

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3414

Appeal MA15-390

Halton Regional Police Services Board

February 21, 2017

Summary: The police received a request under the *Act* for invoices sent to the police association for the recovery of the association president's salary and benefits for specifically identified years. The police denied access to the responsive records, advising that due to the application of the exclusion at section 52(3)3 for records related to labour relations and employment-related matters, the records fall outside of the scope of the *Act*. The requester appealed the police's decision. In this order, the adjudicator finds that the exclusion at section 52(3)3 applies and she upholds the police's decision that the records fall outside of 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, section 52(3)3.

Orders and Investigation Reports Considered: Order MO-3018.

Cases Considered: *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, 2003 CanLII 16894 (ON CA), [2003] O.J. No. 4123.

OVERVIEW:

[1] The Halton Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information relating to the salary and benefits of the Halton Regional Police Association's (the police association's) president. Specifically, the requester sought copies of the invoices sent from the police to the police association for the recovery of the president's gross salary and benefits for the years 2012, 2013 and 2014.

[2] The police denied access to the responsive records on the basis that they are excluded from the scope of the *Act* as a result of the application of the exclusion for records related to labour relations and employment-related matters at section 52(3)3.

[3] The requester, now the appellant, appealed the police's decision to deny access to the responsive records.

[4] During mediation, the mediator notified the individual who was president of the association during the years identified in the request (the affected party). The affected party took the position that, as the association is a non-profit organization, its records are not subject to the *Act*.¹

[5] As a mediated resolution could not be reached, the appeal was transferred to the adjudication stage of the appeal process for an adjudicator to conduct an inquiry. A Notice of Inquiry setting out the facts and issues on appeal was sent to the police, initially. The police responded with representations which were shared with the appellant pursuant to this office's sharing practices set out in *Practice Direction 7*. The appellant provided representations in response.

[6] The sole issue on appeal is whether the exclusion for labour relations and employment-related records at section 52(3)3 applies to the responsive records. In this order, I find that the exclusion at section 52(3)3 applies and that the records fall outside the scope of the *Act*. Accordingly, I uphold the police's decision not to disclose them to the appellant.

RECORDS:

[7] The records at issue are invoices for the salary and benefits of the president of the police association for the years 2012, 2013, and 2014. The invoices are prepared on a monthly basis. For the purpose of this appeal, the police have provided me with one sample invoice.

DISCUSSION:

Are the records excluded from the scope of the *Act* pursuant to the exclusion at section 52(3)3?

[8] The police take the position that the invoices detailing the salary and benefits of

¹ It should be noted that the fact that the police association is not an institution subject to *Act* (see Order MO-2813), does not mean that the records are not subject to the *Act*. The records at issue are subject to the *Act* by virtue of the fact that they are in the custody or control of the police services board which is an institution under the *Act* and, pursuant to section 4(1) of the Act, "[e]very person has a right of access to a record or a part of a record in the custody or under the control of an institution unless" either one of the exemptions outlined in the *Act* apply or if the head is of the opinion that the request is frivolous or vexatious.

the president of the police association are subject to the exclusion for labour relations and employment-related information at section 52(3)3 of the *Act*.

[9] If any of the paragraphs in section 52(3) apply to the records, and none of the exceptions found in section 52(4) apply, the records are excluded from the scope of the *Act*. 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.

[10] 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.²

[11] 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.³

[12] 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 arising from the relationship between a employer and employees that do not arise out of a collective bargaining relationship.⁴

[13] 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.⁵

[14] 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.⁶

² *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.), adopted in Order MO-2589 and others.

³ *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.

⁴ Order PO-2157.

⁵ *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.

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

Representations

[15] In their representations, the police do not specifically address how the invoices fit within the requirements of the exclusion at section 52(3)3. However, their representations provide some background about the requested records and the nature of the relationship between the police and the police association with respect to the payment of the police association president's salary and benefits.

