



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

ORDER M-1060

Appeal M-9700307

Metropolitan Toronto Police Services Board



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NATURE OF THE APPEAL:

The Metropolitan Toronto Police Services Board (the Police) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The request was for access to records concerning allegations made about the requester to the Internal Affairs Bureau of the Police, by a named provincial prosecutor. The requester, who is a police officer, indicated that she wishes to receive the entire file concerning this matter.

The Police identified a number of records responsive to the request and denied access in total on the basis that the records fall within the parameters of section 52(3) of the Act and are, therefore, outside the scope of the Act.

The requester (now the appellant) appealed this decision.

This office provided a Notice of Inquiry to the Police and the appellant. Representations were received from the Police only.

RECORDS:

The records at issue in this appeal consist of letters, reports, memoranda, court documents, transcripts, various notes, as well as other documentation relating to the Internal Affairs investigation.

DISCUSSION:

JURISDICTION

The sole issue in this appeal is whether the records fall within the scope of sections 52(3) and (4) of the Act. These provisions read:

- (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) and (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.

The Police submit that the records at issue fall within the scope of paragraph 1 of section 52(3) of the Act. In order for a record to fall within the scope of this paragraph, the Police must establish that:

1. the record was collected, prepared, maintained or used by the Police or on their behalf; **and**
2. this collection, preparation, maintenance or usage 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 Police.

(Order M-815)

Requirement One

The Police submit that they collected or prepared the records in order to examine the appellant's job performance after having received complaints regarding her work.

Having reviewed the records, I find that the records were collected, prepared, maintained and/or used by the Police. Therefore, the first requirement of section 52(3)1 has been established.

Requirement Two

The Police indicate that, following the investigation for which the records were generated, the appellant could potentially be subject to internal disciplinary measures, or even charges of "obstruct justice" under the Criminal Code.

The Police indicate further that under section 58(1) of Part V of the Police Services Act (the PSA), the chief of police is obligated to investigate any apparent or alleged misconduct by a police officer. During the course of these investigations, evidence and other information is gathered, recorded and stored. The Police advise that, dependent upon the outcome of such investigations, action is taken under sections 59(1)1 to 3, or sections 60(1) to (12) of the PSA.

In her letter of appeal, the appellant indicates that she was exonerated following the investigation into her performance, and therefore, argues that the records do not fall within paragraph 1 of section 52(3).

In Order M-835, Assistant Commissioner Tom Mitchinson made the following findings:

A disciplinary hearing conducted under section 60 of the PSA is a dispute or complaint resolution process conducted by a court, tribunal or other entity which as, by law, the power to decide disciplinary matters. As such, these hearings are properly characterized as "proceedings" for the purpose of section 52(3)1.

The Chief of Police or his delegate has the authority to conduct "proceedings" and the power, by law, to determine matters affecting legal rights and obligations and is properly characterized as an "other entity" for the purposes of section 52(3)1.

In Order P-1223, Assistant Commissioner Mitchinson stated:

In the context of section 65(6) [the provincial equivalent of section 52(3)], 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.

Having reviewed the records at issue in this appeal, I find that they were all collected, prepared, maintained and/or used by the Police in the context of an anticipated disciplinary hearing, and therefore are properly characterized as being in relation to it.

Specifically, I find that the records were collected, prepared, maintained and/or used by the Police for the purpose of investigating the conduct of the appellant, with a view towards an anticipated disciplinary hearing arising from this investigation. As such, I find that all of the records are substantially connected to an anticipated disciplinary hearing. In my view, the fact that the appellant was exonerated has no bearing on the characterization of the matter, as the purpose of the investigation was to determine whether a disciplinary hearing into her performance should be held.

Therefore, the second requirement under section 52(3)1 has been established.

Requirement Three

With respect to this issue, the Police quote from my decision in Order M-899, in which I found:

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 the proceedings under Part V of the PSA relate to 'employment'.

The Police reiterate that disciplinary hearings are conducted under section 60 of the PSA. The Police submit that whether an investigation is brought before a court, tribunal, or other entity which has by law the power to decide disciplinary matters, or whether an investigation does not ultimately result in charges being laid (i.e. section 60(12) of the PSA), the various investigations, proceedings, or anticipated proceedings relate to the employment of a sworn police officer.

I agree, and find that the matter which is the subject of the records relates to the employment of the appellant by the Police. Therefore, I find that the third requirement has been met.

Accordingly, all of the requirements of section 52(3)1 of the Act have been established by the Police. None of the exceptions contained in section 52(4) are present in the circumstances of this appeal. I find that the records fall within the parameters of section 52(3)1 and therefore are excluded from the scope of the Act.

ORDER:

I uphold the decision of the Police.

Original signed by: _____
Laurel Cropley
Inquiry Officer

_____ January 13, 1998