

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3398

Appeal MA15-48-2

Hamilton Police Services Board

January 6, 2017

Summary: The Hamilton Police Services Board (the board) received a multi-part request for access to information relating to two identified Deputy Chiefs and an identified Chief of the Hamilton Police Service. The board granted partial access to the responsive records for a fee. The appellant appealed the board's decision and the amount of the fee. During the course of mediation, copies of printouts from the board's employee database were identified as the only records remaining at issue in the appeal. The board took the position that they were excluded from the scope of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) in accordance with section 52(3)3. In this order, the adjudicator reduces the fee to \$39.80 and finds that section 52(3)3 applies to exclude the remaining records from the scope of the *Act*.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 45(1), 52(3)3 and 52(4); Regulation 823, section 6.

OVERVIEW:

[1] The Hamilton Police Services Board (the board) received a multi-part request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*) for access to information relating to two identified Deputy Chiefs and an identified Chief of the Hamilton Police Service. The request provided that the requester sought the following information:

- 1) Actual signed contract records for each person:

- [named Chief]
- [named Deputy Chief], and
- [named Deputy Chief]

2) Actual mileage logs for personal use of departmental vehicles records for the years 2010 to 2013 for each of:

- [named Chief]
- [named Deputy Chief], and
- [named Deputy Chief]

3) The personal use of an employer-supplied vehicle, or standby charge, is a taxable benefit and adds to the pension calculations of the employee. The Income Tax Act clearly specifies the rate at which the taxable benefit is to be calculated for the first 5,000 kilometers of use and the taxable benefit imposed for kilometers in excess of 5,000 kilometers.

Please supply the actual records of calculations of taxable benefits for the use of the motor vehicles under the Income Tax Act for each year 2010 to 2013 for:

- [named Chief]
- [named Deputy Chief], and
- [named Deputy Chief]

4) You have confirmed that these individuals also received a "Car Allowance". What is the authority for the payments in light of the fact that they also receive the use of a department supplied vehicle 24 hours a day and 365 days a year? Please supply the actual records for car allowance payments together with an explanation of how the allowances were calculated and records of Police Board Approvals for 2010 to 2013 for:

- [named Chief]
- [named Deputy Chief], and
- [named Deputy Chief]

5) Actual records for carry forward of accumulated vacations for each person for each year 2010 to 2014:

- [named Chief]

- [named Deputy Chief]

6) You have confirmed that no records exist to verify the exigencies under which the individuals were unable to use their vacation within the years earned. How did these individuals accumulate vacations to carry forward without Police Board approval bearing in mind that the vacations are accumulated at one rate and paid out at a new rate?

[2] The board initially relied on section 20.1 of the *Act* (frivolous or vexatious request) to deny access to the requested information. The appellant appealed the board's initial decision and appeal file MA15-48 was opened by this office. That file was closed when the board issued a revised access decision.

[3] In response to the appellant's multi-part request, the board's revised access decision provided a response to a number of the items and also provided responsive records to the appellant. Regarding the appellant's request for carry forward of accumulated vacations in item 5 and the explanation requested in item 6, the board stated:

Vacation time carried forward. As you will note from the Chief's agreement Article 4 there are provisions for the Chief to carry vacation time forward with permission from the board. In each of the Deputy's agreements they are also allowed this benefit and do not require the Board's permission.

No further details will be released with respect to vacation time or exigencies of the Service as those records are [excluded from the scope of the *Act*] under section 52(3) which states:

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:

52(3)3 meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

[4] The Board also claimed a fee of \$98.55 for access to the information it was prepared to disclose and, in an invoice that accompanied its revised access decision letter, set out the following charges as being actually incurred for processing the request and preparing the record for disclosure:

Photocopying

Number of pages to be released	49
Photocopying – charge per page	\$.20
Total charge for photocopying	\$9.80
Search Time	
Total minutes to locate and assemble	60
Search time – charge per minute	\$.50
Total charge to search	\$30.00
Preparation Time	
Total minutes to prepare documents	98
Preparation time – charge per minute	\$.50
Total charge to prepare	\$49.00
Shipping/Registered Mail	\$9.75
Total Fee	\$98.55

[5] The board removed the Shipping/Registered Mail charge of \$9.75 and reduced the fee to a total of \$88.80.

[6] The requester (now the appellant) appealed the board’s decision and this appeal file (MA15-48-2) was opened.

[7] During the course of mediation, the mediator received copies of printouts from the board’s personnel data base for annual vacation time, described in the Mediator’s Report as being the records “related to vacation time carried forward and the exigencies or circumstances, that permitted the individual to do that”. The Mediator’s Report indicated that these were the only records remaining at issue and that the board took the position that they were excluded from the scope of the *Act* in accordance with section 52(3)3.

