

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER MO-2925

Appeal MA12-324

York Regional Police Services Board

July 30, 2013

Summary: The appellant sought notes regarding the Combined Forces Special Enforcement Unit - Toronto-Joint Managers meetings made by a named superintendent. The police denied access to the responsive record pursuant to the exclusionary provision in section 52(3)3 (labour relations and employment records) and the exemptions in sections 8(1)(d) and (g) (law enforcement) and 9(1)(d) (relations with other governments). The police also claimed that a portion of the record was non-responsive. This order upholds the police's decision under section 8(1)(g) and does not uphold their decision under section 52(3)3. This order also finds a portion of the record non-responsive to the request.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 52(3)3, 8(1)(g), 17(1).

Orders and Investigation Reports Considered: Order MO-2086.

OVERVIEW:

[1] The York Regional Police Services Board (the YRP or the police) received a request pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) for:

Between [dates], all police officer original, rough, draft and finished notes and notebook entries, including notes regarding the CFSEU-Toronto-Joint

Managers meetings made by Supt. [name], of the York Regional Police that reference [the requester].

[2] The police issued an access decision, indicating that they were denying access pursuant to sections 8(1)(d) and (g) (law enforcement) and 9(1)(d) (relations with other governments). They further stated:

Any records that exist of Superintendent [name] were created in relation to the Combined Forces Special Enforcement Unit (CFSEU). The CFSEU is a joint-force operation tasked with the mandate to expose, investigate, prosecute, dismantle and disrupt organized criminal enterprises and therefore is considered an agency of the Government of Ontario.

[3] The requester, now the appellant, filed an appeal.

[4] During mediation, the appellant confirmed that he is only interested in comments made about his conduct. He also confirmed that he is not interested in the identity of confidential sources or other details of the investigation by the CFSEU. The police subsequently issued a revised decision claiming the exclusionary provision in section 52(3)3 of the *Act* explaining that:

...York Regional Police has a direct interest in these records as a member of CFSEU. Although [the appellant was] an employee of the RCMP [Royal Canadian Mounted Police], he was assigned to this joint task force wherein the records [he has] requested access to were created by certain members of the York Regional Police who at the time of the records were acting in a supervisory capacity.

[5] The police provided additional clarification to the mediator that they were only claiming section 52(3)3 for lines 5-13 on page 2 and sections 8(1)(d) and (g) and 9(1)(d) with respect to the remainder of the entries. The police also advised the mediator that a portion of the entries on page 1 of the notes was not responsive to the request as it does not pertain to the CFSEU meeting.

[6] As the appeal was not resolved during mediation, the file was transferred to the adjudication stage, where an adjudicator conducts an inquiry. I sent a Notice of Inquiry, setting out the facts and issues in this appeal, to the police, seeking their representations. The police provided representations, a copy of which was provided to the appellant along with a Notice of Inquiry. The appellant provided representations in response.

[7] In this order, I uphold the police's decision that a portion of the record is non-responsive. I find that a portion of the record is not excluded from the *Act* by reason of

section 52(3)3. I find that the remainder of the record is exempt by reason of section 8(1)(g).

RECORD:

[8] The record consists of two pages of handwritten notes.

ISSUES:

- A. Are the first 12 lines of page 1 of the record responsive to the request?
- B. Does section 52(3)3 exclude page 2, lines 5 to 13, of the record from the *Act*?
- C. Does the discretionary law enforcement exemption at section 8(1)(g) apply to remaining information in the record?
- D. Did the institution exercise its discretion under section 8(1)(g)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

A. Are the first 12 lines of page 1 of the record responsive to the request?

[9] Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

- (1) A person seeking access to a record shall,
 - (a) make a request in writing to the institution that the person believes has custody or control of the record;
 - (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;

...

- (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[10] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.¹

[11] To be considered responsive to the request, records must "reasonably relate" to the request.²

[12] The police state that the appellant had narrowed the scope of his request during the mediation stage of this appeal and was only seeking access to records made in relation to his conduct. They state that the first page of the superintendent's notes cover the time frame of a portion of the notes on page 1 of the record is non-responsive as they do not contain any information regarding the appellant nor do they contain any information regarding the CFSEU Joint Managers Meeting.

[13] The appellant states that this page reasonably relates to the request because the notes produced directly correspond to information, according to the police's superintendent, that the RCMP utilized to take action.

