



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER MO-2428**

**Appeal MA08-313**

**Thunder Bay 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/Télééc: 416-325-9188  
TTY: 416-325-7539  
<http://www.ipc.on.ca>

## **NATURE OF THE APPEAL:**

The Thunder Bay Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

Copies of the two 911 calls by [a named police officer] on Christmas Day, 2006 that gave rise to the discreditable conduct charges against him. I would like a CD [compact disc] of the conversation with the 911 operator rather than a transcript.

The Police issued a decision denying access to the record on the basis that it falls outside of the scope of the *Act* in accordance with the exclusionary provisions in sections 52(3)1 and 3 (labour relations).

The requester, now the appellant, appealed the Police's decision.

During the mediation stage of the appeal process, the Police indicated that it is their position that the records fall outside the scope of the *Act*. In the alternative, they claim that the mandatory exemption at section 14(1) (personal privacy), read in conjunction with the presumption at section 14(3)(b), applies to the record at issue. Accordingly, I have added the possible application of section 14(1) to the record as an issue in the appeal.

The appellant advised that he takes the position that it is in the public interest for this record to be disclosed. Accordingly, if the record is found to fall within the scope of the *Act*, the possible application of the public interest override provision at section 16 has also been added as an issue in the appeal.

As further mediation was not possible, the file was transferred to the adjudication stage of the appeal process for an inquiry.

I began my inquiry by sending a Notice of Inquiry to the Police. The Police provided representations in response. I then sent a copy of the Notice of Inquiry together with a complete copy of the Police's representations to the appellant. The appellant provided representations in return. As the appellant's representations raised issues to which I believed the Police should be given an opportunity to respond, I provided a complete copy of his representations to the Police. The Police responded by way of reply.

## **RECORDS:**

The record at issue in this appeal is a CD that contains recordings of two 911 calls.

## **DISCUSSION:**

### **LABOUR RELATIONS AND EMPLOYMENT RECORDS**

The Police take the position that the record at issue falls outside the scope of the *Act* due to the operation of the exclusions at either section 52(3)1 and/or section 52(3) 3.

The relevant portions of section 52(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.

If section 52(3) applies to the records, and none of the exceptions found in section 52(3) 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. The meaning of “labour relations” is not restricted to employer-employee relationships. [*Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.). See also Order PO-2157.]

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 *Freedom of Information and Protection of Privacy Act* [Orders P-1560, PO-2106].

The exclusions in s. 52(3) do not exclude all records concerning the actions or inactions of an employee simply because their 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), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.)].

The type of records excluded from the *Act* by section 52(3) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees' actions [*Ministry of Correctional Services*, cited above].

### **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:

Part 4, Chapter 6, of the Thunder Bay Police Services Policy and Procedures identifies that all 911 telephone communication calls are monitored and recorded within the Communications area. These recordings are maintained for a period of four months in accordance with the City of Thunder Bay, Police Services Board By-Law Retention Schedule.

Part 4, Chapter 6, of the Thunder Bay Police Services Policy and Procedures also identifies the procedure for retrieval of this record should the record be seized for evidence. The policy further indicates that the telephones in the Communication Centre shall not be utilized for a personal nature...

As such, on December 25, 2006 an officer of the Thunder Bay Police Service made two emergency 911 telephone calls to 911 employees of the Thunder Bay Police Service, Communication Unit. These two 911 telephone calls were unprofessional in nature and not official business of the Thunder Bay Police Service.

Subsequently, the two 911 recordings were seized and an investigation was commenced by the Thunder Bay Police Service. These two 911 recordings constituted a major part of the investigation as this was the direct evidence relating to the allegations of misconduct concerning the officer in question. This was an investigation under Part V of the *Police Services Act* with the investigation conducted by officers in the employ of the Thunder Bay Police Service. The record was collected, prepared, maintained and utilized for the purpose of the investigation under Part V of the *Police Services Act*.

The appellant did not make any specific submissions on whether the record was “collected, prepared, maintained, or used” by the Police or on their behalf but does state that “the 911 calls were received by the Police, not because it was an employer, but as a result of the fact that it operates the emergency call system in Thunder Bay.”

Having considered the representations before me and having reviewed the record itself, I accept that it was collected, prepared, maintained and used by the Police in relation to an investigation under Part V of the *Police Services Act* into allegations of misconduct by the officer who made the 911 calls. Although the 911 calls may have been initially recorded on the emergency call system for reasons unrelated to the allegations of misconduct, in my view, when the calls were subsequently retrieved from the system for the purposes of the investigation they were “collected, prepared, maintained and used” by the Police within the meaning of part 1 of the section 52(3)1 test.

Therefore, I find that the requirements of part 1 of the test have been satisfied.

### ***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 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 submit:

An investigation was conducted concerning the two 911 communications calls made to the Thunder Bay Police Service Emergency phone line and subsequently an officer of the Thunder Bay Police Service was charged with eleven charges (nine counts of discreditable conduct and two counts of deceit) under the *Police Services Act*, R. S. O. 1990 as amended by the *Police Services Amendment Act, 1997*. This matter went directly to a hearing in accordance with Section 64(7), Part V of the *Police Services Act*.

The Police also referenced the following two particular statements made by former Assistant Commissioner Tom Mitchinson in Order M-840:

- 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).

The Police submit that the circumstances surrounding the two 911 calls form the entire substance of the investigation into the conduct of the police officer who made the calls and that the calls themselves amount to “the evidence required in the proceeding before a court, tribunal or ‘other entity’ as quoted in order M-840.”

The appellant does not make any specific submissions on whether the collection, preparation, maintenance or usage of the information contained in the record at issue was in relation to proceedings or anticipated proceedings before a court, tribunal or other entity.

