Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

# ORDER M-922

## Appeal M_9600404

## Ottawa-Carleton Regional Police Services Board

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## NATURE OF THE APPEAL:

The appellant submitted a request to the Ottawa-Carleton Regional Police Services Board (the Police) under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to copies of all his personal information held by the Police, including the information in an identified file.

The Police provided access to portions of the responsive records. The Police denied access to parts of Record 7 on the basis of the following exemptions in the Act:

- law enforcement report - section 8(2)(a)
- invasion of privacy - sections 14(1) and 38(b)
- discretion to refuse access to requester's own information - section 38(a)

In addition, the Police claimed that Record 8 in its entirety fell within the parameters of section 52(3)3 of the Act, and therefore outside the scope of the Act.

The appellant filed an appeal of the decision of the Police. During mediation, he narrowed the scope of the records at issue to Record 8 in its entirety, and page 18 of Record 7. The Police have exempted this page solely on the basis of sections 14(1) and 38(b).

A Notice of Inquiry was sent to the appellant, the Police and an individual whose interests could be affected by the disclosure of page 18 of Record 7 (the affected person).

Representations were received from the Police only.

## DISCUSSION:

### INVASION OF PRIVACY

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual.

Page 18 of Record 7 is a letter sent by the affected person to the Police. I have reviewed this document and finds that it contains the personal information of both the affected person and the appellant.

Section 36(1) of the Act allows individuals access to their own personal information held by a government institution. However, section 38 sets out exceptions to this right.

Where a record contains the personal information of both the appellant and other individuals, section 38(b) of the Act allows the institution to withhold information from the record if it determines that disclosing that information would constitute an unjustified invasion of another

individual's personal privacy. On appeal, I must be satisfied that disclosure **would** constitute an unjustified invasion of another individual's personal privacy. The appellant is not required to prove the contrary.

Sections 14(2), (3) and (4) provide guidance in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy. Disclosing the types of personal information listed in section 14(3) is presumed to be an unjustified invasion of personal privacy. If one of the presumptions applies, the institution can disclose the personal information only if it falls under section 14(4) or if section 16 applies to it. If none of the presumptions in section 14(3) apply, the institution must consider the factors listed in section 14(2), as well as all other relevant circumstances.

The personal information contained in the letter does not fall within any of the presumptions in section 14(3) of the Act. However, the Police submit that it was supplied to them in confidence and that its contents are highly sensitive. The Police also explain the potential repercussions should the letter be disclosed. Having reviewed this letter, I accept these submissions and thus find that sections 14(2)(f), (h) and (e) of the Act are relevant considerations which favour non-disclosure. As indicated, the appellant has provided no submissions raising considerations which favour disclosure.

Based on a consideration of all the relevant circumstances of this case, I find that disclosure of page 18 of Record 7 would constitute an unjustified invasion of the personal privacy of the affected person and that it is exempt pursuant to section 38(b) of the Act.

**JURISDICTION**

I must now determine if Record 8 in its entirety falls within the scope of sections 52(3) and (4) of the Act. These provisions read as follows:

> (3) Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> 1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
>
> 2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.
>
> 3. Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.
>
> (4) This Act applies to the following records:

1. An agreement between an institution and a trade union.

2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.

3. An agreement between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees.

4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment.

The interpretation of sections 52(3) send (4) is a preliminary issue which goes to the Commissioner's jurisdiction to continue an inquiry.

Section 52(3) is record-specific and fact-specific. If this section applies to a specific record, in the circumstances of a particular appeal, and none of the exceptions listed in section 52(4) are present, then the record is excluded from the scope of the Act and not subject to the Commissioner's jurisdiction.

**Section 52(3)3**

In order to fall within the scope of paragraph 3 of section 52(3), the Police must establish that:

1. the record was collected, prepared, maintained or used by the Police on their behalf; **and**

2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; **and**

3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the Police have an interest.

[Order P-1242]

Record 8 is a report prepared by the Professional Standards Section of the Police. It contains the report itself, with its findings and recommendations, as well as nine attachments consisting of correspondence and memoranda related to the investigation and the investigator's notes.

**Requirements 1 and 2**

The Police state that the information contained in Record 8 was collected, prepared, maintained and used by their Professional Standards Section for the purpose of conducting an internal investigation into the conduct of two officers employed by the Police. The Police explain that once a complaint about an officer is received, all the persons involved, including witnesses, are contacted either in person, by telephone or in writing. The information in Record 8 documents discussions, interviews and communications in the form of memoranda and correspondence which took place among various police offices and witnesses in response to the allegations of misconduct made against the officers by the appellant.

In Order P-1223, former Assistant Commissioner Tom Mitchinson made the following comments regarding the interpretation of the phrase "in relation to" in section 65(6) of the provincial Freedom of Information and Protection of Privacy Act, the equivalent to section 52(3) of the Act:

> In the context of section 65(6), I am of the view that if the preparation (or collection, maintenance, or use) of a record was **for the purpose of, as a result of, or substantially connected to** an activity listed in sections 65(6)1, 2, or 3, it would be "in relation to" that activity. (emphasis added)

Having reviewed the records, I find that they were clearly collected, prepared, maintained and/or used by employees of the Police in relation to meetings, discussions or communications. Therefore, the first and second requirements of section 52(3)3 have been established.

