



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

ORDER MO-1291

Appeal MA-990264-1

Durham Regional Police Services Board



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NATURE OF THE APPEAL:

The Durham Regional Police Services Board (the Police) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for a copy of the “reason why [the requester] failed background check for application for Police Constable”.

The Police identified four pages of background check notes made by a police officer and denied access to them in their entirety claiming that they fell outside the scope of the Act pursuant to sections 52(3)1, 2 and 3 of the Act.

The requester (now the appellant) appealed the decision of the Police.

A Notice of Inquiry was initially sent to the Police. The Police provided representations, which were enclosed with the Notice of Inquiry sent to the appellant. In its representations, the Police submit that they are relying on paragraph 3 of section 52(3).

The appellant did not provide representations.

RECORDS:

The record at issue in this appeal consists of four pages of notes made by the Police during the background investigation of the appellant as part of the selection process.

DISCUSSION:

JURISDICTION

The first issue to be determined in this appeal is whether the requested information falls within the scope of sections 52(3) and section 52(4) of the Act. These sections read, in part:

- (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:

...

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.

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) applies, then the record is excluded from the scope of the Act.

In order for a record 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 or 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]

Requirements 1 and 2:

The Police submit that the records were prepared following the appellant's submission of an application for employment. In particular, the Police submit that the officer conducting the background check collected information about the appellant, prepared notes in reference to this information, maintained the notes in an employment file, and used the information to determine the appellant's suitability for employment.

The records document an aspect of the recruitment process and I am satisfied that they were collected, prepared or used by the Police as part of this process. Moreover, I find that they were collected, prepared or used in relation to meetings, discussions or communications which took place in relation to the appellant's application for employment. Therefore, I find that both of the first two requirements have been met.

Requirement 3:

The Police indicate that all of the records relate to the appellant's application for employment. The Police refer to a previous order of this office (Orders P-1258), which held that job competitions are employment-related matters, and submit that an application for employment should be similarly characterized. I agree that the recruitment process which is initiated by an application for employment is an "employment-related matter".

The only remaining issue is whether this is an employment-related matter in which the Police “have an interest”.

In Order P-1242, Assistant Commissioner Tom Mitchinson stated the following regarding the meaning of the term “has an interest”:

Taken together, these [previously referenced] 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.

However, several recent orders of this office have considered the application of section 65(6)3 of the provincial Act (and its municipal equivalent in section 52(3)3) in circumstances where there is no reasonable prospect of the institution’s “legal interest” in the matter being engaged (Orders P-1575, P-1586, M-1128, P-1618 and M-1161). The conclusion of this line of orders has essentially been that an institution must establish an interest that has the capacity to affect its legal rights or obligations, and that there must be a reasonable prospect that this interest will be engaged. The passage of time, inactivity by the parties, loss of forum or conclusion of a matter have all been considered in arriving at a determination of whether an institution has a legal interest in the records within the meaning of this section.

The Police submit that their legal interest in the employment-related matter is established by various provisions of the Police Services Act (the PSA) and the Ontario Human Rights Code.

With respect to the appointment of an individual as a police officer in accordance with section 43(1) of the PSA, the Police submit that the “a ‘proper job competition’ can not be conducted without references being one hundred percent certain that the information they are providing will not be shared with the applicant in question.” The Police indicate that disclosure of this type of information would critically hinder its ability to effectively screen applicants thus possibly leaving it in a position of violating the Ontario Human Rights Code and/or the PSA.

The Police believe that the appellant’s obvious dissatisfaction with his failure to secure employment as a Constable suggests that he is contemplating a complaint under the Ontario Human Rights Code.

In Order PO-1718, I made the following comments on the “possibility of legal action arising in a matter”:

The Ministry refers to the possibility of some legal action being taken as a result of the audit or disclosure of the audit, and relies on the due performance of its on-going responsibilities to establish that its legal interests are engaged. In my view, the mere possibility of future legal action, which may be said to arise out of many kinds of audit or regulatory activities of government, is insufficient to engage a reasonable anticipation of such action actually occurring or, therefore, to engage an active legal interest ... In my view, unless there is something that arises to give reality to the prospect or anticipation of such action, government’s “interest” in the record relates to the normal course of its affairs, and the requisite legal interest is not established.

In the circumstances of the current appeal, there is no evidence before me that the appellant has questioned the adherence of the Police to the Ontario Human Rights Code or that he has made or is contemplating making a complaint in that forum.

In conclusion, I find that the Police have failed to establish a legal interest in this employment-related matter that is reasonably capable of being engaged. Therefore, I find that the third requirement has not been met and the records are, accordingly, subject to the Act.

ORDER:

1. I order the Police to provide the appellant with a decision letter with respect to those records which it has identified as responsive to the request in accordance with the time frames set out in sections 19 and 22 of the Act, using the date of this order as the date of the request.
2. I order the Police to provide me with a copy of the correspondence referred to in Provision 1. This should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

Original signed by: _____ April 6, 2000
Holly Big Canoe
Adjudicator