Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-2504

Appeal MA09-349

Toronto Police Services Board

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BACKGROUND:

Following his conviction, but before being sentenced on a charge of assault with a weapon, the appellant wrote a letter addressed to the home of the Assistant Crown Attorney who conducted the prosecution and provided a copy to his probation officer. The probation office advised the office of the Assistant Crown Attorney of the appellant's actions and an investigation was initiated by the Toronto Police Service (the Police). The Assistant Crown Attorney was concerned that the appellant may have accessed his home address through the use of the real property database available to the appellant through his employer, the Municipal Property Assessment Corporation (MPAC), which is an institution under the *Municipal Freedom of Information Act and Protection of Privacy Act* (the *Act*).

The Police investigated the complaint against the appellant and contacted MPAC, who subsequently dismissed him from his employment. At the conclusion of their investigation, the Police chose not to lay charges against the appellant for breach of trust, issuing him a caution instead. The appellant filed a privacy complaint with this office alleging that the Police violated his privacy through the disclosure of his personal information about these events to his employer, MPAC. This complaint was dismissed on November 30, 2009.

The appellant also initiated a proceeding before the Ontario Labour Relations Board (the OLRB) seeking his reinstatement with his employer. This proceeding has not yet begun. The police officer who conducted the investigation into the appellant's conduct is to appear as a witness at the OLRB proceeding.

NATURE OF THE APPEAL:

The Toronto Police Services Board (the Police) received a request from the appellant pursuant to the *Act* for access to "copies of all notes from [the investigating officer] from August 2007 to June 2008" related to the events described in a specified occurrence report. The Police located responsive records and denied access to them on the basis that, pursuant to the exclusionary provision in section 52(2)3 of the *Act*, the information contained in the responsive records falls outside the scope of the *Act*.

The appellant appealed that decision.

The appeal was initially assigned to a mediator to attempt to settle the issues. During the mediation process, the appellant asked the mediator if the records included police officer's notes from the named investigator documenting a conversation that the officer had with an individual representing MPAC, his former employer, on February 14, 2008. The mediator confirmed to the appellant that the responsive records did not include any records beyond November 7, 2007. The appellant advised that, because the records identified did not include records relating to the conversation that took place on February 14, 2008, it is his position that additional documents related to this matter exist beyond those identified by the Police.

The Police initially confirmed with the mediator that they have no records in their possession beyond those which document the events of November 7, 2007. During the mediation of the appeal, the Police obtained copies of additional records which postdate November 7, 2007, but these records do not relate to the conversation of February 14, 2008. In a supplementary decision dated December 4, 2009, the Police advised the appellant that access to those records is also denied on the basis of section 52(3) of the *Act*.

The appellant continued to maintain that additional notes taken by the investigating officer relating to the conversation of February 14, 2008 should exist and the issue of reasonable search was accordingly added to the issues on appeal. As further mediation was not possible, the file was referred to adjudication and assigned to me to conduct an inquiry.

I began my inquiry by providing a Notice of Inquiry setting out the facts and issues in the appeal to the Police. I received their representations, a complete copy of which was then provided to the appellant, along with a Notice of Inquiry. The appellant also provided representations in response to the Notice. I then sought and received reply representations from the Police on the reasonable search issue only. In their reply representations, the Police advised that they located the notes prepared by the investigating officer on February 14, 2008 and were relying on the exclusion in section 52(3) for these records as well.

RECORDS:

The Police submit that they have now provided a copy of all of the responsive records to this office, including those relating to the investigating officer's actions on February 14, 2008. The records consist of police occurrence reports, police officer's hand written notes and various other correspondence.

DISCUSSION:

LABOUR RELATIONS AND EMPLOYMENT RECORDS

As noted above, the Police take the position that all of the responsive records are excluded from the operation of the *Act* by virtue of sections 52(3)1, 2 and 3, which 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.
>
> 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]. Meeting this definition requires more than a superficial connection between the creation, preparation, maintenance and/or use of the records and the labour relations or employment-related proceedings or anticipated proceedings [Order MO-2024-I].

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].

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 *Act* [Orders P-1560 and PO-2106].

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 [Ontario (*Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.)].