**Requirement 3**

The Police submit that the investigation was conducted by the Professional Standards Section to determine if there was any wrongdoing by the officers who were the subject of the complaint and to lay a charge under the Police Services Act (the PSA), if warranted. The first issue to be determined is whether the meetings, discussions or communications which constituted this investigation were about "employment-related matters".

In Order M-835, the former Assistant Commissioner addressed the claim of a police force that disciplinary records related to PSA charges fell within the parameters of section 52(3)1 of the Act, and therefore outside the scope of the Act. In considering the issue of whether proceedings under the PSA "related to a person employed by the Police", for the purposes of section 52(3)1, he stated:

> In the circumstances of this appeal, the disciplinary hearing was initiated as a result of an internal complaint under Part V of the PSA, 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.

The former Assistant Commissioner also followed this reasoning in Order M-840. Order M-835 was subsequently the subject of a request for reconsideration on the grounds that police officers are not "employees". In rejecting the request for reconsideration and thus confirming the findings in Order M-835, Inquiry Officer Laurel Cropley stated:

> While it appears that the Courts are clear that, generally speaking, police officers are not "employees", in the context of the PSA, the legislature has made it abundantly clear that what police officers do for Police Services Boards constitutes "employment". In my view, the statutory context of the PSA is the governing factor, and I find that proceedings under Part V of the PSA relate to "employment".

I agree with this finding.

The language of sections 52(3)1 and 3 on this point is slightly different. Section 52(3)1 refers to **the employment of a person by an institution** while section 52(3)3 includes the phrase **employment-related matters**. However, in my view, the finding in Orders M-835 and M-840, confirmed in Order M-899, also supports the view that records prepared, maintained etc. in relation to meetings, discussions and communications concerning PSA charges are about employment-related matters.

I must now determine if this employment-related matter is one "in which the Police have an interest".

In Order P-1242, the former Assistant Commissioner reviewed a number of legal sources regarding the meaning of the term "has an interest", as well as several court decisions which considered its application in the context of civil proceedings. He concluded as follows:

> Taken together, these [previously discussed] authorities support the position that an "interest" is more than mere curiosity or concern. An "interest" must be a legal interest in the sense that the matter in which the Ministry has an interest must have the capacity to affect the Ministry's legal rights or obligations.

I agree with this interpretation and adopt it for the purposes of this appeal.

The Police submit that the investigation that resulted in the creation of Record 8 was conducted pursuant to section 58 of the PSA which imposes a duty on the Chief of Police to investigate any alleged or apparent misconduct by a police officer.

Section 59 of the PSA sets out the rules that apply when an officer is guilty of misconduct but not of a serious nature. In such cases, the officer must be provided with reasonable information about the matter and be given the opportunity to reply, orally or in writing. The Chief may then admonish the officer and may cause an entry concerning the matter, the action taken and the officer's reply to be entered into the officer's employment record. If the officer refuses to accept

the admonition, the particulars are not so recorded until a hearing is conducted. Entries made in an officer's employment record are expunged two years after having been made if during that time no other entries concerning misconduct have been made.

The Police submit that because the PSA establishes how investigations such as those that resulted in Record 8 should be conducted and the resulting records maintained, the employment-related matter in Record 8 is one in which they have an interest because an employee would have the legal right to challenge any record not maintained or created in accordance with the Act and the by-law. Such a challenge could result in a civil action against the Police.

The Police also maintain that they have an "interest" in the employment related matter in Record 8 by virtue of Article 2:01 of the collective agreement between the Police and the Police Association (the Association). This Article reads:

> The Association acknowledges that, subject to the Police Services Act, R.S.O. 1990, as amended, and the Regulations made pursuant thereto, it is the function of the Board and it has the exclusive right to:
>
> (a) maintain order, discipline and efficiency;
>
> (b) hire, discharge, direct, classify, transfer, promote, demote or suspend or otherwise discipline any employee.

Article 2:02 states that the Police agree that no member will be dealt with adversely without reasonable cause, and that it will exercise the functions outlined above fairly, without discrimination and in a manner consistent with the collective agreement, the PSA and its regulations.

The Association is the exclusive bargaining agent for all Police employees who fall within the scope of the collective agreement.

Thus, the Police submit that the collective agreement sets out their legal rights and obligations as employer vis à vis the Association. Should the Association believe that the Police have breached the agreement, in the conduct of an alleged police misconduct investigation, for example, the Association may bring legal action against the Police.

Having reviewed Record 8 and the submissions of the Police, I am satisfied that the Police "have an interest" for the purpose of section 52(3)3 in this record in that it deals with matters having the capacity to affect the legal rights or obligations of the Police, pursuant to the PSA and/or the collective agreement with the Association.

Therefore, the third requirement of section 52(3)3 has also been established.

In summary, I find that Record 8 was collected, prepared, maintained and/or used by the Police in relation to meetings, discussions or communications about employment-related matters in which the Police have an interest. All of the requirements of section 52(3)3 of the Act have thereby been established by the Police. None of the exceptions contained in section 52(4) are

present in the circumstances of this appeal, and I find that Record 8 falls within the parameters of this section, and is therefore, excluded from the scope of the Act.

## ORDER:

I uphold the decision of the Police.

Original signed by: April 9, 1997
Anita Fineberg
Inquiry Officer