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

ORDER MO-1523

Appeal MA-010205-1

Toronto Police Services Board

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NATURE OF THE APPEAL:

The Toronto Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to the Police investigation into allegations that the requesters had been assaulted. Specifically, the requesters sought access to all documentation relating to the assault, including but not limited to the following:

1. Notes of the investigating officer's investigation of the assault;
2. Copies of all documentation generated as a result of the assault, including copies of any reports made by the investigating officer or others regarding the assault;
3. Copies of any statement taken from the witnesses to the assault;
4. Copies of the photographs taken of one of the requester's injuries;
5. Copies of any statements given by the assailants;
6. Any documentation providing the name, address and telephone number of the assailants;
7. Documentation pertaining to the decision to withdraw the charges.

The Police located a number of records responsive to the request and denied access to them, claiming the application of the exclusionary provision contained in section 52(3) of the *Act*. The Police indicated in the decision letter to the requesters that, due to the operation of this section, and because the public complaint investigation into the matter was ongoing at that time, the records fall outside the ambit of the *Act*.

The requesters (now the appellants) appealed the decision of the Police to deny access to the responsive records. Mediation was not successful in resolving the matters in dispute between the parties and the appeal was moved into the adjudication stage.

I decided to seek the representations of the Police initially and received their submissions, which were shared, in their entirety, with the appellants. The Police indicate that the public inquiry into the appellants' complaint against one of the police officers involved in the investigation of the assault allegations has been dismissed. The Police also state that the appellants have filed an appeal of that decision with the Ontario Civilian Commission on Police Services (OCCOPS). The appellants also made submissions to me in response to the Notice of Inquiry which I provided to them. Because of the manner in which I am addressing the application of section 52(3) to the facts of this appeal, it was not necessary for me to solicit further reply representations from the Police.

The records at issue in this appeal consist of a copy of a 911 tape and various police officers' notebook entries.

DISCUSSION:

Are the Records Excluded from the *Act* due to the Operation of Section 52(3)3?

Section 52(3) is record-specific and fact-specific. If section 52(3) applies to the records, and none of the exceptions found in section 52(4) applies, then the records are outside the scope of the *Act*.

The Police claim that the records fall within the scope of section 52(3)3.

Section 52(3)3

Sections 52(3)3 reads:

> (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.

The parties are in agreement that none of the provisions of section 52(4) are relevant in the context of this appeal.

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

1. the records were collected, prepared, maintained or used by the institution or on its 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.

Part One of the Test Under Section 52(3)3

The Police submit that although the records at issue were compiled during the original police investigation into allegations made by the appellants that they had been assaulted, these records were collected and used by the internal Police investigators in making a determination as to the propriety of the police officer's actions.

The appellants agree that the records at issue were collected and used by the Police and that one of its officers prepared them.

The first part of the test under section 52(3)3 has, accordingly, been satisfied.

Part Two of the Test Under Section 52(3)3

The Police take the position that, following the conclusion of the internal investigation under Part V of the *Police Services Act*, the investigating officers communicate their findings to the Chief of Police. Accordingly, the Police submit that the collection and usage of the records was in relation to communications between the investigators and the Chief.

The appellants argue that the purpose for the creation of these particular records must be considered when determining whether they fall within the ambit of section 52(3)3. In the present case, the appellants submit that the purpose for the creation of the records was "purely investigatory" and not in relation to any meetings, discussions, consultations or communications about labour relations or employment-related matters.

I accept the Police's position that the records at issue in this appeal were collected, prepared or used by the Police in relation to communications about the internal investigation into the appellants' complaints against a police officer under the *PSA*. As such, the second part of the section 52(3)3 test has been met.

Part Three of the Test Under Section 52(3)3

The Police rely on the findings in Orders M-899 and M-835 where it was held that proceedings under Part V of the *PSA* relate to employment. The Police argue that "any subsequent hearing before a board of inquiry, i.e. an appeal to OCCOPS regarding the findings of the Public Complaints investigation, also relates to employment".

The appellants argue that I ought to examine the original purpose for which the records were created. If the records were prepared in the course of an investigation into a possible crime, they ought not to be excluded from the scope of the *Act* on the basis that they have some labour relations purpose. However, I have found above that the records were in fact used by the Police in their investigation and public inquiry under Part V of the *PSA* into the allegations by the appellants'. The fact that they were originally created for some other purpose does not preclude their use for some other purpose, such as a public inquiry into the police officer's handling of the criminal investigation.

As far as the third requirement is concerned, previous orders of this office have determined that complaints filed under the *PSA* regarding the conduct of individual police officers, as well as appeals of any decisions made under the *PSA* to OCCOPS, qualify as "employment-related matters" for the purpose of section 52(3)3 of the *Act* (Orders M-922, MO-1346 and MO-1491). Applying the reasoning in these previous orders, I find that the communications reflected in the records at issue in this appeal are about "employment-related matters" concerning the police officer who is the subject of the appellants' *PSA* complaint and OCCOPS appeal.

Accordingly, I find that the Police have established an interest in the employment-related matter to which the records relate.

On this basis, I find that all three requirements for the application of section 52(3)3 have been met, and the records fall outside the scope of the *Act*.

ORDER

I uphold the decision of the Police that the *Act* does not apply to the records.

Original signed by: March 15, 2002
Donald Hale
Adjudicator