

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4029

Appeal MA17-338

Waterloo Regional Police Services Board

March 19, 2021

Summary: A police officer made a request to his employer, the Waterloo Regional Police Services Board (the police), under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records related to investigations into his alleged conduct. The police identified responsive records, including officer's notes, interviews, photographs, reports and emails, and denied access on the basis of various exemptions from the right of access in the *Act*, as well as the section 52(3) labour relations and employment exclusion. The requester appealed the police's access decision, and claimed that additional responsive records ought to exist. During the course of the inquiry, the police took the position that section the 52(3) exemption applied to all of the records at issue. In this order, the adjudicator upholds the police's decision that the records at issue are excluded from the application of the *Act* by section 52(3). She also upholds the police's search for records as reasonable and dismisses the appeal.

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

Orders Considered: Orders M-835, MO-2556, MO-2676 and P-1223.

OVERVIEW:

[1] This appeal arises from a request for information made to the Waterloo Regional Police Services Board (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) by a police officer employed by the police. The police

officer was charged with offences under the *Criminal Code of Canada*. The criminal proceeding concluded after the police officer pled guilty to some of the charges.

[2] The police officer currently faces charges under the *Police Services Act* in relation to the same matters. He requested that the police provide him with a copy of the Crown Disclosure, and any other investigative files and/or surveillance reports related to the criminal matter. He also sought access to a copy of a review (the Review) of the police's criminal investigation that was completed by a different police services board (the Other Police).

[3] The police issued a decision granting the police officer partial access to the records they identified. The police denied access to some of the responsive information pursuant to sections 8(1) (law enforcement), 12 (solicitor-client privilege), 14(1) (personal privacy), 38(a) (requester's own personal information) and 52(3) (labour relations and employment exclusion) of the *Act*. The police also withheld some information they said was not responsive to the request.

[4] The police officer (now the appellant) appealed the police's decision to this office. During mediation, the appellant advised the mediator that he was pursuing access to all of the information withheld by the police, with the exception of the non-responsive information. The appellant also told the mediator that he believed further responsive records should exist.

[5] A mediated resolution was not possible and the matters moved to the adjudication stage of the appeals process, where an adjudicator may conduct a written inquiry under the *Act*. Representations were sought and received from the police and the appellant. The parties provided representations, as well as a reply and sur-reply.¹ The file was then transferred to me to continue the inquiry.

[6] After reviewing the police's representations and reply, I determined that I did not have sufficient evidence to determine whether section 52(3) of the *Act* excluded some of the records at issue and/or whether the solicitor-client privilege exemption at section 12 applied to some of the records. I wrote to the police to ask that they provide additional representations on these issues so that I could continue the inquiry.

[7] The police provided supplemental representations in response to my request. In those representations, the police state that there have been developments in a matter relating to the appellant and the records at issue under the *Police Services Act* and that as a result, it is now their position that all of the records at issue are excluded from the application of the *Act* by the employment and labour relations exclusion at section 52(3).

¹ The parties' representations were shared in accordance with this office's *Code of Procedure and Practice Direction Number 7*. Some portions of the police's representations were withheld because they fit within the confidentiality criteria.

[8] After reviewing the police's supplemental representations, I concluded that there were previous orders from this office that appeared to deal with similar circumstances where adjudicators concluded that records were not excluded by section 52(3) of the *Act*. I asked the police to provide representations in response to these orders. The police provided representations in response, maintaining their position that all of the records at issue were excluded by section 52(3) of the *Act*.

[9] I then wrote to the appellant to explain why I had sought additional representations from the police. I provided the appellant with copies of both of the police's supplemental representations and invited the appellant to make representations in reply, which he did.²

[10] I have considered all of the parties' representations, including those provided in the initial stages of this inquiry, and I find that all of the records at issue are excluded by the employment and labour relations exclusion in section 52(3) of the *Act*. Below, I set out my reasons for making this decision.

[11] Given my finding that all of the records at issue are excluded by section 52(3) of the *Act*, it was not necessary to consider whether any other exemptions applied to the records at issue.

[12] The only other issue that remains is whether the police conducted a reasonable search for records responsive to the appellant's request. In this order, I uphold the police's search as reasonable and I dismiss the appeal.

RECORDS:

[13] There are 945 pages of records at issue in this inquiry. They consist of officers' notes, interviews, photographs, reports, email correspondence, warrant information, property tags, niche queries, invoices, and a cell phone analysis. The police provided copies of all of the records to this office.

ISSUES:

- A. Does section 52(3) exclude the records from the *Act*?
- B. Did the police conduct a reasonable search for records?