Analysis/Findings

[14] As stated above, during mediation, the appellant confirmed that he is only interested in comments made about his conduct. He also confirmed that he is not interested in the identity of confidential sources or other details of the investigation by the CFSEU. Based on a careful review of the information at issue on page 1 of the records, I find that this information is not responsive to the request as clarified during mediation. The information on this page is not related to CFSEU meetings nor does it relate to the appellant's conduct.

[15] Accordingly, I find that the first 12 lines of page 1 of the record are not responsive to the request.

B. Does section 52(3)3 exclude page 2, lines 5 to 13, of the record from the *Act*?

[16] Section 52(3)3 states:

Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:

3. Meetings, consultations, discussions or communications about labour relations or

¹ Orders P-134 and P-880.

² Orders P-880 and PO-2661.

employment related matters in which the institution has an interest.

[17] 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*.

[18] For the collection, preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in paragraph 1, 2 or 3 of this section, it must be reasonable to conclude that there is "some connection" between them.³

[19] 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.⁴

[20] 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.⁵

[21] 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.⁶

[22] 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 *Municipal Freedom of Information and Protection of Privacy Act*.⁷

[23] The exclusion in section 52(3) does not exclude all records concerning the actions or inactions of an employee simply because this conduct may give rise to a civil action in which the Crown may be held vicariously liable for torts caused by its employees.⁸

[24] 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

³ Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

⁴ *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.

⁵ Order PO-2157.

⁶ *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.

⁷ Orders P-1560 and PO-2106.

⁸ *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.).

conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees' actions.⁹

[25] For section 52(3)3 to apply, the institution 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.

[26] The police state that the record contains notes that were made by a YRP superintendent who is a member of the joint task force, who attended a meeting of the CFSEU. They further state that lines 5 to 13 of page two of the record contain information regarding the conduct of the appellant while he was seconded to CFSEU joint task force. They submit that this information is employment-related as it concerns an individual who was seconded to a joint task force which members of the police are part of. They state that although the appellant is not an officer of the YRP, he is a member of the joint-force operation to which the YRP is directly connected to and has an interest in.

[27] The appellant states that the CFSEU is an RCMP-funded organization in which the YRP are invited to participate under a memorandum of understanding. He states that he was employed by the RCMP and working in a RCMP section that was not the CFSEU during the period in question and, furthermore, that the superintendent who took the notes in the record had no supervisory role over him.

Analysis/Findings

[28] I find that part 1 of the test has been met as the police superintendent who wrote the notes at issue collected, prepared, maintained or used these notes on behalf of the police.

[29] I also find that part 2 of the test has been met as the information at issue in the record was collected, prepared, maintained or used in relation to meetings or discussions.

⁹ *Ministry of Correctional Services*, cited above.

[30] Concerning part 3 of the test, the phrase “labour relations or employment-related matters” has been found to apply in the context of:

- a job competition¹⁰
- an employee’s dismissal¹¹
- a grievance under a collective agreement¹²
- disciplinary proceedings under the *Police Services Act*¹³
- a “voluntary exit program”¹⁴
- a review of “workload and working relationships”¹⁵
- the work of an advisory committee regarding the relationship between the government and physicians represented under the *Health Care Accessibility Act*¹⁶

[31] The phrase “labour relations or employment-related matters” has been found *not* to apply in the context of:

- an organizational or operational review¹⁷
- litigation in which the institution may be found vicariously liable for the actions of its employee¹⁸

[32] The records collected, prepared maintained or used by an institution are excluded only if the 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.¹⁹

¹⁰ Orders M-830 and PO-2123.

¹¹ Order MO-1654-I.

¹² Orders M-832 and PO-1769.

¹³ Order MO-1433-F.

¹⁴ Order M-1074.

¹⁵ Order PO-2057.

¹⁶ *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.).

¹⁷ Orders M-941 and P-1369.

¹⁸ Orders PO-1722, PO-1905 and *Ontario (Ministry of Correctional Services) v. Goodis*, cited above.

¹⁹ *Ministry of Correctional Services*, cited above.

[33] The RCMP is an agency of the Government of Canada. In Order MO-2825, I stated that the CFSEU is an RCMP-led unit, comprised of multiple federal or law enforcement agencies and is described on the RCMP's website as:²⁰

A multi-partner operation specifically tasked with the mandate to expose, investigate, prosecute, dismantle, and disrupt organized criminal enterprises.

[34] 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. 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.²¹

[35] Although the YRP is a partner in the CFSEU, the appellant is a RCMP officer, not a YRP officer. Although seconded to the CFSEU, he did not actually begin working for the CFSEU. Instead he was ordered to not report to the CFSEU for duties and was transferred to another position in the RCMP. The YRP's superintendent who took the responsive notes was never the appellant's supervisor, nor did the appellant at any time work for the CFSEU.

