



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-2324

Appeal MA07-22

Guelph Police Services Board



Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téloc: 416-325-9188
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

Background

On March 8, 2006, individuals from a group known as the Guelph Union of Tenants and Supporters entered a Holiday Inn hotel where the Ontario Rental Housing Tribunal was conducting hearings. The protestors attempted to disrupt the hearings and the hotel's staff called the Guelph Police Service (the Police). The Police arrived and arrested several individuals who allegedly refused the Police's order that they leave the hotel.

One of the arrested individuals alleged that she was sexually assaulted by the police officer who arrested her. The province's Special Investigations Unit (SIU) initiated an investigation into her allegation. The SIU is a civilian agency that investigates circumstances involving police and civilians which have resulted in serious injury or death. The SIU defines "serious injuries" as "those that are likely to interfere with the health or comfort of the victim and are more than merely transient or trifling in nature and will include serious injury resulting from sexual assault."

Section 11 of Regulation 673/98 of the *Police Services Act* (the *PSA*) requires police services to conduct their own investigations into incidents in which the SIU has been notified. This provision states, in part:

- (1) The chief of police shall also cause an investigation to be conducted forthwith into any incident with respect to which the SIU has been notified, subject to the SIU's lead role in investigating the incident.
- (2) The purpose of the chief of police's investigation is to review the policies of or services provided by the police force and the conduct of its police officers.
- (3) All members of the police force shall co-operate fully with the chief of police's investigation.
- (4) The chief of police of a municipal police force shall report his or her findings and any action taken or recommended to be taken to the board within 30 days after the SIU director advises the chief of police that he or she has reported the results of the SIU's investigation to the Attorney General, and the board may make the chief of police's report available to the public.

The process for bringing disciplinary proceedings against a police officer is set out under Part V of the *PSA*.

In accordance with sections 11(1) and (2) of Regulation 673/98 of the *PSA*, the Guelph Chief of Police directed his Professional Standards Branch to initiate an investigation for the purposes of reviewing their policies and services, and the conduct of the officers who removed the protestors from the hotel, particularly the officer facing a sexual assault allegation. In short, two

investigations were initiated into the sexual assault allegation: the SIU's investigation and the Police's investigation.

On July 26, 2006, the SIU issued a news release that summarized the outcome of its investigation. The SIU's deputy director dismissed the complaint and stated that, "Independent eyewitnesses establish that the allegation of sexual assault is false. I have no grounds to cause an information to be laid against any police officer in connection with the matter under investigation."

On August 16, 2006, the Police's Professional Standards Branch issued its own report, "Final Report to the Chief of Police, Administrative Review, SIU Investigation GPS 01-2006." This report reiterated the SIU's finding that the sexual assault allegation was "false."

In addition, the report examined whether the other officers who removed the protestors from the hotel conducted themselves properly, and whether the Police's policies (e.g., GPS PO-003 Demonstrations and Protest) provided adequate guidance to their officers. The report concluded that although some "minor conduct issues" were identified with respect to the officers involved, they "have been adequately addressed through additional training and advice." In addition, it found that the Police's policies "adequately addressed this particular situation."

In accordance with section 11(4) of Regulation 673/98 of the *PSA*, the Chief of Police presented this report to the Guelph Police Services Board (the Board). The Police also released a partial version of the report to both the media and the complainant. Although the bulk of the report was disclosed, the Police severed certain portions.

Access request

The Police subsequently received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for "an unedited version" of "Final Report to the Chief of Police, Administrative Review, SIU Investigation GPS 01-2006, August 16, 2006."

The Police issued a decision letter to the requester that denied her access to an "unedited" version" of this record pursuant to section 52(3) of the *Act*. This provision excludes certain labour relations and employment-related records from the scope of the *Act*. In particular, the decision letter claimed that section 52(3)1 applies to the record. It further stated that, "The internal report in regards to this matter is part of an employee file and thus a labour relations issue and will be not be released to you ..."

The requester (now the appellant) appealed the Police's decision to this office, which assigned a mediator to assist the parties in reaching a settlement. This appeal was not settled in mediation. After the mediator's report was issued to the parties, the Police contacted the mediator and advised her that they were also relying on section 52(3)3 of the *Act* to deny access to the record.

As a result, the mediator issued an amended report to the parties indicating that the Police were relying on both sections 52(3)1 and 52(3)3 of the *Act*. In response, the appellant wrote a letter to the mediator that stated, in part:

... We object to the inclusion of s. 52(3)3 as it was not a basis upon which the January 1, 2007 decision of the [Police] was made. We understand from you that this subsection was not raised by the [Police] until after the preparation of the first mediator's report. This appears to be an entirely new basis for the refusal to grant access to the full document.