² Some portions of the police's representations were withheld because they fit within this office's confidentiality criteria, referred to in the note above.

DISCUSSION:

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

[14] The police rely on paragraphs 1 and 3 of section 52(3) of the *Act*, which state that the *Act* does not apply to certain records in the employment or labour relations context. Given my ultimate finding below, I have only considered paragraph 1 of section 52(3), which states the following:

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.

[15] If section 52(3)1 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*.

[16] To be clear, if I find that the records at issue fall within section 52(3)1, then the *Act* does not apply to the records and as a result, I will have no jurisdiction to order the police to disclose them to the appellant. The police may, however, choose to disclose such records outside of the scheme of the *Act*, and a finding that the records are excluded from the *Act* does not affect any disclosure obligations the police may have in relation to the pending disciplinary proceeding.³

[17] For the collection, preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in paragraph 1 of section 52(3), it must be reasonable to conclude that there is "some connection" between them.⁴

[18] The "some connection" standard must involve a connection that is relevant to the statutory scheme and purpose understood in their proper context. For example, the relationship between labour relations and accounting documents that detail an institution's expenditures on legal and other services in collective bargaining negotiations is not enough to meet the "some connection" standard.⁵

[19] 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

³ Order PO-2639.

⁴ Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

⁵ Order MO-3664, *Brockville (City) v. Information and Privacy Commissioner, Ontario*, 2020 ONSC 4413 (Div. Ct.).

and employees that do not arise out of a collective bargaining relationship.⁶

[20] 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.⁷

[21] 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, where the original institution is an institution under the *Act*.⁸

[22] 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 for which an institution may be vicariously liable.⁹

[23] This office takes the “whole record approach” to the exclusions at section 52(3) of the *Act* (and the equivalent section in the *Freedom of Information and Protection of Privacy Act*). This means that in order to qualify for an exclusion, the record is examined as a whole. Either the entire record is excluded under section 52(3), or it is not – the exclusion cannot apply to a portion of the record. The question of whether the exclusion applies to a whole record, based on the appearance in the record of some employment-related information has been addressed in previous orders.¹⁰ In those orders, this office has applied the record-specific and fact-specific analysis to consider whether the record, as a whole, qualifies for the claimed exclusion. I agree with and adopt this approach for this appeal.

[24] For section 52(3)1 to apply, the institution must establish each of the following:

1. the record was collected, prepared, maintained or used by an institution or on its behalf;
2. this collection, preparation, maintenance or use was in relation to proceedings or anticipated proceedings before a court, tribunal or other entity; and
3. these proceedings or anticipated proceedings relate to labour relations or to the employment of a person by the institution.

[25] The word “proceedings” means a dispute or complaint resolution process conducted by a court, tribunal or other entity which has the power, by law, binding

⁶ Order PO-2157.

⁷ *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.

⁸ Orders P-1560 and PO-2106.

⁹ *Ministry of Correctional Services*, cited above.

¹⁰ See for example Orders M-797, P-1575, PO-2531, PO-2632, MO-1218, and PO-3456-I.

agreement or mutual consent, to decide the matters at issue.¹¹

[26] For proceedings to be “anticipated”, they must be more than a vague or theoretical possibility. There must be a reasonable prospect of such proceedings at the time the record was collected, prepared, maintained or used.¹² The word “court” means a judicial body presided over by a judge.¹³

[27] A “tribunal” is a body that has a statutory mandate to adjudicate and resolve conflicts between parties and render a decision that affects the parties’ legal rights or obligations.¹⁴ “Other entity” means a body or person that presides over proceedings distinct from, but in the same class as, those before a court or tribunal. To qualify as an “other entity”, the body or person must have the authority to conduct proceedings and the power, by law, binding agreement or mutual consent, to decide the matters at issue.¹⁵

[28] The proceedings to which the paragraph appears to refer are proceedings related to employment or labour relations per se – that is, to litigation relating to terms and conditions of employment, such as disciplinary action against an employee or grievance proceedings.

The parties’ representations

[29] This office sought and received multiple sets of representations from both parties during the course of this inquiry on various issues. However, due to my ultimate finding that section 52(3) of the *Act* applies to all of the records at issue, some of the representations sought by this office, either in the Notices of Inquiry sent to the parties or in my subsequent letters, are no longer relevant to the outcome of this appeal. As a result, I will outline only the most salient portions of the parties’ representations that are relevant to my decision that section 52(3) of the *Act* applies to all of the records at issue.

The police’s representations

[30] The police say that the appellant, a police officer and their employee, was investigated, criminally charged, and found guilty of an offence under the *Criminal Code of Canada*. The police submit that that the appellant is now the subject of a disciplinary hearing under the *Police Services Act*. The police say that the records at issue relate to both the criminal investigation and the disciplinary hearing.