[36] In Order MO-2086, the requester sought access to all records relating to him that were provided by the Halton Regional Police to the requester's employer, the RCMP. In that order, concerning part 3 of the test under section 52(3)3, Adjudicator Bernard Morrow stated that:

With respect to part three of the test, in my view, neither the representations submitted by the Police nor the records themselves demonstrate that the "communications" are about labour relations or employment related matters in which *the Police have an interest* [my emphasis]. While it may be the case that the RCMP has an interest in a labour relations or employment related matter with the appellant, the RCMP is not an institution under the *Act* and so it cannot gain the benefit of this exclusion. I acknowledge that the Police may have provided the records at issue to the RCMP in the discharge of a statutory responsibility to conduct an investigation of the appellant and to cooperate with RCMP in regard to its internal disciplinary process. However, the Police have not demonstrated that they have an interest in the outcome of this investigation or any discipline that may flow from it. Accordingly, I find that part three of the test under section 52(3)3 has not been met.

Accordingly, I find that section 52(3)3 does not apply in this case.

²⁰ See <http://www.rcmp-grc.gc.ca/on/prog-serv/index-eng.htm>

²¹ *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above.

[37] I agree with this analysis of Adjudicator Morrow, which is consistent with the decision of the Court of Appeal in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*,²² wherein it described this exclusion as relating to matters concerning an institution's own workforce. The appellant is an RCMP employee. He never worked for the YRP either directly or indirectly through the CFSEU.

[38] I find that although the notes at issue contain employment-related information, these notes are not communications about employment-related matters in which the YRP, as an employer, have an interest. Therefore, I find that part 3 of the test has not been met and that lines 5 to 13 of the record are not excluded from the *Act* by reason of section 52(3)3. Accordingly, I will order the YRP to make an access decision concerning this information.

C. Does the discretionary law enforcement exemption at section 8(1)(g) apply to remaining information in the record?

[39] Section 8(1)(g) states:

A head may refuse to disclose a record if the disclosure could reasonably be expected to,

interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons;

[40] The term "law enforcement" is used in several parts of section 8, and is defined in section 2(1) as follows:

"law enforcement" means,

- (a) policing,
- (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or
- (c) the conduct of proceedings referred to in clause (b)

[41] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.²³

²² *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above.

²³ *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

[42] Except in the case of section 8(1)(e), where section 8 uses the words “could reasonably be expected to”, the institution must provide “detailed and convincing” evidence to establish a “reasonable expectation of harm”. Evidence amounting to speculation of possible harm is not sufficient.²⁴

[43] It is not sufficient for an institution to take the position that the harms under section 8 are self-evident from the record or that a continuing law enforcement matter constitutes a *per se* fulfilment of the requirements of the exemption.²⁵

[44] The police submit that the record contains the notes of a YRP superintendent member of the CFSEU made during a joint managers meeting of the CFSEU. The police state that the CFSEU is a joint-force operation tasked with the mandate to expose, investigate, prosecute, dismantle and disrupt organized criminal enterprises, therefore the projects involve organized crime.

[45] The YRP describes these notes as information relating to:

- a particular “project” the task force was working on (the remainder of page one);
- other “projects” the task force is working on (lines 1-3 of page two); and,
- CFSEU processes and mandates (remainder of page two).

[46] The appellant promises that he would not disclose any information he receives and also points out that he narrowed his request during mediation to information regarding his conduct only. He also believes that the projects discussed may at this time be concluded or before court so he sees no issue in having the information disclosed now.

Analysis/Findings re: section 8(1)(g)

[47] The information at issue is notes made during a CFSEU meeting concerning its investigation into organized crime. The YRP has claimed that the portion of the record that concerns the appellant’s conduct has been excluded by reason of the application of section 52(3)3 as set out above. The remainder of the record contains notes related to the CFSEU’s mandate of exposing, investigating, prosecuting, dismantling and disrupting organized criminal enterprises.

²⁴ Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers’ Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

²⁵ Order PO-2040; *Ontario (Attorney General) v. Fineberg*.