In Order P-1223, former Assistant Commissioner Mitchinson stated the following in regard to the meaning of “proceedings” for the purposes of section 65(6)1, the provincial equivalent section to 52(3)1 in the *Freedom of Information and Protection of Privacy Act*:

I am of the view that a dispute or complaint resolution process conducted by a court, tribunal or other entity which has, by law, binding agreement or mutual consent, the power to decide the matters at issue would constitute “proceedings” for the purposes of section 65(6)1.

This office has found that a disciplinary hearing conducted under Part V of the *Police Services Act* qualifies as a dispute or complaint resolution process conducted by a tribunal or other entity which has, by law, the power to decide disciplinary matters. As such, prior orders have consistently held that these hearings are properly characterized as “proceedings” for the purposes of section 52(3)1 [see, for example, Orders M-835, M-840, M-899, PO-1797 and MO-2216].

Based on my review of the record and the submissions of the Police, I accept that the 911 calls were collected, prepared, maintained and used by the Police in relation to an investigation into the conduct of the police officer who made the calls and his subsequent disciplinary hearing conducted under Part V of the *Police Services Act*. In accordance with the prior orders noted above, I find that the police officer’s disciplinary hearing is properly characterized as a “proceeding” before a “tribunal or other entity” for the purpose of section 52(3)1.

Additionally, in the circumstances of this appeal, I find that the information contained in the record at issue is substantially connected to the disciplinary hearing in which it was used as evidence, and is thus properly characterized as being “in relation to” it.

Therefore, I find that the requirements of part 2 of the test under section 53(3)1 have been met with respect to the record at issue.

***Part 3: labour relations or employment***

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

The Police take the position that the record at issue was prepared, collected, maintained and used by the Police in relation to disciplinary proceedings relating to the employment of a police officer under section 64(1.1) of Part V of the *Police Services Act* which states:

The chief of police, may of his or her own motion, make a complaint about the conduct of a police officer on his or her police force, other than the deputy chief of police, and shall cause such complaint to be investigated and the investigation to be reported on in a written report.

The Police submit that in accordance with section 64(1.1), the officer who made the 911 calls was charged with nine counts of discreditable conduct and two counts of deceit under the *Police Services Act*. The Police state that the outcome of these charges had a direct bearing on the employment of that officer. The Police submit that upon commencement of the investigation the officer in question was suspended from his duties pending the outcome of the hearing. The Police indicate that at the hearing the officer pleaded guilty to one count of discreditable conduct and was subsequently ordered to forfeit four days or thirty-two hours of time and to issue an apology to the citizens of Thunder Bay as well as to the civilian and uniformed members of the Police.

The appellant submits:

The 911 calls were an action by an employee, and not a matter related to employment...

The Police, in its own representations to the Commission, agree that these 911 calls were not official business of the Police [at p.2]. The officer's actions were actions not as an employee but as a civilian.

Previous orders of this office have found that disciplinary hearings under Part V of the *Police Services Act* relate to "the employment of a person by the institution" for the purpose of section 52(3)1. In Order M-835, former Assistant Commissioner Mitchinson concluded:

In the circumstances of this appeal, the disciplinary hearing was initiated as a result of an internal complaint under Part V of the *PSA [Police Services Act]*, not under the public complaints part of the statute (Part VI). Despite what I acknowledge to be a general public interest in policing matters, I find that these Part V proceedings do in fact "relate to the employment of a person by the institution". The penalties outlined in section 61(1), which may be imposed after a finding of misconduct, involve dismissal, demotion, suspension, and the forfeiting of pay and time. In my view, these can only reasonably be characterized as employment-related actions, despite the fact that they are contained in a statute and applied to police officers.

I agree with former Assistant Commissioner Mitchinson's reasoning and adopt it for the purposes of this appeal.

Based on the representations before me, I accept that the investigation into the allegations of misconduct regarding the police officer who made the 911 calls lead to disciplinary proceedings against him under Part V of the *Police Services Act*. In accordance with former Assistant Commissioner Mitchinson's reasoning in Order M-835, I accept that the disciplinary proceedings relate to the employment of this officer by the Police and that the officer was subjected to employment-related penalties as a result of the conclusions reached at the disciplinary proceedings.

Therefore, I find that the requirements of part 3 of the section 52(3)1 test have been satisfied as the record in question was collected, maintained and used in relation to proceedings relating to the employment of the officer who made the 911 calls.

Although, from the information before me, it appears that the proceedings have concluded, as noted above, section 52(3)1 does not cease to apply. Once a record is effectively excluded from the operation of the *Act* under this section, it remains excluded [*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]. Therefore, the section 52(3)1 exclusionary



provision still applies even though there may not be further disciplinary proceedings against the officer who made the 911 calls.

Accordingly, I find that all three parts of the test under section 52(3)1 of the *Act* have been met and, subject to my findings concerning section 52(4), the two 911 calls are excluded from the operation of the *Act* under that section. Having made this finding, there is no need for me to determine whether the record is also excluded under section 52(3)3.

**Section 52(4): exceptions to section 52(3)**

If the record falls within any of the exceptions in section 52(4), the *Act* applies to them. Section 52(4) states:

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

I find that the record at issue, the CD containing the two 911 calls, does not fall within any of the exceptions listed in section 52(4). Therefore, section 52(3)1 applies to the record to exclude it from the scope of the *Act*.

As I have found that section 52(3)1 applies, it is not necessary for me to determine whether either sections 14(1) or section 16 apply in the circumstances of this appeal.

**ORDER:**

I uphold the decision of the Police that the *Act* does not apply to the record at issue and I dismiss the appeal.

Original Signed By: \_\_\_\_\_

Catherine Corban  
Adjudicator

\_\_\_\_\_ June 12, 2009