[31] The police say that the collection, preparation and maintenance or use of the

¹¹ Orders P-1223 and PO-2105-F.

¹² Orders P-1223 and PO-2105-F.

¹³ Order M-815.

¹⁴ Order M-815.

¹⁵ Order M-815.

records was in relation to proceedings or anticipated proceedings before a court tribunal or other entity. They assert that, as determined in Order M-835, an officer charged with an offence under the *Police Services Act* is subject to a disciplinary hearing, which is a "dispute or complaint resolution process conducted by a court, tribunal or other entity which has, by law, the power to decide disciplinary matters." They also refer me to Order MO-1433-F, where this office concluded that records relating to *Police Services Act* disciplinary hearings fall under the exclusion at 52(3)1 of the *Act*.

[32] Specifically, the police submit that the records at issue form a part of the "Crown Disclosure" in the criminal matter, which they say concluded after the appellant pled guilty to a criminal offence. The police explain that a police officer's potential criminal conduct automatically becomes the subject of an employment/labour relations investigation and potentially results a proceeding under the *Police Services Act*. They say that once a criminal investigation is commenced, the investigation under the *Police Services Act*, as it relates to the employment misconduct of a police officer, must wait for the outcome of the criminal proceeding and will rely on the records from that proceeding.

[33] The police submit that the criminal matter relating to the appellant has concluded but the disciplinary matter under the *Police Services Act* remains outstanding. The police submit that parties to the criminal proceedings and the hearings under the *Police Services Act* are subject to undertakings to protect information from being used for anything but those proceedings, and to protect the interests of affected third parties that cooperated in both matters.

[34] The police say that the appellant is currently suspended from duty and is facing six charges under the *Police Services Act*, all of which they say arise out matters directly related to the records at issue in this inquiry.

[35] In support of their assertion that section 52(3) applies to all of the records at issue, the police provided an affidavit from their Access to Information Analyst (the Analyst). The Analyst attests that the appellant has been served with a "Notice of Hearing" and a "Statement of Particulars" in relation to the matter under the *Police Services Act*, both of which were included as exhibits to her affidavit.¹⁶ The Notice of Hearing and Statement of Particulars provide detailed information about the disciplinary matter under the *Police Services Act*.

[36] The Analyst attests that the hearing relating to the charges under the *Police Services Act* has been adjourned numerous times at the behest of the appellant, but is anticipated to proceed in the future.

[37] The police explain that when they issued their initial decision letter in response

¹⁶ The exhibits to the Analyst's affidavit have been withheld because they met the confidentiality criteria in *Practice Direction Number 7*. However, the Analyst attests that the appellant has previously received copies of these documents during the course of the matter under the *Police Services Act*.

to the appellant's request for records in 2017, they decided to apply the section 52(3) employment and labour relations exclusion narrowly, "with a view to providing the appellant with access to as much information as reasonably possible." However, they say that since they issued their initial decision letter, "the matter has become clear and the full extent of the records applicable to the disciplinary matter are now known and ascertainable." As such, the police now assert that all of the records fall within the employment and labour relations exclusion at section 52(3) of the *Act*.

[38] The police say that the Index of Records they initially provided to this office and the appellant in 2018 indicates that the exclusion at section 52(3) applies to only portions of specific records at issue. They say that decision was consistent with their initial decision letter that was made before the "crystallization of the full extent of the labour relations matter." The police say that they are content with that decision and the disclosure they have made to the appellant to date as their intention was to provide the appellant with access to as much information as reasonably possible, without interfering with the on-going labour relations matter or causing concern to affected third parties.¹⁷ However, the police say that any further order to provide redacted records would not be appropriate due to the over-arching section 52(3) exclusion.

[39] The police provided specific representations about the records they initially indicated were excluded by section 52(3) in their Index of Records. As noted above, the police now assert that these are not the only records excluded by section 52(3) and, in fact, all of the records at issue are caught by the exclusion. I will refer to those arguments below. With respect to the record they initially claimed are excluded under section 52(3), they say the following about pages one through six of the records at issue:

- The pages contain emails regarding an investigative review (referred to above as the Review) that the Other Police conducted into the appellant's criminal investigation.
- The Review was conducted with a view to ensuring the police conducted a fair and thorough criminal investigation, since the police were the appellant's employer and concerns had been raised about impartiality of the criminal investigation.
- The emails contain information between members of both police services and discuss employment-related matters regarding the appellant.

