



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-2242

Appeal MA07-47

Toronto Police Services Board



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NATURE OF THE APPEAL:

The Toronto Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information relating to motor vehicle accidents involving Police vehicles. The requester, who is a member of the media, specifically sought access to the following:

... copies (preferably electronic) of all Motor Vehicle Accident Reports involving Toronto Police Service vehicles:

- 1) resulting in damages of \$5,000 and over, and/or
- 2) resulting in personal injuries to any party, including injuries to pedestrians and/or bystanders and/or
- 3) resulting in the death of any party, including the death of pedestrians and/or bystanders.

The requester then stated that she was seeking the reports for the most recent twelve months that are available. The request went on to read:

Although I understand that the information may be subject to legislation protecting the privacy of civilians involved in such accidents, I would request that the names of the officers recorded in the reports be released.

Failing that, I would request that the information revealing whether the police vehicle was at fault or not be included in the report. (This could be done by indicating whether the police officer was: "Driver 1" or "Driver 2.")

I would further like to receive copies of the police vehicle damage reports (TPS-559) that were filed in each case.

Lastly, I would require a copy of the accompanying keys that explain the coding of these documents – in the case of the Motor Vehicle Accident Report, the coding is locating down the left and right-hand sides of the document. ...

The Police initially issued an interim decision and a fee estimate, part of which read as follows:

The records responsive to the request may relate to employment-related matters and therefore, may not fall under the *Act*, pursuant to section 52(3) of the *Act*.

The decision letter also indicated that access may be denied to some of the requested information on the basis of the exemptions found in sections 7(1) (advice or recommendations), 8(1)(a), (b), (f), (l) (law enforcement) and 14(1) (invasion of privacy) of the *Act*. It also stated that non-responsive information will be removed from the records.

After the appellant paid the estimated fee, the Police issued a final decision granting partial access to the requested information. In their decision letter, the Police advised the requester of the meaning of the codes indicated on the Collision Report boxes in the responsive Motor Vehicle Accident Reports, and also stated that access to certain information in those reports was

denied on the basis of the exemptions in sections 7(1), 8(1)(a) and 14(1) of the *Act*. In addition, the decision stated:

The records responsive to the request may relate to employment-related matters and therefore, may not fall under the *Act*, pursuant to section 52(3) of the *Act*.

The requester (now the appellant) appealed the Police's decision.

During mediation, the appellant indicated that neither the withheld Motor Vehicle Accident Reports nor the severed portions of the released Motor Vehicle Accident Reports are at issue in this appeal. Accordingly, I need not address the application of the exemptions identified by the Police to those records. Furthermore, the appellant indicated that the information deemed non-responsive is no longer at issue in this appeal.

Also during mediation, the Police indicated that the vehicle damage reports (the completed TPS-559 forms) consist of internal office memos which are filed every time a Police Officer is involved in an accident. The Police take the position that these reports pertain to employment-related matters and, therefore, do not fall within the scope of the *Act* on the basis of the exclusionary provision found in section 52(3) of the *Act*.

During the mediation stage of this appeal, the Police provided this office with a sample of a completed TPS-559 form.

The appellant advised that access to the TPS-559 forms remains at issue in this appeal.

Mediation did not resolve this issue, and the appeal was transferred to the inquiry stage of the process. I sent a Notice of Inquiry to the Police, initially, and they provided representations in response. I then sent a Notice of Inquiry, along with the non-confidential portions of the Police's representations, to the appellant. The appellant provided representations in response.

RECORDS:

The records remaining at issue are the requested Service Vehicle Collision Reports (TPS-559). The Police have provided me with a sample of a completed TPS-559 form.

DISCUSSION:

LABOUR RELATIONS AND EMPLOYMENT RECORDS

The Police take the position that the *Act* does not apply to the records because they fall within the exclusion in section 52(3).

General Principles

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, (“*Solicitor General*”)].

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

Introduction

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

1. the records were collected, prepared, maintained or used by the Police or on their behalf;
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 Police have an interest.

Requirement 1: Were the records collected, prepared, maintained or used by the Police or on their behalf?

