

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3239

Appeal MA14-18

Kingston Police Services Board

Sept 9, 2015

Summary: The appellant requested access to information from the police pertaining to a records check. The police identified records that were responsive to the request and, relying on the exclusion at section 52(3)3 of the *Act* (labour relations or employment information) denied access to them, in full. The adjudicator finds that the responsive records are subject to the *Act* and orders the police to issue an access decision.

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

Orders Considered: Orders MO-1400, MO-1661, MO-1649 and PO-2123.

OVERVIEW:

[1] The Kingston Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*) for access to information pertaining to a "CPIC and Security check" (Records Check). The requester explained that he had applied for the Records Check in order to work for a company that provided cleaning services at the Kingston Police Station and had received "a negative result".

[2] The police identified records that were responsive to the request and, relying on

the exclusion at section 52(3)3 of the *Act* (labour relations or employment information) denied access to them, in full.

[3] Mediation did not resolve the matter and it was moved to the inquiry stage of the appeals process where an adjudicator conducts an inquiry under the *Act*.

[4] During the inquiry into the appeal, I sought and received representations from the police and the appellant. Representations were shared in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

DISCUSSION:

LABOUR RELATIONS AND EMPLOYMENT RECORDS

[5] In this appeal, the police take the position that under section 52(3)3, the responsive records are excluded from the *Act*.

[6] 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.

[7] 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*.

[8] 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

[9] 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

[10] 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.³

[11] 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*.⁴

[12] 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.⁵

Section 52(3)3: matters in which the institution has an interest

[13] 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.

The police's initial representations

[14] In their initial representations, the police explained that the appellant applied to be employed as a cleaner with a third party company that provided cleaning services to

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 *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.

⁴ Orders P-1560 and PO-2106.

⁵ *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.).

the police. As part of the hiring process, the appellant consented to a criminal records reference check.

[15] The police submitted that:

While the appellant was not going to be a direct employee for the [police], if the appellant was successful in obtaining employment with [the cleaning company], he or she would be working in the non-public areas of the [police] station. The [police] retained the right to refuse access to any employee that [the cleaning company] might hire if the [police] deemed that the results of the [police] background check found that the prospective employee was not suitable – taking into consideration the greater security concerns.

Ultimately, the [police] administration judged that the appellant would not be given access to the restricted areas of the [police] building. Without being granted access to the majority of the building, the appellant was effectively stymied in his application for employment.

[16] With respect to the application of the exclusion at section 52(3)3 of *MFIPPA*, the police submit:

The records at issue relate to the reference checks performed by the [police] in relation to the appellant's potential employment as a cleaner working for [the cleaning company] in the [police] station. The reason that the records exist is in relation to the appellant's potential employment in the [police] station. These records were brought together in the process of evaluating the suitability of the appellant to work in the [police] station. It would be the continuing position of [the police] that these records were "collected, maintained or used by or on behalf of the institution in relation to ... meetings, consultations, discussions or ... employment related matters in which the institution has an interest".

[17] The police state that as a result of the record checks they performed, "it was decided that the appellant would not be granted access to the [police] station and this decision was communicated (consultations, discussions or communications) to the [cleaning company]". The police state that as result, the appellant was denied employment with the company.

[18] The police further submit that:

... Insofar as the records relate to the vetting of a prospective employee (granted of a third party agency), it is an employment related matter. As noted elsewhere, the reason for vetting a prospective employee is the greater security concerns related to being granted access to a Police station. This concern does not reflect "a mere curiosity or concern" but a

very serious concern given the special security concerns ... inherent in a Police station. The prospective employment of the appellant by [the cleaning company] working in the [police] station was a matter of serious concern to the [police]. The employment of the appellant by [the cleaning company] was a matter of serious concern to the [police]. The employment of the appellant by [the cleaning company] was an employment based matter in which the [police] had a strong interest.

The appellant's representations

[19] In his representations, the appellant sets out his work history which involved working as a police officer and in jails, federal institutions and Police stations as well as internationally. He states that one of the jobs he held required that he obtain a high level security clearance. He submits that:

I had full access to all secure and restricted areas in all of these places, and was privy to all sensitive reports and files.