¹⁷ I understand the police to be saying that they are willing to disclose those records, or portions of records, that they originally decided to disclose, despite the fact that they now believe that all of the records are excluded from the application of the *Act*. To be clear, if I find that section 52(3) applies to the records at issue, they will be excluded from the *Act* and I will have no jurisdiction to order the police to disclose them to the appellant, despite the fact that the police may be willing to do so. In any event, I understand that the police have already provided the appellant with severed copies of some of the records at issue.

[40] The police submit that pages 7-43 contain further details of the Review. They say that these pages are likely to become part of the labour relations matter in the future because they address the sufficiency of the investigation that led to criminal charges against the appellant and the alleged employment misconduct set out in the Statement of Particulars. As such, the police assert that these records are subject to the section 52(3) exclusion. Furthermore, as seen below, the police confirm that these records form part of their file in relation to the discipline proceeding.

[41] The police submit that pages 761 to 792 contain information recorded in the notes of a police inspector. They say that the involvement of the inspector in the investigation was in her role with the police's Professional Standards Branch which is responsible for investigations into the conduct of members and proceedings under the *Police Services Act*. The police say the notations relate to the appellant's employment and the disciplinary matters that remain ongoing.

[42] According to the police, pages 871 to 874 and 875 to 919 contain Niche (police database) queries conducted by the appellant and Rogers Blackberry invoices for the appellant's work cell phone. The police submit that the Statement of Particulars at Exhibit B clearly indicates that both records were created and/or used in the appellant's *Police Services Act* disciplinary matter as evidence of charges listed in the Statement of Particulars.

[43] As noted above, with regard to the remaining records that the police now assert are excluded pursuant to section 52(3), the police submit that it is apparent from Statement of Particulars that there is a significant overlap between the records at issue and the ongoing matter under the *Police Services Act*. They say, for example, the affected parties who were interviewed in relation to the appellant's criminal matters are now witnesses to the *Police Services Act* matter and their statements directly relate to the investigation into the appellant's employment as a police officer. Furthermore, the police submit that all of the records at issue are now included as evidence in the employment-related matter under the *Police Services Act*.

The appellant's representations

[44] In his initial representations, the appellant submits that he is employed by the police as a police officer and is "currently facing jeopardy with outstanding Police Act charges and it is [his] lawful right to review [his] own disclosure and prepare for his defence."

[45] The appellant asserts that the language the police use in their representations to describe the charges against him is prejudicial. He submits that he was accused of historical, non-violent incidents with mitigating circumstances for which he received a conditional discharge. Specifically, the appellant says that the word "crime" is being used by the police in bad faith to strengthen their arguments.

[46] The appellant also objects to the police's assertion that they are using the records at issue in relation to discussions about his continued employment. He submits that he was approached by a member of the police about a return to work, but that after he contested the charges under the *Police Services Act* no further offers were made in that regard. I understand the appellant to be asserting that this is evidence that the police have not acted in good faith when making decisions about whether to provide him with access to the records at issue in this inquiry.

[47] The appellant further specifies the following:

I still face jeopardy and I believe that information possessed by the institution is not only exculpatory in nature that it also presents investigative malfeasance and conflicts of interest that have not been disclosed. In order to prepare a proper defence I require full and complete disclosure. If full disclosure is not made I am unfairly legally prejudiced and will be trying to defend against potentially unknown issues. Simply, I am entitled to full disclosure and the institution is abdicating its responsibility.

[48] The appellant says that the police's refusal to provide the information he requested places "undue legal prejudice" on him for his pending *Police Services Act* hearing. He also asserts that the police may be improperly using the *Act* as a shield to avoid releasing records that reflect poorly on the police.

[49] The appellant raised additional matters in his initial representations, which I have considered but will not include here as they do not relate to the issue of whether section 52(3) applies to the records.

[50] The appellant's sur-reply representations primarily focus on why he disagrees with the charges he faces under the *Police Services Act* and his belief that the police are attempting to prevent him from being able to contest the charges. In my view, those arguments are not pertinent to my decision about whether section 52(3) applies to the records at issue and therefore I considered them, but will not recount them here.

[51] Finally, I have also considered the appellant's response to my invitation to make representations on the supplemental representations I sought from the police. The appellant has asked that his representations not be shared with the police. In summary, and without revealing the specific content of the appellant's representations, the appellant reiterates his assertion that the police have applied section 52(3) of the *Act* in a self-serving manner and are attempting to suppress information. The appellant says that the police's position that all of the records are subject to section 52(3) is contradictory to their original decision. He says that their new decision does not make sense, given that some of the information has already been released to a third party in a previous access request. He also says that he has been charged under the *Police Services Act* with misconduct for submissions that he made to this office.