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

[9] I commenced my inquiry by sending the board a Notice of Inquiry setting out the facts and issues in the appeal. The board provided responding representations. In its representations, the board defined the records at issue as being printouts from its employee database relating to annual leave/vacation time requested, taken, cancelled,

deferred or the accumulated carryover by the Deputy Chiefs and the Chief of Police for 2010-2014.

[10] I then sought representations from the appellant on the facts and issues set out in a Notice of Inquiry as well as the board's representations.

[11] In this order, I reduce the fee to \$39.80 and find that section 52(3)3 applies to exclude the records remaining at issue from the scope of the *Act*.

RECORDS

[12] In addition to the fee, remaining at issue in this appeal is whether section 52(3)3 operates to exclude the printouts from the board's employee database relating to annual leave/vacation time requested, taken, cancelled, deferred or the accumulated carryover by the Deputy Chiefs and the Chief of Police for 2010-2014, from the scope of the *Act*.

ISSUES:

- A. Should the fee be upheld?
- B. Does section 52(3)3 exclude the records from the *Act*?

DISCUSSION:

Issue A: Should the fee be upheld?

[13] Section 45(1) requires an institution to charge fees for requests under the *Act*. That section reads:

A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,

- (a) the costs of every hour of manual search required to locate a record;
- (b) the costs of preparing the record for disclosure;
- (c) computer and other costs incurred in locating, retrieving, processing and copying a record;
- (d) shipping costs; and

(e) any other costs incurred in responding to a request for access to a record.

[14] More specific provisions regarding fees are found in sections 6 and 9 of Regulation 823. Those sections read:

6. The following are the fees that shall be charged for the purposes of subsection 45(1) of the *Act* for access to a record:

1. For photocopies and computer printouts, 20 cents per page.
2. For records provided on CD-ROMs, \$10 for each CD-ROM.
3. For manually searching a record, \$7.50 for each 15 minutes spent by any person.
4. For preparing a record for disclosure, including severing a part of the record, \$7.50 for each 15 minutes spent by any person.
5. For developing a computer program or other method of producing a record from machine readable record, \$15 for each 15 minutes spent by any person.
6. The costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying the record if those costs are specified in an invoice that the institution has received.

9. If a person is required to pay a fee for access to a record, the head may require the person to do so before giving the person access to the record.

[15] This office may review an institution's fee and determine whether it complies with the fee provisions in the *Act* and Regulation 823.

The board's representations

[16] The board submits that its final access decision was accompanied by an invoice setting out the fee which was based on the actual work done. It states that an error was subsequently discovered on the fee estimate as a shipping/registered mail charge of \$9.75 had been added and was not required. Once the error was discovered it was removed and a new estimate was released for the total of \$88.80. The board states that the appellant paid the fee and received the records that it had decided to disclose.

The appellant's representations

[17] The appellant submits that only the cost of printing the pages of the records he

received should be upheld. He takes the position that except for the photocopying costs all the other fees charged by the board are discretionary and should not be allowed.

[18] The appellant's alternative position is that his municipal tax payments, a portion of which goes to the board's budget, should cover the amounts claimed for search and preparation time.

[19] He adds:

In addition, [in his former position], I have extensive knowledge of the keeping and preparing of accounting records and the time involved in servicing information requests. Computer storage of accounting records makes the task much more efficient. All it requires is the cost of printing.

[20] The appellant submits that the charges for search and preparation time should be rejected as "[t]his charge is another method the institution uses to burden and discourage the taxpayer."

Analysis and finding

[21] To begin, I do not accept the appellant's position that certain fees are discretionary. The fee provisions in the *Act* are clearly set out and based on a "user-pay" principle. Each institution is required to review its own record holdings for responsive records and is required to charge fees as set out in the *Act*. The alternative argument regarding the appellant's municipal tax payments and that fees are another way to burden and discourage the taxpayer is not relevant to this fee appeal.

[22] Based on my review of the materials before me, I find that the board provided me with sufficient evidence to substantiate the actual amount of time required to locate the responsive records disclosed to the appellant. However, I find that there is insufficient evidence provided in support of the board's claim for preparation time. I note in that regard that it appears that unsevered records were provided to the appellant. I therefore uphold the fee for search time in the sum of \$30.00 but not preparation time in the sum of \$49.00. The appellant does not take issue with the cost of photocopying.

[23] Accordingly, in all the circumstances, I reduce the board's fee to \$39.80.

Issue B: Does section 52(3)3 exclude the records from the *Act*?

[24] The board took the position that the records remaining at issue are excluded from the scope of the *Act* in accordance with section 52(3)3.

[25] 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:

Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

[26] 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*.

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

[28] 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

[29] 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

[30] 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

[31] 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.⁵

[32] 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-

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.

