

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3249

Appeal MA14-193

Toronto Police Services Board

October 5, 2015

Summary: The Toronto Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records related to a complaint made about the appellant's treatment by the police. The police denied access to the police officer's statement made in response to the complaint, citing the exclusionary provision in section 52(3) (labour relations and employment records) of the *Act*. The police also denied access to portions of police officers' notebooks as being non-responsive to the appellant's request. This order upholds the police's decision that the police officer's statement is excluded from the application of the *Act* by reason of section 52(3). This order also upholds the police's decision that the withheld notebook portions are not responsive to the appellant's 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, 17(1).

Orders and Investigation Reports Considered: Order PO-3075.

OVERVIEW:

[1] The Toronto Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) for:

1. ... the reporting procedures to be followed by officers in reporting on incidents involving police action. In particular, but without limiting the generality of the foregoing sentence, this request is for; a) the time within

which such reports on incidents are to be made; and b) the information concerning the use of force by officers to be contained in such reports.

2. ... any report by any officer or officers involved in attendance at [identified address] at approximately [time and date], concerning me. I am the leaseholder and resident of that apartment.

3. ... the procedures, in the case of police action where there has been an intrusion on private property that is found to be baseless, to contact the private citizens affected by that intrusion, to apologize for the intrusion and explain the reasons for that intrusion.

4. ... the procedures to be followed by an officer in initiating the use of force in a situation where no force has been initiated against him/her or anyone else involved in that situation.

[2] In their decision, the police state the following:

Please be advised that this office was advised by the Toronto Police Service Professional Standards Unit [TPSPSU] that there is an ongoing investigation with the Office of the Independent Police Review Director (OIPRD) in regarding to the aforementioned incident. Minimal access is therefore granted to the only record (attending officers' memorandum book notes) located concerning your request at this time. Access is denied to certain information pursuant to subsections 8(1)(a), 14(1)(f), 14(3)(b), 38(a) and 38(b) of the *Municipal Freedom of Information and Protection of Privacy Act*.

[3] The requester, now the appellant, appealed the decision.

[4] During the course of mediation, the appellant advised the mediator that he believed that a record containing a statement from an identified officer ought to exist. As a result, the police conducted a further search and issued a supplementary decision letter denying access and indicating that records (such as the statement made by an identified officer) related to complaints filed by the requester and investigated by the police, were collected, prepared, maintained and used to investigate an allegation of misconduct under the *Police Services Act* (the *PSA*). The police advised that the records no longer fall under the jurisdiction of the *MFIPPA* and would qualify for exclusion under the labour relations and employment-related exclusion at section 52(3) of the *MFIPPA*.

[5] Through further discussions with the police, it was discovered that the OIPRD investigation was completed. As such, the police issued a revised decision letter and granted further access to the attending officers' memorandum book notes and withdrew reliance on the discretionary law enforcement exemption at section 8(1)(a) as an exemption being claimed. Access was denied to certain information pursuant to the law enforcement exemption at section 8(1)(l), in conjunction with section 38(a), and the

discretionary personal privacy exemption at section 38(b). Access to some other information was denied on the basis that it was not responsive to the request.

[6] The mediator then contacted an affected person in an attempt to seek consent to release further information to the appellant. The affected person did not consent to the release of their personal information.

[7] No further mediation was possible and the appellant confirmed with the mediator that he would like this appeal to move forward to adjudication. The appellant also confirmed that the information that was withheld pursuant to the exemptions set out above were no longer at issue. However, the information deemed non-responsive by the police remained at issue, along with the records withheld pursuant to the exclusion at section 52(3) of *MFIPPA*.

[8] As no further mediation was possible, this file was transferred to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry. Representations were sought and exchanged between the parties in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

[9] In this order, I uphold the police's decision and dismiss the appeal.

RECORDS:

[10] The records remaining at issue consist of an officer's statement (hardcopy and audio) and officer's notes.

ISSUES:

- A. Does the section 52(3) labour relations and employment records exclusion exclude the audio and hardcopy statement of the named police officer from the *Act*?
- B. What is the scope of the request? Are the police officers' notes responsive to the request?

DISCUSSION:

A. Does the section 52(3) labour relations and employment records exclusion exclude the audio and hardcopy statement of the named police officer from the *Act*?

[11] Section 52(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:

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.

[12] 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*.

[13] 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.¹

[14] 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.²

[15] 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.³

[16] 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.⁴

[17] Section 52(3) may apply where the institution that received the request is not

¹ Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

² *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.

³ Order PO-2157.

⁴ *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.

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*.⁵

[18] 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.⁶

[19] 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.⁷

[20] By way of background, the police state that they attended at the appellant's address in response to a 911 emergency call. It was later found out that a wrong apartment number was provided to them and that the original 911 call was meant for another apartment.

[21] The police state that they provided the appellant with minimal access to the attending police officers' memorandum book notes due to the fact that this incident was investigated by the Office of the Independent Police Review Director (OIPRD), which is responsible for receiving, managing and overseeing all public complaints about the police in Ontario.

[22] The police later provided the appellant with further access to these notebooks when the OIPRD investigation was completed during the course of mediation of this appeal.

[23] The police state that access to the statement made by an identified police officer was denied as it relates to the complaints filed by the appellant and investigated by the Toronto Police Service Professional Standards Unit. They submit that such records were collected, prepared, maintained and used to investigate an allegation of misconduct under the *PSA* and are excluded from *MFIPPA* by reason of the exclusion in section 52(3).