[52] The appellant also reiterates his previous submissions that the allegations against him are not serious, that the investigations have long been completed and that the police are arguing technical points of the *Act* to misrepresent the situation. The appellant says that as he does not have experience with privacy legislation and that he relies on the mandate of the office of the Information and Privacy Commissioner of Ontario to determine this appeal.

Findings and Analysis

[53] For the reasons that follow, I find that all of the records at issue are excluded from the application of the *Act* by the employment and labour relations exclusion in paragraph 1 of section 52(3) of the *Act*.

[54] As set out above at paragraph 24, in order for section 52(3)1 to apply the police must establish each part of a three part test. Below are my reasons for each of the three parts.

Part 1: collected, prepared, maintained or used

[55] Based on my review of all of the evidence before me, I find that all of the records at issue were collected, prepared, maintained and used by the police in relation to the investigation into, and charges against, the appellant under Part V of the *Police Services Act*, as itemized by the Statement of Particulars provided as an exhibit to the Analyst's affidavit.

[56] Having reviewed the records at issue, it is my view that the majority of the records were created by members of the police during investigations into the appellant's conduct, which resulted in criminal charges and the charges under the *Police Services Act*. I accept the explanation and evidence provided by the police that when a police officer is alleged to have committed an offence under the *Criminal Code*, they are also automatically subject to provisions under the *Police Services Act* and that all or some of the allegations in the criminal matter will form the basis of a *Police Service Act* investigation and potential hearing. Based on my review of the Statement of Particulars, I accept the police's representations that these records have been collected, prepared and are being maintained and used in relation to the charges the appellant faces under the *Police Services Act*.

[57] The remaining records were created by the Other Police, or are communications between the police and the Other Police. All of these records directly relate to the criminal investigation of the appellant and, based on my review, I accept the police's representation that the police collected, prepared and maintained these records to be used in relation to the charges against the appellant under the *Police Services Act*.

[58] Based on my review of all of the evidence before me, it is clear that all the records at issue relate to the charges the appellant faces under the *Police Services Act*, as described in the Statement of Particulars provided by the police. As a result, I accept

the police's assertion that the records at issue in this inquiry have been collected and used in relation to the ongoing *Police Services Act* matter. Specifically, I accept that the records at issue in this inquiry are now evidence in the *Police Services Act* matter.

[59] As a result, I find that the requirements of part 1 of the test have been satisfied because the records at issue were "collected, prepared, maintained and used" by the police within the meaning of part 1 of the section 52(3)1 test.

Part 2: in relation to proceedings before a court or tribunal

[60] The second part of the three-part test requires that the collection, preparation maintenance or use of the records was in relation to a "proceeding" or "anticipated proceedings" before a court, tribunal or other entity.

[61] First, I have no trouble finding that the disciplinary proceedings under the *Police Services Act* are "proceedings" for the purpose of section 52(3) of the *Act*. In Order P-1223, former Assistant Commissioner Mitchinson stated the following about the meaning of "proceedings" for the purposes of section 65(6)1, the provincial equivalent section to 52(3)1 in the *Freedom of Information and Protection of Privacy Act*:

I am of the view that a dispute or complaint resolution process conducted by a court, tribunal or other entity which has, by law, binding agreement or mutual consent, the power to decide the matters at issue would constitute "proceedings" for the purposes of section 65(6)1.

[62] As noted by the police, this office has consistently determined that a disciplinary hearing conducted under Part V of the *Police Services Act* qualifies as a dispute or complaint resolution process conducted by a tribunal or other entity which has, by law, the power to decide disciplinary matters. Prior orders have concluded that these hearings are properly characterized as "proceedings" for the purposes of section 52(3)1.¹⁸

[63] As such, I find that the matter under the *Police Services Act* is a proceeding for the purposes of section 52(3)1.

[64] Second, I find, for the following reasons, that the collection, preparation maintenance or use of the records at issue was "in relation to" the disciplinary hearing.

[65] During the inquiry process, I asked the police to provide representations in response to two previous orders of this office, which also dealt with requests for records related to police conduct. In Orders MO-2556 and MO-2676, requests for information were made by members of the public who had been involved in police investigations and then filed complaints against police officers involved in those investigations. The adjudicators in both of the orders noted above determined that the

¹⁸ See, for example, Orders M-835, M-840, M-899, PO-1797, MO-2216 and MO-2428.

requests for records related to the police investigations were not excluded by section 52(3) of the *Act* even though those records were later used in investigations into complaints made by the appellants about the officers that arrested them.¹⁹ As noted in Order MO-2556, merely placing records in a file relating to a complaint about a police officer's conduct does not mean that the records were collected, prepared or maintained in relation to proceedings before a court or tribunal.²⁰

[66] There is some similarity to the nature of the requests in the previous orders and the current appeal; for example, the appellant is seeking records that relate to the initial investigations conducted by the police. However, I agree with the police that the current scenario is different from the circumstances in Orders MO-2556 and MO-2676 because the records in those cases related to an investigation which only later became the subject of a complaint against a police officer. In case before me, the officer was alleged to have committed an offence under the *Criminal Code* and as such, was also immediately subject to an investigation under the *Police Services Act*. I accept the police's representations that due to the operation of the *Police Services Act*, it was immediately known that the records used in the criminal investigation could also be used in the proceeding under the *Police Services Act*.

