

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4287

Appeal MA20-00137

London Police Services Board

November 28, 2022

Summary: The London Police Services Board (the police) received an access request for records relating to a specified incident in which the requester was involved. The police identified responsive records and denied access to the specified report on the basis of the exclusion in section 52(3) (labour relations and employment). The requester appealed the police's access decision, and claimed that additional video surveillance ought to exist. In this order, the adjudicator upholds the police's decision that the specified report is excluded from the application of the *Act* by section 52(3)3. She also upholds the police's search for video surveillance 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)3.

Orders Considered: Orders MO-3083 and MO-4029.

OVERVIEW:

[1] The appellant was involved in an incident with two police officers employed by the London Police Services Board (the police) and subsequently made a complaint to the police about the officers in question. Pursuant to the *Police Services Act*, the police investigated the appellant's complaint.

[2] The appellant then made an access request to the police under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to

the incident. Specifically, the appellant sought a copy of the video surveillance evidence of the incident, as well as a copy of the statement he gave to the police in the context of his complaint about the officers (which the parties referred to as the "pure version" statement).

[3] The police identified responsive records and issued a decision granting partial access to them. The police advised that the appellant's "pure version" statement is found in an occurrence report and, relying on the exclusion for labour relations and employment-related records at section 52(3), withheld the report in its entirety. The police relied on the discretionary personal privacy exemption at section 38(b) to withhold information in the video surveillance records.

[4] The requester, now the appellant, filed an appeal of the police's decision with the Information and Privacy Commissioner of Ontario (the IPC). A mediator was appointed to explore the possibility of resolving the appeal.

[5] During mediation, the appellant advised that he was pursuing access to his "pure version" statement relating to the specified incident. The appellant confirmed that he is not pursuing access to any withheld portions of the video surveillance records withheld pursuant to section 38(b) of the *Act*. However, he stated that he believes that additional video surveillance footage should exist. As a result, the issue of reasonable search was added to the scope of the appeal.

[6] The police advised the mediator that it would not change its decision to deny access to the appellant's "pure version" statement contained in the report. The police conducted a further search for additional video surveillance footage but no additional records were located.

[7] As a mediated resolution could not be reached, the appeal was transferred to the adjudication of the appeals process where an adjudicator may conduct an inquiry under the *Act*.

[8] The adjudicator initially assigned to this appeal invited the police and the appellant to provide representations on the issues in this appeal. She received representations from both parties. This appeal was subsequently transferred to me to continue the adjudication. I have reviewed the parties' representations and have decided that I do not require further submissions before making my decision.

[9] In this order, I uphold the police's decision that the specified report is excluded from the application of the *Act* by section 52(3)3. I also uphold the police's search for video surveillance records as reasonable and dismiss the appeal.

RECORDS:

[10] The record at issue is an 18-page General Occurrence Report (the report).

ISSUES:

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

DISCUSSION:

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

[11] The appellant's access request relates to an incident involving himself and the police. As noted above, following the incident, the appellant filed a complaint to the police regarding the conduct of two police officers' during that incident. The occurrence report relates to the appellant's complaint.

[12] The exclusion at section 52(3)3 of the *Act* is record-specific and fact-specific. If the report, as a whole, falls within the requirements of section 52(3)3, and none of the exceptions in section 52(4) applies to it, then it is excluded from the application 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:

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

[13] 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.¹

[14] 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.²

[15] If section 52(3) applied at the time the record was collected, prepared,

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

maintained or used, it does not cease to apply at a later date.³

[16] For section 52(3)3 to apply, the report must satisfy the following three-part test:

1. the report was collected, prepared, maintained or used by the police or on its behalf;
2. this collection, preparation, maintenance or use 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 police have an interest.

Representations

[17] The police withheld the report in its entirety on the basis of section 52(3)3. In their representations, they address the three-part test for section 52(3)3. They submit that the report was collected, prepared, maintained and used by the police in relation to the investigation into the complaint advanced by the appellant. More specifically, the police state the report relates to the police's responsibilities under Part V of the *Police Services Act*.⁴ They explain that access to the report is restricted only to the Professional Standards Branch office, which is responsible for investigating complaints made about an employee, service or policy of the police.

[18] With respect to the second part of the test, the police submit that the report reflects discussions and statements made in support of and in response to the complaint advanced by the appellant.

[19] With respect to the third part of the test, the police submit an investigation under Part V of the *Police Services Act* has clear implications for both the officers in question and the police in regard to the employment relationship, as the complaint alleged misconduct by the two identified police officers. They explain that where misconduct is substantiated, the identified officers may be subject to disciplinary actions, including suspension and/or termination of employment. The police submit that any investigation into an officer's employment performance or potential disciplinary misconduct are clearly matters in which the police have "an interest" that is more than a mere curiosity or concern.

[20] The police rely on Order MO-1433-F, where the phrase "labour relations or employment-related matters" has been found to apply in the context of disciplinary proceedings under the *Police Services Act*.

³ *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R.(3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507.

⁴ R.S.O. 1990, c. P.15.

[21] The police also rely on a number of IPC orders where records relating to *Police Services Act* complaint investigations and related hearings have been found to fall under the exclusion at section 52(3)1 of the *Act*.⁵

[22] Although the appellant provided representations, they did not address the requirements for section 52(3)3.

Analysis and findings

[23] For the reasons that follow, I find that the report is excluded from the application of the *Act* by the employment and labour relations exclusion in section 52(3)3 of the *Act*.