[16] The police submit that the records at issue in this appeal, the invoices for the salary of the police association's president for the years 2012, 2013, and 2014, are prepared on a monthly basis by the police and contain both salary and benefit information. They submit that it is "financial information, i.e. employment-related matters in which the Police Service has a direct interest." They explain that the invoice is submitted to the police association on a monthly basis for payment and that this recovery is based on Article 14.01 (a) of the uniform collective agreement between the police and the police association which stipulates that the police incur "the compensation expense (salary and benefits) and then record a recovery such that the budget impact in any given fiscal period is \$0 to the taxpayers of the Regional Municipality of Halton." In support of their position, the police provided me with an excerpt of the relevant uniform collective agreement that discusses the terms of a leave of absence for the member elected as president of the association.

[17] The police submit that when contemplating the disclosure of the records at issue, they consulted the president of the police association (whose salary and benefits are indicated on the invoices) and he advised them that he does not consent to the disclosure of the requested information. They submit that they then looked at who pays the salary of the president, and determined that the salary, including benefits, is fully reimbursed to the police by the police association on a monthly basis.

[18] The appellant provided brief representations stating that despite the fact that the uniform collective agreement between the police and the police association in the current appeal and the uniform collective agreements between other police organizations and their respective police associations have very similar or identical wording, other police service boards have disclosed to him invoices of the type at issue in this appeal to him. He submits that the salary disclosure has "nothing to do with [the] association but [has to do with] police services." He further submits that while the president conducts association business, his salary is funded by taxpayers of the municipality and not the association, therefore the amounts in the invoices are recovery and not revenue.

Findings and Analysis

[19] On my review of the representations and the other material before me, I find that the invoices at issue were prepared and used in relation to communications about labour relations or employment-related matters in which the police have an interest. As a result, I accept that the exclusion at section 52(3)3 applies and the records fall outside of the scope of the *Act*.

Collected, prepared, maintained or used in relation to meetings, consultations, discussions or communications

[20] Based on both the representations submitted by the police, as well as my review of the records themselves, it is clear that the invoices, which are on police letterhead and addressed to the police association, were prepared and used by the police as communications between itself and the police association with respect to the recovery of the salary and benefits of the police member elected to fulfill the role of president of the association.

[21] Accordingly, I find that the invoices were prepared and used in relation to communications as required by the exclusion.

In relation to meetings, consultations, discussion or communications about labour relations or employment-related matters in which the institution has an interest

[22] I also find that the invoices were prepared and used in relation to communications with the police association about labour relations or employment-related matters in which the police have an interest, specifically, the recovery of the salary and benefit of the police member.

[23] As indicated above, the phrase "in relation to" in section 52(3) and its provincial equivalent has been interpreted to mean that there is "some connection" between the collection, preparation, maintenance or use of a record and the subjects mentioned in paragraphs 1, 2, or 3 of that section.⁷ For the exemption at section 52(3)3 to apply, there must be "some connection" between the collection, preparation, maintenance or use of the record and meetings, consultations, discussions or communications about labour relations or employment-related matters in which the police have an interest. The term "has an interest" has been described as something more than a "mere curiosity or concern."

[24] In considering the application of section 52(3)3 in the specific circumstances of this appeal, I considered the analysis and findings of Assistant Commissioner Sherry Liang in Order MO-3018. In that order, Assistant Commissioner Liang found that records relating to Toronto Hydro's surveillance of one of its union officials acting as a Health and Safety Representative (a position that is governed by a collective agreement), were about labour relations or employment related matters in which Toronto Hydro has an interest. In reaching her finding, Assistant Commissioner Liang found a number of factors to be persuasive in establishing that Toronto Hydro had a labour relations or employment-related interest in the records at issue and concluded:

In these circumstances, it is not accurate to suggest that Toronto Hydro has no employment or labour relations interest in the HSR [Human Safety Representative] position, or in whether the individual in that position is

⁷ *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.), adopted in Orders MO-2589, MO-3018 and others.

fulfilling his or her responsibilities ... Toronto Hydro's interest in the position is recognized in the job description as well as the collective agreement. As stated in the HSR job description, the primary function of the HSSR requires working with the employer to "embed a culture of health and safety culture." Further, the collective agreement recognizes the employer's interest in having the HSR work performed by providing for a wage refund to Toronto Hydro for time not spent on HSR functions.