I had access to the Corrections Canada computer system as well as the provincial court computer system. I also had access to CPIC.

[20] He submits that in the course of his former employment, he attended at the police station "for meetings and presentations and was granted entry to secure areas".

[21] He concludes his representations by further submitting:

I am surmising that there is information on CPIC that resulted in a negative decision. People's lives and careers have been dramatically affected by unproven and false allegations or circumstances that are on or remain on police computers. I feel vulnerable, my reputation ruined, and my livelihood affected by what the police will not release.

...

I was not seeking employment with the police force and the records must not be excluded from the *Act*.

The police's reply representations

[22] In reply, the police submit that the records:

... were created exclusively for the purpose of vetting the appellant as a cleaner with access to secure areas of the [police] station. If the appellant had applied for employment with [the cleaning company] working in any other facility, these records would never have been collected, prepared or maintained. ... The check as noted in the original representations was not

performed as a service for the appellant (so that he could either view or share these results) but in order for the [police] to make an informed decision as to the appellant's suitability. At the conclusion of their deliberations, the [police] concluded that the appellant had not passed the vetting process to be employed as described. ... If the [police] had deemed that the appellant ... was a suitable candidate, the results of those deliberations would not have been communicated back to the appellant. In either case (either passing or failing the vetting process), the [police] would only have communicated to [the cleaning company] whether or not the appellant had passed the vetting process.

[23] The police submit that this was a mechanism to "vet and by extension to protect [the police's] interests as they related to the suitability of the appellant for the position sought". They submit that they "had an active interest (not a mere curiosity) respecting the suitability of any applicant being employed in the [police] station by [the cleaning company] as a cleaner".

[24] In conclusion, the police submit:

... The records at issue were all collected, prepared, maintained and used exclusively by the [police] to assess the suitability of the appellant to work in the [police] station for [the cleaning company]. Thereupon the [police] used the information to conduct consultations/discussions respecting the suitability of the appellant to be employed as described. Clearly these records were used in relation to an employment-related matter (the employment of the appellant by [the cleaning company] and for the [police] albeit at third hand) in which the institution (the[police]) had an interest (employment at the [police] station).

Analysis and finding

[25] Assuming without deciding that the first two parts of the test are met, I will address part three of the test. In that regard, 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.⁶ Furthermore, the phrase "in which the institution has an interest" has been interpreted to refer to matters relating to the institution's own workforce.⁷

[26] In my view, section 52(3)3 does not apply, because the relationship between the police and the appellant is at arm's length. This is because the appellant was applying to be an employee of the cleaning company, not the police. This is not a situation

⁶ Order PO-2157.

⁷ *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above at paragraph 35.

where the appellant was applying for a reference check in the context of an application to work for the police, such as in Orders MO-1400 or MO-1649, or for another institution directly, such as in PO-2123. Rather, he is applying for a Records Check in order to work for a third party cleaning company. A situation very similar to the one addressed in Order MO-1661, where Adjudicator Donald Hale found a distinction between employment by a police service and employment by a university subject to a security clearance conducted by the police service.⁸ To find that section 52(3)3 applies in the circumstances before me would, in my view, cast the net too broadly.

[27] Accordingly, I find that the third requirement for the application of section 52(3)3 has not been met and as such the records are subject to the application of the *Act*. As a result of my finding I will order the police to provide an access decision to the appellant with respect to any responsive records.

ORDER:

1. I do not uphold the police's application of section 52(3)3 of the *Act*.
2. I order the police to make an access decision under the *Act* with respect to any records that are responsive to the appellant's request, in accordance with sections 19, 21 and 22 of the *Act*, treating the date of this order as the date of the request, and to provide their decision letter to the appellant.
3. In order to verify compliance with order provision 2, I reserve the right to require the police to provide me with a copy of the access decision sent to the appellant.

Original Signed by: _____
Steven Faughnan
Adjudicator

September 9, 2015 _____

⁸ Although decided prior to the subject university being made an institution under the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, the reasoning is, in my view, applicable to the appeal before me.