

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2930

Appeal MA12-325

York Regional Police Services Board

August 6, 2013

Summary: The appellant sought access to notes about his conduct made by a specific police staff sergeant. The police denied access, citing the exclusion in section 52(3)3 (labour relations and employment records), the mandatory exemption in section 9(1)(d) (relations with other governments), and the discretionary law enforcement exemptions in sections 8(1)(d) and (g). The police also claimed that portions of the records were non-responsive to the appellant's request. This order finds that most of the information in the records is not responsive to the appellant's request and also determines that the remainder of the information in the records is excluded from the *Act* by reason of section 52(3)3.

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

Orders and Investigation Reports Considered: Orders MO-2825 and MO-2925.

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 January 01, 2009 to April 26, 2012, all police officer rough, draft and finished notes, notebook entries, including notes regarding the

CFSEU-Toronto-Joint Managers meetings made by [a named staff sergeant (S/Sgt)], of the York Regional Police, that reference [the requester].

[2] The police located responsive records and 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 may exist of S/Sgt. [name] would have been 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, appealed this decision.

[4] During mediation, the appellant confirmed that he is only interested in comments made about his conduct and that he is not interested in the identity of confidential sources or other details of the investigation. 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 and that although the appellant was an employee of the RCMP, he was assigned to the joint task force and the records requested were created by certain member of the York Regional Police, who at the time 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 certain parts of the notes and that other portions of the records were not responsive to the request.

[6] As the appeal was not resolved during mediation, the file was transferred to the adjudication stage, where an adjudicator conducts an inquiry under the *Act*. 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 in response which were shared with the appellant, along with a Notice of Inquiry. The appellant provided representations in response.

[7] In this order, I find that most of the information in the records is not responsive to the appellant's request. I also find that the remainder of the information in the records is excluded from the *Act* by reason of section 52(3)3.

RECORDS:

[8] The records consist of excerpts from six notebooks of the named staff sergeant dated from October 5, 2009 to January 29, 2012, more particularly:

Record#	Date	Pages	Exemption(s)/Exclusion Applied
1	December 11, 2009	1-2	8(1)(d) & (g)
2	March 18, 2010	3-5	52(3)3 to: page 3, lines 6-17 8(1)(d) & (g) to: page 3 - except lines 6-17 page 4 - except line 1 page 5 - all 9(1)(d) to: page 4 - except line 1 page 5 - all Responsiveness to: page 4 line 1
3	Undated	6-7	52(3)3 to: page 6 - lines 8-10 8(1)(d) & (g) to: page 6 - except lines 8-10 page 7 - all 9(1)(d) to: page 6 - except lines 1-22 page 7 - all
4	September 7, 2010	8-9	8(1)(d) & (g) to: page 8 - except lines 1-8 page 9 - all Responsiveness to: Page 8 - lines 1-5
5	February 22 and 23, 2011	10-11	8(1)(d) & (g) to: page 10 - except lines 1-2 page 11 - all 9(1)(d) to: page 10 -except lines 1-2 page 11- lines 1-4 Responsiveness to: page 10 - lines 1-2
6	Undated - excerpted from notebook of September 3, 2010 to January 18, 2011	12	52(3)3 to: page 12 - except lines 1-4 Responsiveness to: page 12 - lines 1-4

7	April 7, 2011	13-14	52(3)3 to: page 13 except lines 1-17 page 14 lines 1-8 8(1)(d) & (g) to: page 13 lines 1-17 page 14 except lines 1-8
8	Undated - excerpted from notebook of November 7, 2011 to January 29, 2012	15-16	52(3)3 to: pages 15-16

ISSUES:

- A. What is the scope of the request? What records are responsive to the request?
- B. Does section 52(3)3 exclude the information at issue in the records from the *Act*?

DISCUSSION:

A. What is the scope of the request? What records are 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 is an RCMP (Royal Canadian Mounted Police) Officer who was seconded to the CFSEU. They explain that the CFSEU is a joint-force operation tasked with the mandate to expose, investigate, prosecute, dismantle and disrupt organized criminal enterprises. They point out that the appellant's original request was for all the original, rough, draft and finished notes and notebook entries, including notes regarding the CFSEU-Toronto Joint Managers meetings made by a particular staff sergeant of the YRP that referenced the appellant for a specific time period. The police state that:

The staff sergeant located 16 pages of notes that consisted of notes made on 11 separate occasions that contained records that were responsive to the original request. Access was denied to the records as the notes refer to the staff sergeant's day to day responsibilities as a supervisor of an investigation unit with the York Regional Police as well as information collected by his unit. One of the unit's responsibilities is investigating organized crime within York Region. On occasion intelligence information collected by this unit is dismantled to the CFSEU in order to assist them with joint investigations. The requester was a member of the joint task force, so references to him are made throughout the staff sergeant's notes in relation to his role as a member of CFSEU and information forwarded to CFSEU. Also there is reference in the officers' notes to the requester making presentations at CFSEU meetings that the staff sergeant attended. During mediation the requester advised the mediator that he was narrowing the scope of this request [and] was only seeking access to records made in relation to his conduct.

After a further review of the records and mediator's report, none of the identified records contain any information regarding the conduct of the requester [emphasis added].

[13] The appellant states that the CFSEU is a section within the RCMP, funded, operated and administrated by the RCMP. There is a CFSEU located in the Province of Ontario. The RCMP also has similar units in other provinces across the country. He states that when the CFSEUs are established, partner agencies agree to a memorandum

¹ Orders P-134 and P-880.

² Orders P-880 and PO-2661.

of understandings (MOU's) regarding their participation. All supervision within the CFSEU comes from the chain of command within the CFSEU.