The Police take the position that the requested records - the TPS 559 Damage Reports - are “collected”, “prepared” and “maintained” by the Police. The Police state:

The records exempted under this section are the training records (specifically the TPS 559 Damage Report) of Toronto Police Service members.

... [The] “Service Vehicle Collision Report form TPS 559 Damage Report” is created for all Service and Government Vehicles, including Police Horse, Police Dog, Police Officers patrolling streets, Police Officers patrolling on a bicycle, Motor Motorbike and, Auxiliary Members to name a few, that may be involved in a collision. This report is prepared along with Provincial SRLD401, the Ministry of Transportation Ontario (MTO) form by the first attending officer at the scene and Sergeant at Traffic Services. Where and when a collision involves a Service Vehicle operated by a member, regardless of whether it meets the standard set out under the Highway Traffic Act, a TPS form 559 is created to investigate the Officer involved. This 559 form is an internal memo, prepared by the Sergeant on duty at Traffic Services in order to investigate the Officers actions and determine the estimated damage. This record is created and managed by Professional Standards to monitor Service Vehicle Collisions for the trend analysis, problem identification, quality assurance and training issues. It is also used to discipline/counsel the Officer involved. These records are not released to the public, Insurance Companies or the (Ministry of Transportation).

The Police then state:

... the record has been “collected” and “prepared” by [the Police]. Subsequently the [Police] records are maintained for the completion of Officers’ training and are retained in accordance with the Records Retention schedule under the *Toronto Police Services Board Record Retention Schedule, City of Toronto, Municipal Code, Chapter 219, Article 1*.

It is the position of [the Police] that the record in question has been clearly collected, prepared, maintained and used by this institution, and that Part One has been met.

The appellant does not address the issue of whether the records are collected, prepared, maintained or used by the Police.

The Police have clearly identified that the records at issue are prepared by the identified Sergeant on duty at Traffic Services in order to investigate the officers’ actions and determine the estimated damage. They also identify that the records are created and managed by the Police’s Professional Standards Branch to monitor Service Vehicle Collisions for the trend analysis, problem identification, quality assurance and training issues, and that they are also used to discipline and/or counsel the officer involved. Based on the material provided to me, I am satisfied that the records are collected, prepared, maintained and/or used by the Police, and that requirement one has been met.

Requirement 2: Were the records collected, prepared, maintained and/or used in relation to meetings, consultations, discussions or communications?

In support of its position that the records were collected, prepared, maintained and/or used in relation to meetings, consultations, discussions or communications, the Police state:

A review of ... [the] TPS 559 Damage Report is conducted immediately following a collision involving a TPS member. This review is completed by either the Divisional Supervisor, or a Sergeant from Traffic Services. If it is determined that the officer failed to comply with established procedures and/or misconduct is determined to have existed, an investigation into the event would commence. This investigation could result in a disciplinary hearing being held pursuant to the [*Police Services Act (the PSA)*].

The Police also state:

As a training tool or guideline, the TPS 559 would ... be utilized in deciding the training of a TPS member. ... negotiations may occur during the settling or determination of what level a member may need additional training. This is done

in a confidential manner and is discussed between Professional Standards and the Unit Commander.

In addition, as set out above, the Police state:

This 559 form is an internal memo, prepared by the Sergeant on duty at Traffic Services in order to investigate the Officers actions and determine the estimated damage. This record is created and managed by Professional Standards to monitor Service Vehicle Collisions for the trend analysis, problem identification, quality assurance and training issues. It is also used to discipline/counsel the Officer involved.

The appellant does not address the issue of whether the records are collected, prepared, maintained or used by the Police in relation to meetings, consultations, discussions or communications.

Based on the Police's representations outlined above, I am satisfied that the records are collected, prepared and/or used in relation to meetings, consultations, discussions or communications. The Police have identified that these reports may result in discussions between Professional Standards Branch and the Unit Commander. In addition, the records themselves are internal memoranda, which themselves constitute communications.

Part 3: Were the meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest?

