



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER MO-1491

Appeal MA-010189-1

Durham Regional Police Service



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NATURE OF THE APPEAL:

The Durham Regional Police Service (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The requester referred to a police file number. He stated that he had filed a complaint on December 17, 1999 and that a Staff Sergeant of the Professional Standards Branch had completed an investigation of the matter on March 20, 2000. The requester indicated that he was seeking copies of the following four documents that had been used as documentary evidence referred to on pages 13 and 14 of the Staff Sergeant's report:

- Letter to Crown Attorney's Office dated February 7, 2000 (3 pages)
- Letter from Crown Attorney's Office dated February 9, 2000 (1 page)
- Fax Transmission from [a named law firm] dated January 7, 2000 (5 pages)
- Letter to named individual, dated January 4, 2000 (1 page)

The Police denied access to the records on the basis that they fell within the scope of the exclusion provided by section 52(3) of the *Act*.

The requester, now the appellant, appealed the Police's decision.

During mediation, it was confirmed that the appellant had filed two complaints against two different police officers under the *Police Services Act* (the *PSA*), and had also commenced a civil lawsuit. The Police took the position that the four records relate to both complaints and possibly to the civil lawsuit.

The Mediator set out the status and chronology of the complaints and civil lawsuits in her Report of Mediator provided to the parties at the end of the mediation stage of the appeal:

- In October 1994, the Police criminally charged the appellant.
- The charges were withdrawn in March 1996.
- Following the withdrawal of the criminal charges, the appellant filed a civil lawsuit against the Police for a large amount of money in damages. The lawsuit is presently ongoing. The particulars of the lawsuit are not known, however it appears that the appellant is alleging that the police tampered with a videotape.
- The appellant also filed complaints against two officers who are employed by the Police, details as follows:

Complaint against Officer #1

- In 1999, the appellant filed a complaint against Officer #1 with the Professional Standards Branch of the Police. Officer #1 was involved in the 1994 police investigation of the appellant.

- In March 2000, the Professional Standards Branch found the appellant's complaint against Officer #1 to be unsubstantiated.
- The appellant requested a review of the decision of the Professional Standards Branch by the Ontario Civilian Commission on Police Services (OCCPS). In July 2000, the OCCPS upheld the decision of the Professional Standards Branch.
- According to the appellant, the matter is still ongoing, as he has requested reviews. It is not clear whether the appellant applied for a judicial review of the July 2000 OCCPS decision, or whether by "review", he is referring to the complaint he subsequently filed relating to Officer #2.

Complaint against Officer #2

- The appellant filed a complaint with the Police Standards Branch of the Police against Officer #2. Officer #2 is the officer who investigated the appellant's complaint against Officer #1. The appellant alleges that Officer #2 had a conflict of interest, because at the time he investigated the appellant's complaint against Officer #1, he was also assisting the Police in its defence of the ongoing civil lawsuit with the appellant.
- The Professional Standards Branch did not uphold the appellant's complaint against Officer #2.
- The appellant requested a review by the OCCPS. OCCPS referred the matter back to the Professional Standards Branch, on the basis that it was a "service" complaint, rather than a "conduct" complaint.
- The Professional Standards Branch considered the service complaint in August 2001, and decided not to uphold the appellant's complaint.
- The appellant advised the Mediator that he is intending to seek a review of this decision.

Mediation was not successful, and the appeal proceeded to the adjudication stage. I sent a Notice of Inquiry initially to the Police, who provided representations in response. These representations were provided to the appellant, together with a copy of the Notice. The appellant also provided representations.

RECORDS:

As noted earlier, the records at issue are:

1. Letter to Crown Attorney's Office dated February 7, 2000 (3 pages)
2. Letter from Crown Attorney's Office dated February 9, 2000 (1 page)
3. Fax Transmission from [a named law firm] dated January 7, 2000 (5 pages)
4. Letter to named individual, dated January 4, 2000 (1 page)

DISCUSSION:

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.

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.

The four records at issue in this appeal consist of various correspondence exchanged in the context of the appellant's two complaints to the Professional Standards Branch.

The Police maintain that all three requirements of section 52(3) are present.

First, the Police submit that Records 1 and 4 were prepared by the Police, and that Records 2 and 3 were collected and used by the Police in the context of the appellant's complaints and the ongoing civil litigation involving the appellant.

Second, the Police submit that this collection, preparation and usage was in relation to communications concerning the complaint and litigation matters.

And third, the Police submit that these communications are about employment-related matters in which the Police have an interest. The Police point out that the records all stem from complaints made by the appellant under the *PSA* regarding the conduct of two police officers, and that these records also relate to ongoing civil litigation commenced by the appellant in relation to the same subject matter as the *PSA* complaints.

The appellant does not dispute that his civil lawsuit regarding his complaint concerning Officer #1 is ongoing, or that he is contemplating further legal action concerning his second complaint, as outlined in the Report of Mediator. However, the appellant takes the position that his dispute with the Police is not "an employment or labour relations context complaint", and that the records do not fall within the scope of section 52(3)3. The appellant also points out that some of the documents identified as responsive records represent correspondence to and from his lawyer.

Having reviewed the records and the submissions of the parties, I accept the Police's position that all of the records at issue in this appeal were collected, prepared or used by the Police in relation to communications about the appellant, specifically about his complaints made against the two police officers under the *PSA*. I also accept that the Police are maintaining these records in the context of ongoing and anticipated civil litigation involving the appellant and stemming from his *PSA* complaints. Accordingly, the first two requirements of section 52(3)3 are present.

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 OCCPS, qualify as "employment-related matters" for the purpose of section 52(3) of the *Act* (See Orders M-922 and MO-1346). Applying the reasoning in these previous orders, I find that the communications reflected in the various records at issue in this appeal are about "employment-related matters" concerning the two police officers who were the subjects of the appellant's *PSA* complaints.

Although the complaint and appeal involving Officer #1 before the Professional Standards Branch and OCCPS appear to have been completed, litigation stemming from this complaint is ongoing. As far as the complaint involving Officer #2 is concerned, the Professional Standards Branch issued its final decision dismissing the complaint in August of this year, and the appellant has expressed an intention to seek a review of that decision. Presumably this review would be in the nature of an appeal to OCCPS. There is also nothing precluding the appellant from

commencing a civil action regarding his second complaint and, given its close connection to the first complaint and the fact that the appellant has already commenced a lawsuit in this regard, in my view there is a strong possibility that further appeals and litigation involving the complaint against Officer #2 will be forthcoming. 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 Police's decision that the *Act* does not apply to the records.

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

_____ December 13, 2001