The appeal was not resolved in mediation and was moved to the adjudication stage of the appeal process for an inquiry. I started my inquiry by issuing a Notice of Inquiry to the Police and inviting them to submit representations. In response, the Police submitted representations to this office. I then issued the same Notice of Inquiry to the appellant, along with a copy of the Police's representations. The appellant submitted representations in response. Next, I sent the appellant's representations to the Police for the purpose of inviting them to submit reply representations. The Police submitted reply representations to this office.

RECORD:

The record at issue is the "Final Report to the Chief of Police, Administrative Review, SIU Investigation GPS 01-2006, August 16, 2006".

DISCUSSION:

LABOUR RELATIONS AND EMPLOYMENT RECORDS

General principles

The Police claim that the record at issue falls within the exclusionary provisions in sections 52(3)1 and 3 of the *Act*.

Section 52(3)1 and 3 state:

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.
3. Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

Section 52(4) provides exceptions to the section 52(3) exclusions. None of these exceptions apply in the circumstances of this appeal.

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

Although the Police claim that both sections 52(3)1 and 3 apply to the record at issue, I will start by addressing the possible application of section 52(3)3.

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

Preliminary Issue – Appellant’s objection to inclusion of section 52(3)3

The appellant objects to the inclusion of section 52(3)3 of the *Act* in this appeal because “it was not a basis upon which the January 1, 2007 decision of the [Police] was made.” She further submits that the exclusions that an institution relies upon for withholding portions of a record “should be properly identified at the time of the severance as they form the legal basis for withholding the information.”

In their representations, the Police acknowledge that they did not cite section 52(3)3 in their original decision letter but submit that “we were advised by the mediator that we were fully within our rights to raise new issues ...”

I have considered the appellant’s objection to the inclusion of section 52(3)3 in this appeal and both parties’ representations on this issue. For the reasons that follow, I have concluded that the section 52(3)3 exclusion may be considered in this appeal.

Under section 4(1)(a) of the *Act*, every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless the record or the part of the record falls within one of the exemptions under sections 6 to 15. Exemptions are exceptions to the general rule that a person has a right to a record or a part of a record.

However, the *Act* also contains certain exclusionary provisions that set out the types of records to which the *Act* simply does not apply. For example, section 52(2) stipulates that the *Act* does not apply to records placed in the archives of an institution by or on behalf of a person or organization other than the institution. Similarly, section 52(2.1) states that the *Act* does not apply to a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed. Section 52(3), which has been raised by the Police in this appeal, states that the *Act* does not apply to certain labour relations and employment-related records.

The application of section 52(3) is a jurisdictional issue. If section 52(3) applies to a specific record 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. Consequently, I have a duty to consider the possible application of any of the three exclusionary provisions in section 52(3), even if they are raised late or not even raised by an institution at all.

I have also considered whether the inclusion of section 52(3)3 in this appeal raises any issues with respect to fair procedure. In my view, it does not. Although the Police raised the application of section 52(3)3 at the conclusion of the mediation stage of the appeal process, the

appellant was subsequently given an opportunity at the adjudication stage to provide representations on all issues, including the application of section 52(3)3. The appellant availed herself of this opportunity and provided detailed representations on this provision.

In short, I find that the section 52(3)3 exclusion may be considered in this appeal, and I will now proceed to determine whether this provision applies to the record at issue.

Section 52(3)3 – General principles

Section 52(3)3 stipulates that the *Act* does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to meetings, consultations, discussions or communications about labour relations or employment-related 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, consultations, 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

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

The Police submit that the report was “collected, prepared, maintained and used in relation to ... the appellant’s allegations.” The appellant acknowledges that the Police “prepared the record which is the Administrative Review under s. 11 of O.Reg 673/98 and used the record to report to the [Board].”

I have reviewed the record at issue and considered the parties’ representations. I find that the report was prepared and used by the Police. I am satisfied, therefore, that the Police have met Part 1 of the section 52(3)3 test.

Part 2: meetings, consultations, discussions or communications

To satisfy Part 2 of the section 52(3)3 test, the Police must establish that their preparation and usage of the record was in relation to meetings, consultations, discussions or communications.

The Police submit that they prepared and used the report “in relations to meetings, consultations, discussions, or communications about the appellant and the involved officer, more specifically, in respect to an investigation into the allegations that led to the administrative review.” It further submits that they prepared and used the report “in relation to discussions and communications between the Professional Standards Inspector and others, including the [Board], [the] involved officer and the appellant.”

The appellant acknowledges that “the preparation and use of the record was in relation to a Report to the [Board], which was considered at a [Board] meeting.”

I have reviewed the record at issue and considered the parties’ representations. The Police prepared and used the report for the primary purpose of investigating the conduct of their police officers, particularly the officer who was accused of sexually assaulting a protestor. Although the report contains a brief evaluation as to whether the Police’s policies provided adequate guidance to their officers, the report is fundamentally about the conduct of the officers who removed the protestors from the hotel. The Chief of Police, the Professional Standards Branch and the Board all had meetings, discussions and communications about the matters set out in the report.