The phrase "labour relations or employment-related matters" has been found to apply in the context of:

- a job competition [Orders M-830, PO-2123]
- an employee's dismissal [Order MO-1654-I]
- a grievance under a collective agreement [Orders M-832, PO-1769]
- disciplinary proceedings under the *Police Services Act* [Order MO-1433-F]
- a "voluntary exit program" [Order M-1074]
- a review of "workload and working relationships" [Order PO-2057]
- the work of an advisory committee regarding the relationship between the government and physicians represented under the *Health Care Accessibility Act* [*Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*], [2003] O.J. No. 4123 (C.A.)]

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]
- litigation in which the institution may be found vicariously liable for the

actions of its employee [Orders PO-1722, PO-1905]

The phrase “in which the institution has an interest” means more than a “mere curiosity or concern”, and refers to matters involving the institution’s own workforce [*Solicitor General* (cited above)].

In support of its position that the records falls within the exclusion in section 52(3)3, the Police state:

The TPS 559 Damage Report as stated previously is an internal report used for the purpose of determining the need for additional training.

...

The collection and retention of the TPS 559 Damage Report is a tool used to gauge whether subject Officer(s) require additional training to perform their duties. “Training” is part of a member’s duties during their career, i.e. their “employment” and therefore, it is our position that part three has been met.

The appellant does not address the issue of whether the meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

Findings

This office has considered the application of section 52(3)3 (and its equivalent in the *Freedom of Information and Protection of Privacy Act* (the provincial *Act*), section 65(6)3) to records held by an institution on a number of occasions. Many of these cases have turned on the issue of whether the preparation, collection, maintenance or use of a record is “in relation to” a labour relations or employment-related matter.

In this appeal, the records at issue are the completed Service Vehicle Collision Reports (TPS-559). The Police have indicated that these reports are internal reports used for the purpose of determining whether an officer involved in a collision requires additional training. They have also identified that, if these reports indicate that an officer failed to comply with established procedures, or that misconduct is determined to have existed, an investigation is then held, which could result in a disciplinary hearing being held pursuant to the *PSA*. The Police have stated that “training” is part of a member’s duties during their career (their “employment”) and that the meetings, consultations, discussions or communications are about employment-related matters in which the institution has an interest.

The Ontario Court of Appeal, in *Solicitor General* (cited above), reviewed the wording of section 65(6)3 of the provincial *Act*. In that decision, the Court stated:

As already noted, s. 65 of the *Act* contains a miscellaneous list of records to which the *Act* does not apply. Subsection 6 deals exclusively with labour relations and employment-related matters. Subsection 7 provides certain exceptions to the exclusions set out in subsection 6. Examined in the general context of subsection 6, the words “in which the institution has an interest” appear on their face to relate simply to matters involving the institution’s own workforce. Subclause 1 deals with records relating to “proceedings or anticipated proceedings ... relating to labour relations or to the employment of a person *by the institution*” [emphasis added]. Subclause 2 deals with records relating to “negotiations or anticipated negotiations relating to labour relations or to the employment of a person *by the institution*” [emphasis added]. Subclause 3 deals with records relating to a miscellaneous category of events “about labour relations or employment-related matters in which the institution has an interest”. Having regard to the purpose for which the section was enacted, and the wording of the subsection as a whole, the words “in which the institution has an interest” in subclause 3 operate simply to restrict the categories of excluded records to those records relating to the institutions’ own workforce where the focus has shifted from “employment of a person” to “employment-related matters”....

Based on the nature of the records at issue in this appeal, and on the Police’s representations, I am satisfied that the records were created or prepared “for the purpose of” or “as a result of” labour relations or employment-related matters. The Police have stated that the records at issue, the TPS-559 reports, are internal reports used for the purpose of determining the need for additional training. They have also stated that these records may also provide the basis for an investigation and/or a disciplinary hearing of the member involved, pursuant to the *PSA*. In these circumstances, I am satisfied that the TPS-559 reports were created for these purposes, and that they relate directly to the management of the Police workforce. I find that investigations and disciplinary hearings of police officers, as well as the specific need for additional or supplementary training that may be required of these individuals, are employment-related matters (See *Solicitor General*, cited above).

Accordingly, I am satisfied that the records were collected, prepared, maintained or used for meetings, consultations, discussions or communications about labour relations or employment-related matters. As such, the records are “substantially connected to” the activities listed in section 52(3)3, and were therefore created, prepared, maintained or used “in relation to” them.