[48] Section 8(1)(g) prevents the disclosure of information that could reasonably be expected to interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons. The term “intelligence information” means:

Information gathered by a law enforcement agency in a covert manner with respect to ongoing efforts devoted to the detection and prosecution of crime or the prevention of possible violations of law. It is distinct from information compiled and identifiable as part of the investigation of a specific occurrence.²⁶

[49] I find that the CFSEU, as a partnership among various police forces tasked with the mandate to expose, investigate, prosecute, dismantle, and disrupt organized criminal enterprises, is a law enforcement agency. I further find that the information at issue in the record was gathered by the CFSEU in a covert manner with respect to ongoing efforts devoted to the detection and prosecution of crime or the prevention of possible violations of law. I find that disclosure of this intelligence information could reasonably be expected to reveal law enforcement intelligence information.

[50] I have considered the appellant’s promise that he is bound not to disclose any of the information in the record. However, the IPC has found in previous orders that disclosing records to a requester under the access scheme in Part II of *MFIPPA* is deemed to be disclosure to the world.²⁷ *MFIPPA* does not impose any restrictions or limits on what a requester can do with records disclosed to him or her.

[51] I have also considered the appellant’s concern that the investigation has concluded and therefore, section 8(1)(g) does not apply. I find that even if the investigation has concluded disclosure of the information at issue could reasonably be expected to reveal law enforcement intelligence information respecting the organizations that were investigated by the CFSEU.

[52] Accordingly, I find that subject to my review of the police’s exercise of discretion, the remaining information at issue in the record is exempt by reason of section 8(1)(g).

D. Did the institution exercise its discretion under section 8(1)(g)? If so, should this office uphold the exercise of discretion?

[53] The section 8(1)(g) exemption is discretionary and permits an institution to disclose information, despite the fact that it could withhold it. An institution must

²⁶ Orders M-202, MO-1261, MO-1583, PO-2751; see also Order PO-2455, confirmed in *Ontario (Ministry of Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No. 4233 (Div. Ct.).

²⁷ Orders M-96, P-169, P-679, MO-1719, MO-1721-F, PO-3117 and MO-2909.

exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[54] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[55] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.²⁸ This office may not, however, substitute its own discretion for that of the institution.²⁹

[56] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:³⁰

- the purposes of the *Act*, including the principles that
 - information should be available to the public
 - individuals should have a right of access to their own personal information
 - exemptions from the right of access should be limited and specific
 - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization

²⁸ Order MO-1573.

²⁹ Section 43(2).

³⁰ Orders P-344 and MO-1573.

- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

[57] The police state that when determining whether or not to release the information they looked to whether the appellant was seeking access to his own information, the nature of information and the extent to which it is significant and/or sensitive to the institution and the relationship between the appellant and any affected parties.

[58] The YRP states that the majority of the information in the record is in relation to the tasks and projects of the CFSEU and its investigations into organized crime and not the conduct of the appellant. The YRP states that they considered the sensitivity of the record and the potential harm the release of the record could cause to the CFSEU and its operations. They also considered the fact that the appellant states that he is only interested in information about his conduct. They state that any specific information in the record regarding the appellant's conduct is employment-related information that is excluded from the *Act*.

[59] The appellant states that the YRP has exercised their discretion in bad faith and for an improper purpose and has taken into account irrelevant considerations and not taken into account relevant considerations. He bases these claims on the fact that the CFSEU is an RCMP unit under the federal government and the YRP has "...falsely represented CFSEU as an agency of the Ontario Government."

[60] The appellant also points out that the superintendent who wrote the notes in the record was never his supervisor. The appellant states that he never worked for the CFSEU and reiterates that by virtue of his employment he is bound to keep any information he receives confidential.

Analysis/Findings

[61] Based on my review of the information at issue, I find that the YRP in exercising their discretion took into account relevant considerations and did not take into account irrelevant considerations. The information at issue is sensitive information gathered in the course of a law enforcement investigation into organized crime.

[62] Although the appellant may not have been assigned to the CFSEU at the time of the recording of the notes that comprise the record, nevertheless, the information that I have found subject to section 8(1)(g) reveals law enforcement intelligence information respecting criminal organizations. This information is significant to the police and I find that the appellant does not have a sympathetic or compelling need to receive the information.

[63] Accordingly I uphold the police's exercise of discretion under section 8(1)(g) and find that the remainder of the record is exempt by reason of this exemption.

ORDER:

1. I order the police to issue a decision letter to the appellant with respect to lines 5 to 13 of page 2 of the record, in accordance with sections 19 and 22 of the *Act*, using the date of this order as the date of the request.
2. I uphold the police's decision that the first 12 lines of page 1 of the record are not responsive to the request.
3. I uphold the police's decision that the remainder of the record is exempt by reason of section 8(1)(g).

Original signed by: _____
Diane Smith
Adjudicator

_____ July 30, 2013