[67] Based on my review of the evidence before me, I find that the records at issue are being used by the police in relation to the investigation into the conduct of the appellant and the disciplinary hearing under Part V of the *Police Services Act*. I accept the evidence provided by the police that a hearing in relation to the charges under the *Police Services Act* has been postponed, but is pending. I find the information contained in the records at issue has some connection to the disciplinary hearing in which the police say it will be used as evidence, and is thus properly characterized as being "in relation to" to that hearing. I base this finding on my review of the records at issue and the background information provided by the parties in their representations, as well as the information contained in the Statement of Particulars provided by the police.

[68] As a result, I find that the police have met the requirements of part 2 of the test under section 52(3)1 of the *Act* with respect to the records at issue.

Part 3: proceedings related to labour relations or employment

[69] To satisfy part 3 of the section 52(3)1 test, the police must establish that the proceedings relate to labour relations or to the employment of a person by the institution.

[70] Previous orders of this office have found that disciplinary hearings under Part V of the *Police Services Act* relate to "the employment of a person by the institution" for the purpose of section 52(3)1. In Order M-835, former Assistant Commissioner

¹⁹ Order MO-2676 at para. 21; See also Order MO-2556 and *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct).

²⁰ Order MO-2556 at page 5.

Mitchinson concluded:

In the circumstances of this appeal, the disciplinary hearing was initiated as a result of an internal complaint under Part V of the PSA [*Police Services Act*], not under the public complaints part of the statute (Part VI). Despite what I acknowledge to be a general public interest in policing matters, I find that these Part V proceedings do in fact “relate to the employment of a person by the institution”. The penalties outlined in section 61(1), which may be imposed after a finding of misconduct, involve dismissal, demotion, suspension, and the forfeiting of pay and time. In my view, these can only reasonably be characterized as employment-related actions, despite the fact that they are contained in a statute and applied to police officers.

[71] Subsequent orders of this office have agreed with, and relied on, former Assistant Commissioner Mitchinson’s reasoning, and I do the same for the purposes of this appeal.²¹

[72] Based on the evidence before me, I accept that the investigation into the criminal charges against the appellant led to disciplinary proceedings against him under Part V of the *Police Services Act*. In accordance with former Assistant Commissioner Mitchinson’s reasoning in Order M-835, I accept that the disciplinary proceedings under the *Police Services Act* that are currently pending relate to the employment of the appellant by the police.

[73] As such, I find that part 3 of the test under section 52(3)1 has been satisfied, as the collection, preparation or maintenance of the records by the police was in relation to proceedings or anticipated proceedings concerning the appellant’s employment.

[74] In summary, I find that all three parts of the test under section 52(3)1 of the *Act* have been met for all of the responsive records.

[75] I also find that none of the responsive records fall within any of the exceptions in section 52(4). Accordingly, I uphold the decision of the police that the records at issue are excluded from the operation of the *Act* under section 52(3)1.

[76] In making these findings, I have considered all of the appellant’s representations. While the majority do not directly relate to the issue of whether section 52(3)1 applies to the records at issue, I will briefly address some of the points the appellant raises.

[77] First, the appellant submits that he requires access to the records at issue in order to defend himself from the *Police Services Act* charges. As noted by the police in their reply representations, there is a separate process for disclosure under the *Police*

²¹ See for example, Orders PO-3010, MO-2216, MO-2328, MO-2428, and MO-3503.

Services Act. I agree that the disclosure process in the *Police Services Act* is separate and distinct from the process for requests for information made under the *Act*. The issue before me in this inquiry was whether the *Act* applies to the records at issue. I have concluded that it does not, for the reasons set out above. While I note that the basis for the appellant's request was not relevant to this determination, the fact that the appellant asserts that he requires the records at issue to respond to the charges against him under the *Police Services Act* offers further support for my decision that the records relate to a proceeding about the employment of the appellant.

