



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

# **ORDER MO-2556**

## **Appeal MA10-70**

### **London Police Services Board**



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## **NATURE OF THE APPEAL:**

The London Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for all information concerning the requester in the possession of the Police.

In response to the request, the Police issued a decision in which they identified that partial access was granted to the records requested. The Police advised the requester that access to some of the records was denied on the basis of the exemption in section 38(b) (personal privacy), and section 38(a) (discretion to refuse requester's own information) in conjunction with sections 8(1)(c) and (l) (law enforcement) and 15(a) (information published or available). The Police also indicated that certain information had been removed from the records as non-responsive to the request. In addition, the Police took the position that certain records were removed from the scope of the *Act* on the basis of the exclusionary provision in section 52(3) of the *Act*.

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

During mediation, the appellant confirmed that he was not pursuing access to certain records or portions of records. These records are the ones which the Police denied access to on the basis of the identified exemptions and, as a result, the exemptions in sections 38(a), 38(b), 15(a), 8(1) and 21(1) were no longer at issue in this appeal.

As a result of mediation, the sole remaining issue in this appeal is whether the remaining records (pages 10-41, 56-61, 101-102, 123-124, 127-128, and 133-134) are excluded from the scope of the *Act* on the basis of the exclusionary provisions in section 52(3)1 and 52(3)3. Mediation did not resolve this issue, and this file was transferred to the inquiry stage of the process where an adjudicator conducts an inquiry under the *Act*. I began my inquiry by sending a Notice of Inquiry identifying the facts and issues in this appeal to the Police.

After receiving the Notice of Inquiry, the Police indicated that they were revising their decision regarding access to certain records. The Police issued a revised decision to the appellant in which they stated that partial access to a number of additional records was now being granted, and that the exclusionary provisions in section 52(3) were no longer being claimed for those records. The revised decision also identified the exemptions which applied to the withheld portions of these records, and that the appellant could appeal the revised decision to this office. As issues regarding the exclusionary provisions in sections 52(3) are no longer at issue for these records, they are removed from the scope of this appeal.

The Police maintained that the exclusionary provision still applied to nine pages of records, and they provided representations to this office in support of their position that pages 13-21 of the records were excluded from the scope of the *Act* on the basis of sections 52(3)1 and 52(3)3.

In light of my finding below, I determined that it was not necessary to seek the representations of the appellant in this appeal.

## **RECORDS:**

The records remaining at issue in this appeal are pages 13-21. They consist of a one-page incident sheet and an eight-page general occurrence report.

## **DISCUSSION:**

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

As noted above, the Police take the position that pages 13-21 are excluded from the operation of the *Act* by virtue of section 52(3). In the index, the Police refer to section 52(3)1; however, the Police's representations focus on section 52(3)3. These sections read:

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(4) applies, the records are excluded from the scope of the *Act*.

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 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 Police**

In support of their position that the records at issue fall within the ambit of the exclusionary provisions in section 52(3), the Police provide representations which they state are confidential.

I fail to see on what basis this claim is made, as the representations do not appear to meet the requirements for confidentiality found in section 7.07 of the *Code of Procedure*. However, I have not issued an interim decision on the sharing of those representations, as I decided it was not necessary to seek the appellant's representations on the issues in this appeal. Because I have not issued a sharing decision, I will only generally refer to the positions put forward by the Police. However, I have carefully reviewed all of the representations of the Police (which are brief) in my analysis of the application of section 52(3).

The Police's representations, summarized generally, are that a complaint was made by the appellant against a Police officer, and that the records at issue were collected, prepared, maintained and used in relation to proceedings arising from the complaint. The Police refer to a number of proceedings and the possible results of those proceedings, and indicate that these and other proceedings are ongoing.

### **Analysis**

The records remaining at issue in this appeal consist only of a one-page incident sheet and an eight-page general occurrence report relating to the investigation of incidents involving the appellant. These records identify the people involved, and the general occurrence report summarizes the actions and interactions resulting from an incident, including witness statements. On my review of the records, they appear to relate solely to the incidents that are the subject of the initial investigations by the Police. On their face, they do not relate to any subsequent complaints, proceedings or other matters arising from the events referred to in the records.

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 section 65(6) in the *Freedom of Information and Protection of Privacy Act* (the equivalent of section 52(3) at issue in this appeal) 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 *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 relied 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 ... 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 an initial police investigation, like the records at issue in this appeal, and records that were collected, prepared, maintained and used by others who subsequently investigate complaints or other matters involving the original investigating officer’s activities. I took a similar approach to records of this nature in Order MO-2131, in which the Toronto Police had issued a decision on access to the original investigation into an accident, but had taken the position that these same records, in the Public Complaint Investigation file, were excluded from the scope of the *Act*. I stated:

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).

In this appeal, I take the same approach. As the records at issue in this appeal relate to the initial, 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). Although it may well be that subsequent complaints about the actions of the investigating officer resulted in further investigations and/or the creation of additional files (of which I have very little evidence), the original records that relate to the original investigations 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 other legislation. Any such review does not alter the character of the original records, which were prepared for the purposes of the investigations conducted by the officer (see also Order MO-2504). Accordingly, I find that the original incident sheet and general occurrence report that form the records at issue in this appeal are not excluded from the operation of the *Act* simply because of their possible inclusion or review in subsequent complaint investigations and/or other proceedings.

Based on the foregoing discussion, I find that the exclusionary provisions in sections 52(3)1 and 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*, (set out above) 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) 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).

In 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.

**ORDER:**

I order the Police to provide the appellant with a decision letter respecting access to pages 13-21 of the responsive records in accordance with the requirements of sections 19 and 22 of the *Act*.

Original signed by: \_\_\_\_\_  
Frank DeVries  
Adjudicator

\_\_\_\_\_ October 18, 2010