Representations of the parties

In support of their contention that the records at issue fall within the ambit of the exclusionary provisions in section 52(3), the Police submit that:

- the records were prepared, collected and maintained by the Police;
- the records were used by an officer with its Professional Standards Unit (the PSU) in the course of an investigation under the *Police Services Act* into the appellant's May 9, 2008 complaint that the investigating officer breached the appellant's privacy rights, thereby committing a misconduct. This complaint was not upheld in a Report of Investigation issued by the PSU officer on October 6, 2008. The Police rely on the decision in Order M-835 in which former Assistant Commissioner Tom Mitchinson found that a disciplinary hearing involving a police officer conducted under section 60 of the *PSA* is properly characterized as a "proceeding" for the purposes of section 52(3)1;

- the records will be used by the officer who conducted the initial Police investigation when he gives testimony before the OLRB tribunal about the involvement of the Police in the circumstances surrounding the appellant's dismissal from his employment; and
- the OLRB proceedings "relate to labour relations or the employment of a person by the institution".

The appellant counters with the following arguments:

- the records that were prepared and used by the Police "relate only to a criminal investigation and not to allegations made by [MPAC]";
- the records requested pertain to the original criminal investigation conducted by the investigating officer "and not the records related to the police investigation of my complaint" against the officer under the *Police Services Act*; and
- the OLRB proceeding referred to by the Police relates to a dispute involving the appellant and his former employer, MPAC, and it does not involve the Police.

Analysis

The records requested in the present appeal consist only of those prepared by the police officer who investigated allegations of criminal behaviour by the appellant. They relate only to that officer's inquiries and actions pertaining to the appellant's actions and whether they constituted a criminal offence.

The application of the exclusionary provisions in section 52(3) to records maintained by police authorities have been the subject of a number of judicial review proceedings. In *Ministry of Correctional Services,* cited above, the Divisional Court examined the application of the section 65(6), the equivalent of section 52(3) in the *Freedom of Information and Protection of Privacy Act* (the provincial *Act*), to records compiled by the Ministry of Correctional Services relating to allegations of abuse made against Ministry employees at a specified location over a specified time. Addressing the context of the provision, in light of its legislative history and the purpose of the provincial Act, Justice Swinton stated:

> In my view, the language used in s. 65(6) does not reach so far as the Ministry argues. Subclause 1 of s. 65(6) deals with records collected, prepared, maintained or used by the institution in proceedings or anticipated proceedings 'related 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.

Justice Swinton then went on to examine the relationship between section 65(6) and the exceptions to it set out in section 65(7), which she found applicable to "documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resource questions are at issue." Justice Swinton followed this statement with a review of the legislative history of the section 65(6) enactments, noting that they were intended to "ensure the confidentiality of labour relations information". Next, Justice Swinton examined the purpose of the Act, as set out in section 1.

Addressing the question of whether an institution "has an interest" in a particular matter, Justice Swinton relies on the decision of the Court of Appeal in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.) in which the Court stated (at para. 35):

> 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 and 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 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 [See note 11 at end of document] 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'.

In my view, a distinction can be made between the collection, preparation, maintenance and use of records that relate exclusively to the initial criminal investigation, like the records at issue in this appeal, and records that were collected, prepared, maintained and used by the PSB investigator who conducted the *PSA* investigation into the original investigating officer's activities. I find support for this approach in the decision in Order MO-2131 in which Adjudicator Frank Devries relied on an earlier decision of Senior Adjudicator John Higgins in Order M-927 to find:

> In the material provided by the appellant, one of the issues he raises is whether all of the information contained in the Public Complaint Investigation file actually relates to the investigation of the complaint. He takes the position that records

created for one purpose, such as an accident investigation, and in advance of a public complaint, ought not to fall within the ambit of section 52(3) simply because they reside in the complaint file.

