed an appeal with this office indicating that the Police had not replied to the access request within the requisite time frame under the *Act*. Under section 22(4) of the *Act*, failing to respond to a request for access to a record within the statutory time frame results in a "deemed refusal" to provide access, which gives rise to a right of appeal. Accordingly, this office opened file MA07-363-1 and sent a Notice of Inquiry to both the appellant and the Police.

The Police then issued a decision letter identifying records responsive to the request and granted partial access to them. The Police relied on the discretionary exemption in section 38(b) of the *Act* (personal privacy) with reference to the presumption in section 14(3)(b) (investigation into a possible violation of law), and the exclusion in section 52(3) (*Act* does not apply) to deny access to the portion of the records that they withheld.

As a result of the Police issuing a final decision letter, appeal file MA07-363-1 was closed. The appellant appealed the decision of the Police to deny access to the records sought.

At mediation, the appellant advised that he was not seeking access to the withheld portions of a responsive Police Report and officers’ notebook entries. As a result, that information and the application of discretionary exemption at section 38(b) of the *Act* are no longer at issue in the appeal. The appellant did indicate, however, that certain identified notebook entries were not legible, and the Police provided a transcribed version of the notes.

Also during mediation the appellant took the position that additional responsive records ought to exist. In support of his position, he indicated that an identified Police detective’s notes, as well as photographs that were taken of the appellant’s backyard, were not disclosed. The Police advised the mediator that the detective’s notes were part of the investigation records pertaining to the complaint the requester filed against the Police, and were withheld under section 52(3). The Police also advised that the photographs were returned to the appellant and none remain in their custody or control.

Mediation did not resolve the matter and the appeal was moved to the adjudication stage of the appeals process.

After attending in person at the offices of the Police to review the content of the complaint file, I sent a Notice of Inquiry setting out the facts and issues in the appeal to them. The Police provided representations in response to the issues set out in the Notice. A Notice of Inquiry, along with the complete representations of the Police, was then sent to the appellant. The appellant did not provide representations in response.

## **RECORDS:**

At issue in this appeal are the contents of a Professional Standards Bureau (PSB) public complaint file in relation to a complaint the appellant made under the *PSA*.

## **LABOUR RELATIONS AND EMPLOYMENT RECORDS**

The Police take the position that sections 52(3)1 of the *Act* operate to remove the contents of the PSB file in relation to a complaint the appellant made under the *PSA* from the scope of the *Act*.

Section 52(3)1 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:

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.

Section 52(4) provides exceptions to the section 52(3) exclusions, none of which apply to the records at issue here.

Section 52(3) is record-specific and fact-specific. If this section applies to the records at issue in this appeal, these records are excluded from the scope of the *Act*.

### **Section 52(3)1: court or tribunal proceedings**

#### ***Introduction***

For section 52(3)1 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 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***

To satisfy Part 1 of the section 52(3)1 test, the Police must establish that the records were collected, prepared, maintained or used by an institution or on its behalf.

The Police submit that they collected, prepared, maintained and/or used the records at issue in the investigation of the *PSA* complaint about several police officers. The Police submit that the complaint file is stored in the PSB office of the Police and only staff assigned to the PSB have access to those files. The Police advised the mediator that the identified detective's notes sought by the appellant arose out of the investigation of the *PSA* complaint about the conduct of police officers who attended at the appellant's home to investigate an incident. The Police state that the notes were not part of the investigation of the original incident. The copy of the *PSA* decision letter provided by the appellant confirms that the identified detective was assigned to investigate the complaint.

In all the circumstances I find that the records contained in the complaint file, including the identified detective's notes, were collected, prepared, maintained or used by the Police in order to investigate the conduct of several police officers.

In short, I am satisfied that the records contained in the complaint file were collected, prepared, maintained or used by an institution. Consequently, the Police have met Part 1 of the section 52(3)1 test.

***Part 2: in relation to proceedings before a court, tribunal or other entity***

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 term "in relation to" in section 52(3)1 means "for the purpose of, as a result of, or substantially connected to" [Order P-1223].

The Police state that the complaint file was specifically created to conduct an investigation under the *PSA* with respect to the appellant's complaint about the conduct of several police officers. This office has consistently held that proceedings arising from complaints filed under the *PSA* constitute proceedings before a "tribunal or other entity" for the purposes of section 52(3)1. I find, therefore that the copies of the records in the complaint file were collected, prepared, maintained or used in relation to anticipated proceedings under the *PSA*. As a result, I find that the second part of the test under section 52(3)1 has been met with respect to the copies of the records contained in the complaint file.