[78] The appellant asserts that the police's position that section 52(3) applies to all of the records at issue is contradictory to its original decision to apply the exemption to only portions of the records at issue. In my view, the police provided an adequate explanation about why they decided that section 52(3) applied to all of the records at issue. That explanation was supported by the affidavit provided by the Analyst, and ultimately by the evidence before me in this inquiry. Regardless of the police's initial decision, they provided sufficient evidence to support their submission that section 52(3) applied to all of the records at issue and I have provided my reasons for upholding that decision. As I noted at the outset, the police can exercise their discretion to disclose records outside of the *Act*, where an exclusion applies to them. That appears to be what the police did initially in this case.

[79] I have also considered the appellant's assertion that some of the records he seeks were released to a third party in a previous access request. The appellant has not provided any additional substantive information about what specific information was requested or released.²² I am unable to determine whether any of the information released is the same information before me in this case, and if so, how that may or may not impact my decision. In any event, I see no basis for to alter my decision to uphold the police's decision to apply section 52(3).

[80] The appellant also argues that the police's decision to apply section 52(3) to the records was made in bad faith, that they used prejudicial language in an attempt to bolster their arguments, and that they are attempting to use the *Act* as a shield to hide the content of the records. I see no evidentiary basis to support these allegations. In my view, the language used by the police appears to be in line with the content of the records and the Statement of Particulars. Furthermore, the police based their arguments about the records at issue on the relevant principles set out in the Notice of Inquiry they received, as well as previous orders of this office. I determined that section 52(3)¹ applied to the records based on those arguments, which I outlined above.

[81] Finally, the appellant asserted in his final submissions that he was charged with misconduct by the police for submissions made to this office. I have reviewed the Statement of Particulars provided as an exhibit to the Analyst's affidavit and am unable

²² For example, the number of pages, the title of the "electronic report," or the parties to the email communications the appellant refers to.

to link any of the charges to any information provided to this office. In the absence of any additional details about this claim, I see no need to consider it further.

[82] In summary, for all of the reasons set out above, I uphold the police's decision that section 52(3)1 applies to all of the records at issue. As a result of this finding, it is unnecessary to consider whether any of the other exemptions apply to the records at issue. Below I will consider the only remaining issue in this inquiry, which is whether the police conducted a reasonable search for records responsive to the appellant's request.

Issue B: Did the police conduct a reasonable search for records?

[83] The appellant asserts that additional responsive records beyond those identified by the police should exist. Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.²³ If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[84] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.²⁴ To be responsive, a record must be "reasonably related" to the request.²⁵

[85] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.²⁶

[86] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.²⁷

[87] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.²⁸

[88] A requester's lack of diligence in pursuing a request by not responding to requests from the institution for clarification may result in a finding that all steps taken

²³ Orders P-85, P-221 and PO-1954-I.

²⁴ Orders P-624 and PO-2559.

²⁵ Order PO-2554.

²⁶ Orders M-909, PO-2469 and PO-2592.

²⁷ Order MO-2185.

²⁸ Order MO-2246.

by the institution to respond to the request were reasonable.²⁹

The police's representations

[89] The police submit that they have conducted a reasonable search for responsive records. They say that the appellant has not offered any details or evidence about what further records he believes exist. As a result, the police say that they have no means to determine what additional information the appellant is seeking.

[90] The police submit that their search for records was undertaken and directed by an experienced, trained employee who expended reasonable efforts in conducting a search to identify records that reasonably relate to the request.

[91] The police's affidavit from their Access to Information Analyst (referred to above as the Analyst) provided details about their search for responsive records. The Analyst states that she has worked on thousands of access to information requests and has received general and specific training in the police environment as it relates to access to information.

[92] With regard to the appellant's request for records related to the Review conducted by the Other Police, the Analyst attested that this information existed in a file that she was able to retrieve in full.

[93] In response to the appellant's request for the copy of the "Crown Disclosure" and investigative files and/or surveillance reports, the Analyst says that 33 members of the police were forwarded details with regard to the appellant's request and asked to perform searches for responsive records. She says that the "request memos" were sent to members of the police who were linked in the police's electronic record database (Niche) under the "current officers tab." According to the Analyst the "current officers tab" in Niche includes the names, badge numbers and classifications of officers who responded to and/or investigated a police incident. She says that when the data entry was completed for the incident involving the appellant, a number of officers who were personal witnesses were mistakenly linked as "current officers." She attests that those members had no investigative role in the incident and should have been recorded under the "involved persons tab" as witnesses.

[94] The Analyst says she emailed the investigating officer to confirm which members were involved in the incident in their professional capacity rather than in a personal capacity. She said that based on the investigating officer's response, she obtained records from those members.