I accept the position taken by the appellant with respect to the nature of records contained in a public complaint file. Merely placing records in a file of that nature does not mean that these records are collected, prepared or maintained "in relation to" proceedings or anticipated proceedings before a court, tribunal or other entity. 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.
>
> …[The records at issue] consist of pages from a police officer's notebook, five witness statements, a typed Motor Vehicle Collision Report with two supplementary reports, and photographs of the damaged vehicles.
>
> In my view, in assessing the possible application of section 52(3) in this case, it is important to note that the request was essentially directed at the contents of the police investigation file concerning the accident, and any related entries in officers' notebooks. It was not a request for information relating to the allegations against the investigating officers.
>
> It is difficult to imagine any category of records which would be more integral to the basic mandate of a police force than the files kept in connection with day-to-day police investigations of incidents occurring within the force's jurisdictional boundaries, and related entries in officers' notebooks. Moreover, although some of them are prepared by employees of the Police, such records are not, in essence, related to employment or labour relations. Rather, they record the activities and conclusions of the investigating officers and, at times, others who conduct forensic analyses, etc. Generally speaking, such records are subject to the *Act*.
>
> It is an established principle of statutory interpretation that an absurd result, or one which contradicts the purpose of the enactment, is not a proper implementation of the Legislature's intention. In *Driedger on the Construction of Statutes* (3rd ed., Butterworths), by Ruth Sullivan, the author states (at page 89):

> Legislative schemes are supposed to be elegant and coherent and operate in an efficient manner. Interpretations that produce confusion or inconsistency or undermine the efficient operation of a scheme are likely to be labelled absurd.

Applying section 52(3) to the information at issue in this appeal would have the effect of permanently removing certain information maintained by the Police with respect to their basic mandate (i.e. protection of the peace and investigation of possible criminal behaviour which comes to their attention) from the scope of the *Act*, while most information of this nature would remain subject to the *Act*. As noted above, this information is not, in essence, related to employment or labour relations, and in my view, broadly speaking, it is to these latter categories of information that section 52(3) is intended to apply. Moreover, applying this section in the context of this appeal would result in the inconsistency that some files kept in connection with day-to-day police investigations of incidents occurring within the force's jurisdictional boundaries and related entries in officers' notebooks would be subject to the *Act*, while others would not be.

In my view, therefore, it would be a manifestly absurd result, and one not intended by the Legislature, if the records at issue were removed from the scope of the *Act* because they happen to have been reviewed in connection with an investigation of an employee's conduct.

On the other hand, in the context of a request for the file relating to an investigation of a police officer's conduct, where copies of incident reports, etc. from the original investigation formed part of that file, section 52(3) could apply to that entire file including those particular copies. However, in my view, the main investigation file housing the original incident reports, etc., and related officers' notebook entries, would remain subject to the *Act*.

In this excerpt from Order M-927, Senior Adjudicator Higgins clearly identified the important distinction between records or copies of records which relate to day-to-day police investigations of incidents occurring within the force's jurisdictional boundaries, and copies of those same records which may reside in a file relating to an investigation of a police officer's conduct. I accept this distinction for the purpose of my review of the records at issue in this appeal, and the possible application of section 52(3).

Similarly, I take the approach that since the records at issue in this appeal relate to a day-to-day police investigation into circumstances involving the appellant which occurred within the jurisdiction of the Police, they do not fall within the exclusionary provision in section 52(3). While additional copies of these records may also reside in the file maintained by the PSU investigator, the original records that relate to the original investigation into the appellant's actions are not removed from the scope of the *Act* simply because they were reviewed or considered as part of a review of the officer's conduct under the *PSA*. Such a review does not alter the character of the original records, which were prepared for the purposes of the investigation conducted by the officer. Accordingly, I find that the original investigation records that are the subject of this request and appeal are not excluded from the operation of the *Act* simply because of their possible inclusion or review in the subsequent *PSA* complaint investigation.

As indicated in the representations of the Police, the original police investigation records at issue in this appeal may be used in the future by the Police investigator if he gives testimony at a proceeding before the OLRB. The proceeding has been initiated by the appellant, who seeks reinstatement to his position with MPAC. However, I note that the OLRB proceeding does not relate to labour relations or to the employment of a person by the Police, whose participation will be limited to giving testimony about the potentially criminal activity of the appellant. This degree of interest in the records is not sufficient to trigger the application of the exclusionary provision in paragraph 1 of section 52(3) because the OLRB matter does not pertain to the Police's interest as an employer. As noted by Justice Swinton in *Ministry of Government Services* (see above), section 52(3)1 only applies where the institution (in this case, the Police) has an interest as employer. The fact that these records may be used in an OLRB proceeding in which MPAC is the employer, and in which the Police may be required to give evidence, is not sufficient to trigger the application of the exclusionary provision in section 52(3).