...

[T]he fact that an individual holding the HSR position is granted leave from regular bargaining unit duties does not erase Toronto Hydro's employment and labour relations interest in the work performed by that individual. Neither does the fact that the selection of the individual is made through a vote of the Union's membership. The provisions of the Union's Constitution, governing the HSR position are also consistent with Toronto Hydro's continuing employment and labour relations interest. Rule 8 of the Constitution, for example, refers to the job description which was agreed to by the Union and Toronto Hydro and which contains a number of provisions reflecting Toronto Hydro's interest in this position.

[25] In Order MO-3018, Assistant Commissioner Liang found that the evidence before her demonstrated that there was "some connection" between the records at issue and labour relations and employment-related matters in which Toronto Hydro had an interest. As a result, she found that the records were excluded from the *Act* under section 52(3)3. I find her reasoning to be relevant and helpful in my consideration of the circumstances of this appeal.

[26] As noted above, during my inquiry, both the police and the appellant provided me with excerpts of the uniform collective agreement that exists between the police and the police association. The collective agreement outlines the specifics of each party's obligations with respect to the leave of absence of the member of the police service elected to serve as president of the police association. Section 27.09 of that agreement reads, in part, as follows:

The Board shall grant a Leave of Absence to the Member elected as President of the Association with pay to conduct the affairs of the Association, subject to the following conditions:

- (i) The President will acknowledge, in writing, that he/she remains a member of the Halton Regional Police Service during the leave and in particular that, as a police officer, he/she remains subject to the Code of Conduct under the Police Services Act. The purpose of this condition is to ensure that his/her status under the Code will not change as a result of his leave.

(ii) The Association will bear all expenses associated with the leave. The details of this condition are as follows:

1. The Association shall reimburse the Halton Regional Police Services Board for all salary, benefit and allowance expenses upon receipt of an invoice from the Board on a monthly basis.
2. The Board will maintain all benefits to which the member is entitled pursuant to the provisions of the applicable Collective Agreement. However, unless the Board determines otherwise, the Association shall reimburse the Service for the cost of the maintenance of such benefits.
3. The President shall make pension contributions for the period of time of the Leave in accordance with the OMERS Act and Regulations governing and the Association will be invoiced, as applicable, for the employer's share of the contributions.
4. During the leave period, no entitlement to vacation, designated/statutory holidays, bereavement leave or accrued time will accrue.
5. During the period of leave, the Board will not be responsible for costs associated with sick leave.
6. In the event the President is required to attend court in connection with his duties as a member of the Service, he shall be reimbursed at the Board's expense, in accordance with Article 9.05 of the applicable Collective Agreement.

(iii) The President will accumulate seniority during the Leave. Upon returning to employment following this Leave, he/she shall return to the same classification/rank as he held at the time the Leave commenced provided any legislative and re-qualification requirements are complied with. If a Member is president for a period of longer than six (6) years, any costs to meet legislative and re-qualification requirements are to be borne by the Association. Any required training required following a leave shall be conducted prior to the Member returning to duty.

(iv) The Association agrees to indemnify the board with respect to any liabilities, charges, increases in premiums, etc. the Board may incur in respect of the President or any actions he may take in his/her capacity as Association president while on leave of absence. This would include (but not limited to) such matters as premiums, charges etc. under the Workplace Safety and Insurance Act and liabilities arising from civil action. This condition is intended to ensure that the Association

assumes total financial responsibility for any liabilities attributable to the President's actions on its behalf.