Consequently, I find that the preparation and use of the record at issue by the Police were in relation to meetings, discussions and communications. In short, I am satisfied that the Police have met Part 2 of the section 52(3)3 test.

Part 3: labour relations or employment-related matters in which the institution has an interest

To satisfy Part 3 of the section 52(3)3 test, the Police must establish that the meetings, discussions and communications that took place were about labour relations or employment-related matters in which the Police have an interest.

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.)].

In the circumstances of this particular appeal, there is no evidence before me that would suggest that the meetings, discussions and communications that took place were about the collective bargaining relationship between the Police and their officers. I find, therefore, that these meetings, discussions and communications were not about “labour relations.”

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]. Disciplinary matters involving police officers are “employment-related matters” for the purposes of section 52(3)3 of the *Act* [Orders PO-2499 and PO-2426].

In a recent decision, the Divisional Court found that section 65(6) of the *Freedom of Information and Protection of Privacy Act* (the equivalent provision in the provincial Act to section 52(3) of the municipal Act) does not exclude all records concerning the actions or inactions of an employee simply because the conduct may give rise to a civil action in which the Crown may be held vicariously liable for torts caused by its employees [*Ontario (Ministry of Correctional Services) v. Goodis* [2008] O.J. No. 289]. 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 52(3)3 of the *Act*, because such records have been created as a result of complaints 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.)

In short, the Divisional Court reiterated the principle that records documenting the investigation of a complaint against a police officer are “employment-related,” because of the *potential* for disciplinary action. However, it emphasized the importance of scrutinizing the particular record at issue.

In the appeal before me, the Police submit that the meetings, discussions and communications that took place were about employment-related matters in which they have an interest:

The allegations ... pertained to a police constable who was acting in that capacity at the time of the incident. Clearly an employer’s investigation into allegations regarding the behaviour or actions of an employee is an employment-related matter.

The [Police] have a legal obligation under the [PSA] to investigate complaints from the public about their employees and to deal appropriately with the matter, taking any necessary disciplinary action. This was the case in terms of the allegations ... and should they have been found to be true, the officer would have faced disciplinary action under the [PSA] ...

The appellant submits that any Board meetings that took place with respect to the report cannot be about “employment-related matters,” because the Board does not have the power to discipline officers:

... This report is for the Board to be apprised of the policies of the service and conduct of the officers involved. If any conduct issues are identified, they would then become the subject of separate disciplinary proceedings. The Board has no disciplinary power in conduct matters over individual officers (save the Chief or Deputy Chief – see section 60(5) ... under Part V of the [PSA]). The Board would merely be informed that conduct issues have been identified.

I have carefully reviewed the record at issue and considered the parties’ representations. For the reasons that follow, I find that the meetings, discussions and communications that took place were about employment-related matters in which the Police have an interest.

As noted above, the Police prepared and used the report for the primary purpose of investigating the conduct of their police officers, particularly the officer who was accused of sexually assaulting a protestor. Although the report contains a brief evaluation as to whether the Police’s policies provided adequate guidance to their officers, the report is fundamentally about the conduct of the officers who removed the protestors from the hotel.

In my view, the report is about employment-related matters, because of the potential for disciplinary action against the officers involved. It logically follows, therefore, that the meetings, discussions and communications that took place with respect to the report were also about employment-related matters. Even though the report did not recommend that disciplinary proceedings be initiated against any of these officers, this does not remove employment-related matters from the realm of these meetings, discussions and communications.

I am not persuaded by the appellant's submission that the Police have not met Part 3 of the section 52(3)3 test because any Board meetings that took place with respect to the report cannot be about "employment-related matters," because the Board does not have the power to discipline officers. The Board is not the only entity that had meetings, discussions and communications with respect to the report. In particular, the Professional Standards Branch, which conducted the investigation, would have had meetings, discussions and communications about whether the officers involved in the report carried out their employment duties properly and whether they should be disciplined. These meetings, discussions and communications would, therefore, have been about employment-related matters.

The remaining question is whether these meetings, discussions and communications were about employment-related matters "in which the institution has an interest." 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 [*Ontario (Solicitor General)*, cited above].

In my view, the Police have an interest in the employment-related matters in the record at issue that extends beyond a "mere curiosity or concern." As the employer of the officers, the Police clearly have more than a trifling interest in whether their officers have conducted themselves properly in carrying out their employment duties.

In short, I am satisfied that the Police have met Part 3 of the section 52(3)3 test.

Conclusion

I find that the Police have proven that they prepared and used the report in relation to meetings, discussions and communications about employment-related matters in which they have an interest. Consequently, they have satisfied the requirements of section 52(3)3 of the *Act*.

Given that the Police have met the requirements of section 52(3)3, I find that the report is excluded from the scope of the *Act*. It is, therefore, not necessary for me to assess whether the report is also excluded under section 52(3)1.

ORDER:

I uphold the Police's decision that the *Act* does not apply to the record at issue.

Original signed by: _____
Colin Bhattacharjee
Adjudicator

June 27, 2008