Therefore, I find that paragraph 1 of section 52(3) is not engaged by the OLRB proceedings which may take place. In addition, unlike MPAC, the appellant's former employer, I find that the Police do not have an interest in the subject matter of the records for the purpose of paragraph 3 of section 52(3).

Previous orders have also established that 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 and PO-2106]. In the circumstances of this appeal, the anticipated proceedings referred to by the Police involve MPAC, which is also an institution under the *Act*. I have considered whether the exclusionary provision in section 52(3) could apply to the records because the anticipated proceedings involve another institution. I have concluded that these circumstances to do trigger the application of the section 52(3) exclusion. Although the anticipated proceeding involves MPAC as an employer, the records were collected, prepared, maintained and used by the Police in the course of their investigation into the conduct of the appellant. MPAC was not involved in collecting, preparing, maintaining or using the records and it is unclear to me whether MPAC was ever provided with a copy of them. In the circumstances, I am not satisfied that section 52(3) is triggered by the fact that these

records may be used as evidence in an anticipated proceeding involving MPAC, and not the Police, as the employer.

Based on the foregoing discussion, I find that the exclusionary provisions in sections 52(3) have no application to the records at issue in this appeal. It is clear from the language used by the Court of Appeal in *Solicitor General, supra*, that the exclusionary provisions only apply to records that relate to matters "involving the institution's own workforce". These include records pertaining to proceedings or anticipated proceedings relating to labour relations or to the employment of a person *by the institution* (paragraph 1), records that are about negotiations or anticipated negotiations relating to labour relations or to the employment of a person *by the institution* (paragraph 2) or records relating to a miscellaneous category of events 'about labour relations or employment related matters in which the institution has an interest' (paragraph 3).

For the reasons stated above, I have already found that sections 52(3)1 and 3 do not apply. I find also that the exclusionary provision in paragraph 2 of section 52(3) also has no application as the records were not collected, prepared, maintained or used by or on behalf of an institution in relation to negotiations or anticipated negotiations relating to labour relations or the employment of a person by the Police.

By way of conclusion, I find that the records at issue fall within the ambit of the *Act* and I will order the Police to provide the appellant with a decision letter respecting access to them.

REASONABLENESS OF SEARCH

Throughout the processing of this request and the subject appeal, the appellant has maintained that records relating to an alleged telephone conversation between the police investigator and a representative of MPAC ought to exist. In support of this contention, the appellant provided me with a copy of notes taken by the MPAC employee in which he describes a conversation the employee had with the Police investigator on February 14, 2008.

With its reply representations, the Police indicated that they had located certain notes taken by the police investigator in which he described the conversation he had with the MPAC representative on February 14, 2008. The Police indicate that they now "possess the complete file relating to the appellant's request" and, with their reply representations, provided me with a copy of the police investigator's notes relating to the February 14, 2008 conversation he had with the MPAC representative. Further, the Police advise that they rely on the exclusionary provision in section 52(3) for these notes, in addition to the other investigative records described in their initial representations.

I have found above that the exclusionary provision in section 52(3) does not apply to the records at issue in this appeal. I wish to reiterate that this finding also pertains to the notes located during the course of the inquiry process into this appeal.

The representations of the appellant relating to the reasonable search issue focussed specifically on notes taken by the investigating officer in the course of a telephone conversation with an identified MPAC employee on February 14, 2008. The notes sought by the appellant have been

located by the Police and a decision respecting access has been made (though not communicated to the appellant) in relation to them. In the circumstances, I am satisfied that the Police have now conducted a reasonable search and I dismiss this aspect of the appeal.

ORDER:

1. I order the Police to provide the appellant with a decision letter respecting access to all of the responsive records, including the officer's notes relating to the February 14, 2008 conversation, in accordance with the requirements of sections 19 and 22 of the *Act* and without recourse to a time extension under section 20 of the *Act*.

2. I find that the Police have conducted a reasonable search for records responsive to the request and I dismiss that aspect of the appeal.

Original Signed By: March 17, 2010
Donald Hale
Adjudicator