[24] In particular, the police state that in this case, the audio and hardcopy statement from the named police officer was collected, prepared, maintained and used to investigate this police officer's conduct under the *PSA* after an OIPRD complaint was filed by the appellant. During the *PSA* investigation, they state that these records were

⁵ Orders P-1560 and PO-2106.

⁶ *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.).

⁷ *Ministry of Correctional Services*, cited above.

collected and disclosed to the OIPRD as part of the complaint process.

[25] The police further state that as the OIPRD has the authority to recommend the laying of charges under the *PSA* against the officer, the investigation may have resulted in disciplinary action.

[26] The appellant states that the statement should be disclosed to him because he already knows about some of the information in the statement. As such, he claims that the absurd result principle or waiver should apply.

Analysis/Findings

[27] It appears from the police's representations that they are relying on the exclusion in section 52(3)3. The phrase "labour relations or employment-related matters" in section 52(3)3 has been found to apply in the context of disciplinary proceedings under the *Police Services Act*.⁸

[28] 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.⁹

[29] Records that are 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.¹⁰

[30] In this appeal, it is clear that the statement was prepared for an employment-related matter in which the police have an interest. The top of the hardcopy of the statement is entitled "Complaint Response" and was prepared in response to the complaint made by the appellant about this officer's behaviour. The statement was disclosed to the OIPRD as part of the complaint process.

[31] In Order PO-3075, the adjudicator considered the application of section 65(6)3,¹¹ to complaints that the appellant had brought against the Ontario Provincial Police (the OPP). In that appeal, the adjudicator found that:

The term "employment related matters" in section 65(6)3 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.¹⁵ I find that the records in these appeals relating to the PSB

⁸ Order MO-1433-F.

⁹ *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above.

¹⁰ *Ministry of Correctional Services*, cited above.

¹¹ Section 65(6)3 of the *Freedom of Information and Protection of Privacy Act* (the provincial *Act*) is the equivalent to section 52(3)3 of *MFIPPA*.

[Professional Standards Branch] investigation about the conduct of specific OPP officers from the Bancroft detachment are “employment related” because of the potential for disciplinary action against those officers. Moreover, as the employer of these officers, the ministry clearly has “an interest” in the PSB’s decisions with respect to the complaints filed against them and the outcome of the subsequent reviews conducted by OCCPS.¹²

I find that these records were collected, prepared, maintained or used by or on behalf of the ministry by the OPP and OCCPS in relation to meetings, consultations, discussions or communications about employment related matters involving OPP officers in which the ministry has an interest. Consequently, these records are excluded from the scope of the Act under section 65(6)3. Section 65(7) provides exceptions to the section 65(6) exclusions but none of them apply to these records.

[32] In this appeal, the records at issue, a statement in audio and hardcopy format, was made by the named police officer in response to the complaint brought by the appellant against him, which statement was collected by the police and disclosed to the OIPRD as part of the complaint process.

[33] I find that the records relate to an investigation into the conduct of a police officer and are “employment-related” because of the potential for disciplinary action against this officer. Moreover, as the employer of this police officer, the police clearly have “an interest” in the subject matter of the records as they relate to the complaints filed against their officers and the outcome of the review conducted by the OIPRD. The Office of the Independent Police Review Director (OIPRD) receives, manages and oversees all complaints about police in Ontario.¹³

[34] I find that the records at issue, the statement in audio and hardcopy format, were collected, prepared, maintained or used by the police in relation to meetings, consultations, discussions or communications about employment-related matters involving the police officer in which the police have an interest. I further find that the exceptions to section 52(3) in section 52(4) do not apply. Consequently, the statement, in both audio and hardcopy form, is excluded from the scope of *MFIPPA*.

[35] As the statement is excluded from *MFIPPA*, the *Act* has no application to it and I am unable to consider whether the principles of absurd result or waiver apply.

¹² The OCCPS, the Ontario Civilian Commission on Police Services, now the OCPC (the Ontario Civilian Police Commission) is an independent oversight agency committed to serving the public by ensuring that adequate and effective policing services are provided to the community in a fair and accountable manner under the Ontario *Police Services Act*. See <http://www.ocpc.ca/english/index.aspx>

¹³ See <http://www.oiprd.on.ca/En/Pages/Home.aspx>

B. What is the scope of the request? Are the police officers' notes responsive to the request?

[36] 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).

[37] 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.¹⁴

[38] To be considered responsive to the request, records must "reasonably relate" to the request.¹⁵

[39] The police state that it withheld the non-responsive portions of the police officers' notes as these portions contain information concerning other calls the officers attended, which are completely unrelated and not responsive to the appellant's request.

[40] The appellant did not provide representations on this issue.

Analysis/Findings

[41] Based on my review of the police officers' notebooks, I agree with the police that the portions of the notebooks they deemed non-responsive are non-responsive to the appellant's request for information about himself. The information that the police have deemed non-responsive is about investigations involving the activities of other individuals. The withheld portions of these notebooks contain information that is not about the appellant's interaction with the police, as referred to in his request and in his

¹⁴ Orders P-134 and P-880.

¹⁵ Orders P-880 and PO-2661.

representations.

[42] Accordingly, I am upholding the police's decision that the withheld portions of the police officers' notebooks are not responsive to the appellant's request.

ORDER:

I uphold the police's decision and dismiss the appeal.

Original Signed by: _____

Diane Smith
Adjudicator

_____ October 5, 2015