[24] I find the report was collected, prepared, maintained and used by the police and that this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications about the conduct of the officers being investigated. Consequently, I find that parts 1 and 2 of the section 52(3)3 test have been met.

[25] The more significant issue for determination is whether these meetings, consultations, discussions and communications were about "labour relations" or "employment-related" matters in which the police have an interest, as stipulated in part 3 of the section 52(3)3 test.

[26] The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship.⁶

[27] 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.⁷

[28] Numerous orders of the IPC have found that disciplinary matters involving police officers are "employment-related" matters.⁸

[29] The report at issue in this appeal describes the police's investigation of a complaint made by the appellant against two officers, which is governed by Part V of the *Police Services Act*. In my view, this report is "employment-related," because of the potential for disciplinary action against these two officers. I find, therefore, that the

⁵ See Orders M-835, MO-2216, MO-2328, MO-2428, MO-3503, MO-4029 and PO-3010.

⁶ Order PO-2157.

⁷ *Ministry of Correctional Services*, cited above.

⁸ See Orders MO-1433-F, PO-2426 and PO-2499.

meetings, discussions, consultations and communications that took place were clearly about "employment-related matters" for the purposes of part 3 of the section 52(3)3 test.

[30] To satisfy this part of the test, it must also be established that the police have "an interest" in these employment-related matters. The phrase "in which the institution has an interest" in section 52(3)3 means more than a "mere curiosity or concern," and refers to matters involving the institution's own workforce.⁹ The employment-related matters that are documented in the report concerns members of the police's own workforce. The police clearly have an interest in these employment-related matters that extend beyond a "mere curiosity or concern."

[31] In sum, I am satisfied that the report was collected, prepared, maintained and used by the police in relation to meetings, consultations, discussions and communications about employment-related matters in which the police have an interest. In my view, none of the exceptions in section 52(4) apply to the report. As such, I find that the report is excluded from the *Act* under section 52(3)3.

B: Did the police conduct a reasonable search for video surveillance footage?

[32] The appellant claims that additional video surveillance footage 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 17.¹⁰ If the IPC is satisfied that the search carried out was reasonable in the circumstances, it will uphold the institution's decision. Otherwise, it may order the institution to conduct another search for records.

[33] 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.¹¹ To be responsive, a record must be "reasonably related" to the request.¹²

[34] 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.¹³

[35] 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.¹⁴

⁹ *Supra* note 10.

¹⁰ Orders P-85, P-221 and PO-1954-I.

¹¹ Orders P-624 and PO-2559.

¹² Order PO-2554.

¹³ Orders M-909, PO-2469 and PO-2592.

¹⁴ Order MO-2185.

[36] 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.¹⁵

Representations

[37] In their representations, the police assert that they conducted a reasonable search for responsive video records. In support of their assertion, the police provided a sworn affidavit by an analyst in the freedom of information unit. The affiant had served in that role for a total of nine years. She currently holds the position of property clerk.

[38] The affiant states that after receiving and reviewing the request, she requested and received the specified report. Shortly afterwards, she states that she spoke to and requested from the sergeant in charge all video footage inside and outside of the police headquarters for the date in question.

[39] The affiant attests that she received the following five camera recordings:

- Camera 114 – HQ entrance east view
- Camera 115 – HQ entrance
- Camera 116 – HQ front counter
- Camera 119 – Double doors
- Camera 136 – HQ intercom

[40] Subsequently, she confirmed with the sergeant in charge that there are no other cameras within or outside of the entrance to the police headquarters that would have captured the appellant's interaction with the police officers on the date in question.

[41] During mediation, the affiant was advised that the appellant raised the issue of reasonable search. Subsequently, she emailed the Information, Communication and Technology (ICT) Branch to inquire whether there were any additional cameras other than those referenced above. She received an email from the systems analyst of the ICT Branch which confirmed that the cameras, referenced above, were the only cameras in place within or outside the front of the police headquarters on that date. She was also advised that the retention period for the cameras is 180 days. Consequently, she was only able to obtain and review the footage relating to camera 114. After reviewing this footage, she did not locate any additional records.

[42] Although the appellant provided representations, his representations did not address this issue.

¹⁵ Order MO-2246.

Analysis and findings

[43] As set out above, in appeals involving a claim that additional responsive records exist, the issue to be decided is whether the police have conducted a reasonable search for the records as required by section 17 of the *Act*. In this appeal, if I am satisfied that the police's searches for responsive records were reasonable in the circumstances, the decision will be upheld. If I am not satisfied, I may order that further searches be conducted.

[44] In the circumstances, I am satisfied that the searches by the police for video surveillance records responsive to the request were reasonable. I make this finding based on a number of reasons.

[45] As previously explained, 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 that are reasonably related to the request. In the circumstances of this appeal, I find that the police have provided sufficient evidence to demonstrate that they made a reasonable effort to identify and locate responsive records within their custody and control. The police searched for all video footage inside and outside of the police headquarters for the date in question. I accept that these searches were conducted by experienced employees who were knowledgeable in the subject matter and they expended a reasonable effort to locate any responsive records. I further accept that given the police's retention policy for the camera footage, it is unlikely that any additional footage that existed was destroyed and is no longer accessible.

[46] As set out above, although a requester will rarely be in a position to indicate precisely which records an institution has not identified, he must still provide a reasonable basis for concluding that such records exist. In this case, the appellant did not do so. He simply argues that there must be additional video surveillance records responsive to his request.

[47] Accordingly, I find that the police's search for responsive video surveillance records was reasonable and dismiss the appeal.

ORDER:

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

Original Signed by: _____
Lan An
Adjudicator

November 28, 2022