***Part 3: relating to labour relations or to the employment of a person by the institution***

To satisfy Part 3 of the section 52(3)1 test, the Police must establish that the proceedings or anticipated proceedings relate to labour relations or to the employment of a person by the institution.

In my view disciplinary hearings under the *PSA* relate to the employment of a person by the institution for the purposes of section 52(3)1. In this regard, I adopt the findings of former Assistant Commissioner Tom Mitchinson in Order M-835 where he found that the penalties which follow the discipline of police officers pursuant to the *PSA* "can only reasonably be characterized as employment related actions."

In Order PO-2658 Adjudicator Colin Bhattacharjee had the opportunity to discuss the impact of *Ontario (Ministry of Correctional Services) v. Goodis* [2008] O.J. No. 289 (*Goodis*) on sections 65(6) 1 and 3 of the *Freedom of Information and Protection of Privacy Act*, the provincial equivalent of sections 52(3)1 and 3 of the *Act*. He wrote:

... the Divisional Court found that section 65(6) does not exclude all records concerning the actions or inactions of an employee simply because this conduct may give rise to a civil action in which the Crown may be held vicariously liable for torts caused by its employees [*Goodis*]. In particular, the Court stated the following with respect to the meaning of sections 65(6)1 and 3:

Subclause 1 of s. 65(6) deals with records collected, prepared, maintained or used by the institution in proceedings or anticipated proceedings "relating to labour relations or to the employment of a person by the institution". The proceedings to which the paragraph appears to refer are proceedings related to employment or labour relations *per se* - that is, to litigation relating to terms and conditions of employment, such as disciplinary action against an employee or grievance proceedings. In other words, it excludes records relating to matters in which the institution has an interest as an employer. It does not exclude records where the Ministry is sued by a third party in relation to actions taken by government employees.

Moreover, the words of subclause 3 of s. 65(6) make it clear that the records collected, prepared, maintained or used by the Ministry in relation to meetings, consultations or communications are excluded only if those meetings, consultations, discussions or communications are about labour relations or “employment-related” matters in which the institution has an interest. Employment-related matters are separate and distinct from matters related to employees’ actions.

This raises the question as to whether records concerning disciplinary matters involving police officers are “employment-related matters” for the purposes of section 65(6)3 of the *Act*, because such records have been created as a result of complaints filed by a third party with respect to the actions of those officers. In its decision, the Divisional Court provided some guidance on this issue. In particular, it commented on the Court of Appeal’s decision in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355, in which one of the records at issue was a copy of a public complaint file of the Police Complaints Commission:

*... there was no dispute in that case that the file documenting the investigation of the complaint was employment-related - not surprisingly because of the potential for disciplinary action against a police officer. However, the case does not stand for the proposition that all records pertaining to employee conduct are excluded from the Act, even if they are in files pertaining to civil litigation or complaints brought by a third party. Whether or not a particular record is “employment-related” will turn on an examination of the particular document. (Emphasis added.)*

I have carefully examined the records at issue in the appeal before me, which document the PSB’s investigation of the complaints filed against the two OPP officers and OCCPS’s review of the two decisions issued by the PSB Bureau Commander. In my view, these records are “employment-related,” because of the potential for disciplinary action against the two officers. I find, therefore, that the meetings, discussions, consultations and communications that took place were about “employment-related matters.”

I agree with Adjudicator Bhattacharjee’s analysis and adopt it for the purposes of this appeal. I find that it is equally applicable to the analysis in the third part of the section 52(3)1 test. Having examined the copies of the records contained in the complaint file, I conclude that those copies relate to employment, because of the potential for disciplinary action against the police officers. I find, therefore, that the proceedings that took place were related to employment.

In short, I am satisfied that the Police have met Part 3 of the section 52(3)1 test. Given that the Police have met the three-part section 52(3)1 test, I find that the copies of the records contained in the public complaint file are excluded from the scope of the *Act* under that section.

**ORDER:**

1. I uphold the decision of the Police that the *Act* does not apply to the copies of the records contained in the Professional Standards Bureau file in relation to a complaint the appellant made under the *Police Services Act*.
2. The appeal is dismissed.

Original signed by: \_\_\_\_\_  
Steven Faughnan  
Adjudicator

July 11, 2008 \_\_\_\_\_