[14] The appellant states that he was never seconded to the CFSEU because he is an RCMP officer and it is an RCMP section. For two years he was assigned to the CFSEU. After being in another unit, he was re-assigned within the RCMP to a position back in the CFSEU, but then was ordered not to report to the CFSEU.

[15] The appellant states that the RCMP officer in charge of the CFSEU advised that the partner agencies (which included the YRP) would withdraw their membership if he returned to the CFSEU, and did not provide any details as to why. The partner agencies provided their rationale to the RCMP, therefore, he submits that the information he seeks "reasonably relates" to [his] request. He states that:

The requested documents "reasonable relate" to the request because the notes produced by YRP S/Sgt [name] directly correspond to information according to [a named superintendent] that the RCMP utilized to take actions.

Analysis/Findings

[16] The records are a YRP staff sergeant's handwritten notes from his notebooks. The appellant is only seeking information in the records about his own conduct.

[17] Information about the appellant is found only at:

Page Number	Line(s) Numbers	Section Claimed
2	11	8(1)(d) & (g)
8	18	8(1)(d) & (g)
10	7	8(1)(d) & (g), 9(1)(d)
12	10 - 17	52(3)3
13	18 - 24	52(3)3
14	1 - 3	8(1)(d) & (g)
15	23	52(3)3

[18] Of this information, only page 12, lines 10 to 17, and page 13, lines 18 to 24, refer to the appellant's conduct. Although there is information about the appellant in the remaining items listed in this chart, the appellant is mentioned only briefly in his capacity as an RCMP officer, including, for example that he attended a meeting. The police have not claimed the section 52(3)3 employment and labour relations exclusion for this information, other than for the information at page 15 line 23. The information on page 15, which is subject to the section 52(3)3 exclusion claim, concerns the conduct of a police officer other than the appellant.

[19] Accordingly, based on a very careful review of the information in the records, I find that all of the information in the records, except for page 12, lines 10 to 17, and page 13, lines 18 to 24, is not responsive to the appellant's request, as modified during mediation. Page 12, lines 10 to 17, and page 13, lines 18 to 24, only mention the appellant's conduct briefly, in relation to another individual's behaviour.

[20] I will now consider whether section 52(3)3 excludes page 12, lines 10 to 17, and page 13, lines 18 to 24, from the *Act*. There is no need for me to consider the application of the sections 8(1)(d) and (g) and 9(1)(d) in this order, as I have found the information to which these exemptions have been claimed to be not responsive to the appellant's request as modified during mediation.

B. Does section 52(3)3 exclude the information at issue in the records from the *Act*?

[21] 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 employment related matters in which the institution has an interest.

[22] 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*.

[23] 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

[24] 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

[25] The term "employment of a person" refers to the relationship between an employer and an employee. The term "employment-related matters" refers to human

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.

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

[26] 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

[27] 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

[28] 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

[29] 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.⁹

[30] 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.

[31] The police submit that portions of the records refer to the relationship between the staff sergeant who wrote the notes that comprise the records and the officers that he supervises. They state that one of its unit members works closely with the appellant on joint investigations with the CFSEU, and therefore a portion of the records contain

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.).

⁹ *Ministry of Correctional Services*, cited above.

employment-related information regarding that YRP officer and his conduct while working with members of the CFSEU, not the appellant's conduct.

[32] The police state that the information at issue is information regarding employment related matters, including performance reviews, training and discipline files of individuals under the supervision of the staff sergeant. They also state that none of the records fall under the application of section 52(4) as they do not refer to any agreements or an expense account submitted by an employee.

[33] The appellant states that he is not employed or supervised by YRP staff sergeant, nor did he work with police officers from YRP Intelligence Section, of which the staff sergeant was the supervising officer.

Analysis/Findings

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

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

[36] 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

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.

- the work of an advisory committee regarding the relationship between the government and physicians represented under the *Health Care Accessibility Act*¹⁶

[37] 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

[38] 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

[39] 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.

[40] 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

[41] Although the YRP is a partner in the CFSEU, the appellant is an RCMP officer. He has never worked for the YRP either directly or indirectly through the CFSEU. The YRP’s staff sergeant who took the responsive notes was never the appellant’s supervisor. However, this staff sergeant was the supervisor of the YRP officer whose conduct is the subject matter of the notes at issue.

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

¹⁹ *Ministry of Correctional Services*, cited above.

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.

[42] In the decision of the Court of Appeal in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*,²² it described the section 52(3)3 exclusion as relating to matters concerning an institution's own workforce.

[43] Order MO-2925 concerned a request for access to the notes made by a YRP superintendent at a CFSEU meeting. I found that, although a portion of these notes contained employment-related information, they were not communications about employment-related matters in which the YRP, as an employer, had an interest as the subject matter of the information at issue was an RCMP officer.

[44] However, in this appeal, I find that the notes at issue contain employment-related information in which the YRP, as an employer, has an interest. The notes concern the conduct of the YRP's own police officer. Although the appellant is mentioned peripherally, the notes at issue are communications about employment-related matters in which the YRP, as an employer, has an interest and relates primarily to their own employee. Therefore, I find that part 3 of the test has been met and that page 12, lines 10 to 17, and page 13, lines 18 to 24, of the records are excluded from the *Act* by reason of section 52(3)3. Furthermore, the exception to this exclusion in section 52(4) does not apply to this information.

[45] Accordingly, as all of the information in the records is either non-responsive to the request or excluded from the *Act* by reason of section 52(3)3, I will uphold the police's decision to deny access to the records and dismiss the appeal.

ORDER:

I uphold the police's decision to deny access to the records and dismiss the appeal.

Original signed by: _____
Diane Smith
Adjudicator

_____ August 6, 2013

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