As a result, I find that the third requirement of section 52(3)3 has been established for the records at issue in this appeal.

All of the requirements of section 52(3)3 of the *Act* have thereby been established by the Police. None of the exceptions contained in section 52(4) are present in the circumstances of this appeal, and I find that the records fall within the parameters of this section, and are excluded from the scope of the *Act*.

As I have found that the records are excluded from the scope of the *Act* on basis of section 52(3)3, it is not necessary for me to determine whether section 52(3)1 or 52(3)2 apply.

Additional matters

Although the appellant's representations do not directly address the three requirements for section 52(3)3 set out above, the appellant does raise two matters which I wish to address.

The appellant identifies that, based on the Police's representations, the responsive records exist outside of the personnel files of the officers who were involved in the accidents, and that the records ought not to be regarded as "confidential" on that basis. Although I accept the appellant's position that the records may reside in locations other than the officer's personnel files, this is not determinative of whether the records fall outside the scope of the *Act* for the purpose of section 52(3). The requirements to be met for section 52(3) to apply are not dependent on the location of the records in the Police's record-holding system (see, for example, Order MO-2131); rather, the records must fit the requirements set out in 52(3). Senior Adjudicator John Higgins clearly set out this distinction in Order M-927 where he stated:

Section 52(3) is record-specific and fact-specific. If this section applies to a specific record, in the circumstances of a particular appeal, and none of the exceptions listed in section 52(4) are present, then the record is excluded from the scope of the *Act* and not subject to the Commissioner's jurisdiction.

Secondly, the appellant refers to the Police's representations which state that the records are created and managed by its Professional Standards Branch "to monitor Service Vehicle Collisions for the trend analysis, problem identification, quality assurance and training issues." The appellant states that these matters would assuredly be matters of public interest. She refers to the possibility that a trend may reveal various dangers to the public, or reveal that officers are not properly trained. She then states:

Even if it can be successfully argued that it is necessary to withhold the names of the officers ... involved in the accident, I can't see why the information relating to the type of damages, the cost of repair and the type of disciplinary action taken, if any is taken, cannot be made public. If the name of the officer is blacked out, why can't that information be released? Why can't the public know how many police officers were disciplined for driving infractions?

By making these arguments, the appellant seems to be raising two additional issues. First, she is taking the position that the records ought to be released because of the "public interest" in these records. Section 16 of the *Act* clearly establishes that a public interest override exists for records which are exempt from disclosure under the *Act*; however, the issue in this appeal is not whether the records are exempt from disclosure under the *Act*, but whether they are excluded from the scope of the *Act*. Because of the nature of the records and the wording of the exclusionary

provision in section 52(3), I have found that the records are excluded from the scope of the *Act*. As a result, the public interest override has no application in the circumstances of this appeal.

The second issue the appellant raises is the possibility that portions of the records could be severed (ie: the names and personal identifiers), and that the remaining information could then be disclosed. Again, the *Act* clearly provides that even if records are found to be exempt, the non-exempt portions ought nonetheless to be disclosed. Section 4(2) states:

If an institution receives a request for access to a record that contains information that falls within one of the exemptions under sections 6 to 15 ..., the head shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions.

However, again, the issue in this appeal is not whether the records are exempt from disclosure under the *Act*, but whether they are excluded from the scope of the *Act*. Because of the nature of the records and the wording of the exclusionary provision in section 52(3), I have found that the records are excluded from the scope of the *Act*. Accordingly, I conclude that the severance provision of section 4(2) also has no application in the circumstances of this appeal.

As a final note, although I have found that the records are excluded from the scope of the *Act* as a result of the application of section 52(3)3, this section in no way prohibits an institution from disclosing records or portions of records, it simply removes them from the access and privacy regimes established by the *Act*. Outside the scope of the *Act*, an institution still has the discretion to disclose records even when section 52 is applicable (See Order PO-2613).

ORDER:

I uphold the decision of the Police that the records are excluded from the scope of the *Act* as a result of section 52(3)3.

Original signed by: _____
Frank DeVries
Adjudicator

_____ October 31, 2007