[95] The Analyst attested that the records collected included officers' notebook entries, interview summaries, photographs, emails, warrant information, property tags, Niche queries, invoices and a disc containing cell phone analysis.

²⁹ Order MO-2213.

[96] The Analyst specifies that in order to obtain full copies of electronic records relating to the incident, she sought assistance from the Administrative Assistant of the Professional Development office (then referred to as "Professional Standards"). She says that the electronic records were stored in the Access Control List domain, where restrictions are placed on which members have access to sensitive matters. She says that this system is put in place to protect the personal information of employees involved in criminal investigations or prosecutions in their personal capacity.

[97] The Analyst says that the Administrative Assistant provided printed copies of the electronic records in relation to the appellant's request. On reviewing the records, the Analyst says she was satisfied that all of the records responsive to the request were collected.

[98] The Analyst notes that in his original request the appellant asked for the "Crown Disclosure package." She says that the police explained to the appellant that the disclosure package had been prepared for criminal court and as a result, those records fall under the custody and control of the Crown Attorney as the primary record holder. She says that the appellant subsequently clarified that he was seeking all police records in relation to his criminal investigation.

[99] The Analyst says that it is possible that the appellant is of the opinion that further records exist because he believes the "Crown Disclosure package" and the police's records responsive to his request should be identical. However, she says that materials included in Crown Disclosure may have been created by the Crown Attorney or other agencies and are therefore not police records.

The appellant's representations

[100] The appellant's representations focus primarily on why he believes he should have access to the records at issue in this inquiry and do not specifically explain why he believes that additional responsive records exist beyond those already identified by the police.

[101] With regard to his assertion that additional records should exist, he says that the Review conducted by the Other Police was "never presented in disclosure in any manner." He says that he knows that an electronic version of the review and emails threads of relevant parties exist because he a third party requested the same information through the *Act* and he saw a copy. The appellant submits that "the records exist" and that many were disclosed to the third party.

[102] He also submits that the police failed to produce records "that they claimed they did during this request (the cell phone analysis CD, officer's notes and investigative notes)." He says that while the police have produced disclosure during the criminal aspect of the trial, that information was provided to his legal counsel and he does not have access to those records.

The parties' additional representations

[103] In reply to the portion of the appellant's representations relating to the whether additional responsive records may exist, the police reiterate their original representation that the appellant is confusing the disclosure process for the matter pursuant to the criminal matter, or the matter under the *Police Services Act*, with the process for requesting records under the *Act*.

[104] The police say that the appellant repeats several times that that he is "entitled to full disclosure in relation to his PSA hearing" and that the police provided that disclosure to the lawyer representing him on that matter. The police say the issue of the disclosure for the hearing under the *Police Services Act* is outside the scope of this inquiry and they reiterate their position that all of the responsive records that exist were provided to the appellant.

[105] The appellant was offered an opportunity to provide a sur-reply in response to the police's reply. The only portion of the appellant's sur-reply that responds to the issue of whether additional responsive records exist is his assertion that an electronic copy of the Review conducted by the Other Police exists and has not been provided to him.

Findings and analysis

[106] Based on the police's representations and the Analyst's affidavit, I find that the police conducted a reasonable search for responsive records and I decline to order any further searches.

[107] In my view, the police tasked an appropriate person, with the requisite knowledge and skills, to locate the records that would be responsive to the appellant's request. I find that the Analyst provided a satisfactory explanation of the steps she took to try to locate the responsive records, and I am satisfied that those steps were reasonable in the circumstances. Based on the information provided by the police, I find that there is no reasonable basis upon which I could conclude that additional records are likely to exist.

[108] First, I accept the Analyst's evidence that the records the appellant is seeking, which he refers to as the Crown Disclosure, if they do exist, are not part of the police's record holdings. Specifically, I accept the police's explanation that the records that form the Crown Disclosure referred to by the appellant are held by a different institution and that the police's own records holdings may not be identical to the records that may comprise the Crown Disclosure referred to by the appellant.

[109] With regard to the appellant's assertions regarding the file he says exists in relation to the Review conducted by the Other Police, it is my view that the police identified these records and listed them in the Index provided to the appellant. The police withheld these records pursuant to section 52(3) of the *Act* and I upheld that

decision for the reasons outlined above.

[110] Absent any further information from the appellant about why he believes that there are additional records that should exist or where those records could reasonably be located, I am satisfied that the police's search was reasonable and I find that it has fulfilled its obligations under the *Act*. I decline to order any further searches and I will dismiss the appeal.

ORDER:

The appeal is dismissed.

Original Signed by: _____
Meganne Cameron
Adjudicator

March 19, 2021 _____