⁵ Orders P-1560 and PO-2106.

related matters are separate and distinct from matters related to employees' actions.⁶

[33] 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.

[34] If the records fall within any of the exceptions in section 52(4), the *Act* applies to them.

[35] Section 52(4) states:

This Act applies to the following records:

1. An agreement between an institution and a trade union.
2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.
3. An agreement between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees.
4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment.

The board's representations

[36] The board submits that it denied access to information contained in an employee database relating to annual leave/vacation time requested, taken, cancelled, deferred or the accumulated carryover by the Deputy Chiefs and the Chief of Police for 2010-2014.

[37] The board submits:

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

The requester has also been advised several times that the Deputy Chiefs do not require board approval to move, change or defer any vacation time and they only need to advise the Chief they are doing so. Their contract clearly states this.

The Chief however, is required to notify (seek approval) from the board (as his Employer) of any changes made to his vacation. This is a common practice/formality that to the best of my knowledge has never been denied. This process is considered employment relations between an employee and the employer.

[38] It submits:

Any further records/details of time signed for, taken, deferred, accumulated or carried over are contained in a Member Time Management database and any correspondence if it existed between the employer and the employee regarding time taken, deferred, cancelled or carried over are records collected, prepared and maintained in the employee data base and is used by the institutions Human Resources section in accordance with our annual leave signing policy.

[39] The board states that the records remaining at issue should be considered outside of the scope of the *Act*.

The appellant's representations

[40] The appellant's representations set out a chronology of his various access to information requests and a summary of his interactions with the board. He remains dissatisfied with the manner in which his requests were addressed and questions the bona fides of the board.

[41] The appellant submits that:

I have provided a detailed account, above, backed up with information and documents to illustrate the numerous occasions on which Hamilton Police Services has blocked my attempts to obtain information, provided me with misinformation or avoided providing information to me. The above should assist you in concluding that there should not be a further incidence of HPS preventing the public from knowing how the Chief and Deputies accumulated large vacation carryovers through the use of the terminology "contingency". The amount of payouts at the time employment is terminated, either at retirement or non-renewal of contracts is materially significant. One individual was paid in excess of \$125,000. Neither the carryforwards nor the payouts were referred to the Police Services Board for approval.

[42] With respect to section 52(3) in particular, the appellant submits that this section does not operate to exclude the records he is seeking.

[43] He submits:

The records do not contain employee names or T-4 information. They are accounting records needed to analyze and interpret accounting information for purposes of my concerns. It is necessary because most of the information posted on websites of other Police Services in Ontario consist of policies and by-laws and not actual accounting information. Hamilton Police Services posts no policies or by-laws.

..., I require these accounting records so that my analysis will be more informed, and the public will be better educated concerning how their dollars are allocated.

[44] He closes his representations by asking that I consider the taxpayers' interests and states that "[t]he taxpayers' interests are at stake and no one is above the law".

Analysis and finding

[45] I note that the contracts of the Chief and Deputy Chiefs set out in general terms their vacation and leave entitlements. The appellant is seeking more specific information that relates to the Chief and Deputy Chiefs, as the case may be.

Part 1: collected, prepared, maintained or used

[46] Based on my review of the records, which is taken from information contained in the employee database used by the board's Human Resources section, I am satisfied that the information in the records at issue was collected, prepared, maintained or used by the board.

Part 2: meetings, consultations, discussions or communications

[47] The records at issue consolidated the responsive employment annual leave/vacation time requested, taken, cancelled, deferred, or the accumulated carryover vacation entitlement information, that was provided to the board by the Chief or Deputy Chiefs as the case may be, which are reflected in the final records that were generated from the database for the purposes of this appeal. I am satisfied that the records at issue thereby reflect a communication for the purposes of part two of the test.

Part 3: labour relations or employment-related matters in which the institution has an interest

[48] 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.⁷

[49] The records collected, prepared, maintained or used by the board 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.⁸ As reflected in their contracts, the Chief and Deputy Chiefs are employees of the board. In the circumstances before me I am satisfied that the employment annual leave/vacation time requested, taken, cancelled, deferred or the accumulated carryover vacation entitlement information that was provided by the Chief or Deputy Chiefs, as the case may be, as reflected in the records, qualifies as an employment related matter in which the board has an interest.

[50] As all three parts of the test under section 52(3)3 have been met and I am satisfied that none of the exceptions in section 52(4) apply, the records at issue are excluded from the *Act*.

ORDER:

1. I reduce the board’s fee to \$39.80.
2. The records remaining at issue are excluded from the scope of the *Act*.

Original Signed by: _____
Steven Faughnan
Adjudicator

_____ January 6, 2017

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

⁸ *Ministry of Correctional Services*, cited above.