(v) At the request of the Association Executive, a Member may be seconded to the Association in the event the President of the Association is unable to perform his/her duties for a period of two (2) consecutive months. Approval of such member and the duration of the secondment shall be subject to the operational needs of the Service. The Association shall be responsible for all associated costs of such a secondment in the identical manner to that of the full time President.

[27] From my review of the terms of the collective agreement in light of the issue before me, there are a number of factors that inform my finding that there is "some connection" between the police's preparation and use of the invoices and communications with the police association about labour relations or employment-related matters in which the police "have an interest". Specifically, although the president is considered to be on leave from his position as a member of the police for the term for which he is elected as president of the police association, there is a connection with respect to certain employment-related matters that is maintained between the police and the president. In my view, this connection is sufficient to establish that the invoices regarding the president's salary and benefits relate to employment-related matters in which the police have an interest.

[28] Of particular note is that during his leave, the president explicitly remains a member of the police and continues to be subject to the Code of Conduct under the *Police Services Act*. Additionally, the collective agreement stipulates that the police shall be reimbursed by the police association for all salary, benefit and allowance expenses incurred by the police during the president's time with the association. This, together with the records themselves, reveals that during the period that the member is on leave, the police appear to continue to perform the administrative function of paying the individual's salary even if the salary is ultimately not coming out of their own budget. Further, based on the provisions in the collective agreement that discuss the maintenance of benefits, payment of pension contributions, and accumulation of seniority during the leave, as well as matters of re-qualification following the termination of the member's term as president, there appears to be a presumption that the president will return to his employment with the police. In my view, these provisions ensuring the maintenance of certain benefits that the individual enjoys as a member confirms that there are employment-related matters that continue to exist between the police and the president during his leave to perform his role as president of the police association.⁸

⁸ It should be noted that while the courts have stated that, generally speaking, police officers are not employees, the Legislature has made it clear in the *Police Services Act* that what police officers do for police service boards constitutes employment and therefore certain records relating to officers can be said to relate to the "employment of a person by [an] institution within the meaning of section 52(3) of the *Act* [Order M-899].

[29] Furthermore, in *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*,⁹ the Court of Appeal stated that the phrase "labour relations" should not be read too narrowly and that "there is no reason to restrict the meaning of "labour relations" to employer/employee relationships; to do so would render the phrase 'employment-related matters' redundant." This direction from the Court of Appeal supports a finding that as result of the terms set out in the collective agreement, the police retain some degree of employment or labour relations relationship with and interest in the president of the association, despite him being considered to be "on leave."

[30] In sum, I find that even though the individual elected as president of the association is "on leave" from the police during his term as association president, there is sufficient evidence to support a conclusion that the police's recovery of the president's salary and benefits amounts to a labour relations or employment related matter in which the police "have an interest." I also find that there is "some connection" between the police's interest in these matters and the preparation and use of the invoices themselves. In my view, this finding is consistent with the content of the records, the terms of the collective agreement, the findings in Order MO-3018 and the suggested direction of the Court of Appeal in *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)* not to interpret the terms "labour relations" and "employment-related matters" too narrowly.

[31] Accordingly, I find that the invoices at issue in this appeal were prepared and used by the police in relation to communications about labour relations or employment-related matters in which they have an interest. As I have found that the requisite components of the section 52(3)3 exclusion have been established and there is no evidence before me to suggest that any of the exceptions to the exclusion set out in section 52(4) can be established, I find that the invoices are excluded from the scope of the *Act* under section 52(3)3 and I uphold the police's decision not to disclose them to the appellant.

ORDER:

I uphold the police's decision not to disclose the records and dismiss the appeal.

Original Signed By: _____
Catherine Corban
Adjudicator

February 21, 2017 _____

⁹ 2003 CanLII 16894 (ON CA), [2003] O.J. No. 4123.