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

ORDER MO-1661

Appeal MA-020334-1

Toronto Police Services Board

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NATURE OF THE APPEAL:

Background

The Toronto Police Services Board (the Police) and the University of Toronto (the University) entered into an agreement, referred to as a Memorandum of Understanding (the MOU), setting out the terms and conditions governing the use of police information databases by the University's own policing staff. As part of the MOU, the University agreed that any of its policing staff who are to have access to the databases must be "security cleared". The security clearances are performed by the Police, rather than by the University's own policing staff.

The request and appeal

The Police received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information relating to the reasons why the requester did not pass a "security clearance" undertaken by the Police pursuant to the MOU at the request of her employer, the University. The requester is an employee of the University's police service and had applied for a position that required that she undergo a security clearance. It should be noted that the University is not an institution for the purposes of the *Act* or its provincial counterpart.

The Police located a large number of records responsive to the request and denied access to them. Access to records relating to the security investigation undertaken by the Police and to the MOU itself was denied on the basis that these records fall outside the ambit of the *Act* due to the operation of section 52(3). In addition, the Police applied the mandatory exemption in section 14(1) (invasion of privacy) to portions of the responsive records.

The requester, now the appellant, appealed this decision. During the mediation stage of the appeal, the appellant indicated that she was not interested in obtaining access to the information withheld from the responsive records under section 14(1) that referred to her husband's criminal record. These portions of the records are, accordingly, no longer at issue. The appellant continues to seek access to the MOU between the Police and the University and to 38 pages of documents relating to the security clearance investigation.

I decided to seek the representations of the Police initially as they bear the onus of demonstrating the application of section 52(3) to the records at issue. The Police provided me with representations, which were shared, in their entirety, with the appellant, along with a copy of the Notice of Inquiry. The Police indicate that they are relying on section 52(3)3 to exclude the records from the application of the *Act*. The appellant also made representations that were shared with the Police, who declined to make further submissions by way of reply.

RECORDS:

The records at issue consist of a MOU between the Police and the University and 38 pages of records relating to the security clearance investigation undertaken by the Police.

DISCUSSION:

ARE THE RECORDS EXCLUDED FROM THE APPLICATION OF THE *ACT* UNDER SECTION 52(3)3?

Introduction

Section 52(3)3 of the *Act* provides:

> 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:
>
> > Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

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 **an 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 institution** has an interest. [my emphasis]

Section 52(3)3 is record-specific and fact specific. If section 52(3)3 applies to the records, and none of the exceptions found in section 52(4) apply, section 52(3)3 has the effect of excluding the records from the scope of the *Act*.

I find that the exceptions listed in section 52(4) have no application to the current appeal.

Parts one and two of the test under section 52(3)3

The Police submit that pages 1 and 2 of the records, which are waivers signed by the appellant authorizing the Police to collect the appellant's personal information and disclose it to the University, were collected, prepared and maintained by the Police. They also indicate that the remaining 36 pages that comprise the Investigator's Report were also collected, maintained and used by the Police. Finally, the Police take the position that the MOU was also prepared and "used to ensure the process, including the screening of applicants, is secure."

In my view, the Police have established that they prepared, collected and/or used the records, thereby satisfying the first part of the test.

With respect to the second part of the test, the Police argue that the Investigation Report records were "directly related to the appellant's application for employment" with the University. It submits that the results of the investigation were communicated to the University "in conjunction with" the terms of the MOU. In addition, the Police indicate that "the [MOU] is itself, communications between the [Police] and the [University] clearly stating the requirements which must be met by employees".

The appellant argues that the records were not collected in relation to any of the activities listed in the section.

I also accept that this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications between the Police and the University relating to the appellant's application for a particular position with the University's police staff.

Part three of the test under section 52(3)3

Representations of the parties

The Police submit that the records at issue in this appeal "were prepared and used for the sole purpose of ensuring the demands listed in the C.P.I.C. Reference Manual, which were incorporated into the [MOU], were met." They also quote from the relevant sections of the C.P.I.C. Operations Manual regarding access to the system by staff persons employed by police services and others. With respect to the question of whether the Police "have an interest" in the subject matter of the records, the Police state:

> It is recognized by the institution that the correlation between the [Police] and a potential [University Police Service] employee is not a traditional employee/employer relationship. In fact, in reading the interpretation of "have an interest" made by the Ontario Court of Appeal would suggest that Section 52(3) would only apply to records involving an employee of the institution that received the request. However, the Ontario Court of Appeal states ". . . the words 'in which the institution has an interest' **appear on their face** to relate simply to matters involving the institution's own workforce. [emphasis by the Police]
>
> This interpretation is not absolute, it leaves room to argue that although on the surface it would appear only to apply to employee records, there may be situations in which the institution has an obligation to take a real interest in the records, beyond that of a mere curiosity, and to have authority over the hiring of an individual by an outside agency. In the case at hand, the indication by a member of the [Police] that the appellant was unsuccessful in her background check, removed her from contention for the [University Police Service] position that which she had applied.

> Based on the above facts, it is the position of this institution that all of the requirements of Section 52(3)3 have been met and that as 52(4) does not apply, the records at issue fall outside the access provisions of MFIPPA.

The appellant relies on the clear statement referred to above from the decision in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.) in support of her contention the exclusionary provisions in section 52(3) do not apply in the circumstances of this case, as the appellant is not and has never been an employee of the Police and has not applied for positions with the Police. The appellant indicates that, according to the decision in *Ontario (Solicitor General),* records which are excluded from the operation of section 52(3) are restricted to "records relating to the institution's own workforce".

The appellant points out that the ultimate responsibility for hiring in the case of the job competition involving the appellant was the University. She argues that any interest the Police may have in the individual who is hired for a position with the University's police staff and has access to C.P.I.C. is not an interest within the meaning of section 52(3). According to the appellant, "If the legislature had intended that this section applied to records outside the institutions workforce then they would have said so in express terms".

Findings under the third part of the test under section 52(3)3

I have reviewed the contents of the records and the submissions of the parties and find that there is no merit in the arguments advanced by the Police. The decision of the Ontario Court of Appeal in *Ontario (Solicitor General)* clearly indicates that the provisions of section 65(6) of the provincial *Act*, which is substantially similar to the wording of section 52(3), "operate simply to restrict the categories of excluded records to those records *relating to the institution's own workforce . . ."* [my emphasis]

In the present appeal, the appellant made an application for a position with the University and was required to undergo a security clearance conducted by the Police pursuant to the terms of the MOU. This was necessary because the position applied for gave the successful candidate access to certain police information databases. At no time was the appellant making an application for a position with the Police (or any other institution under the *Act* or its provincial counterpart). The records which were prepared and collected, accordingly, did not relate to labour relations or employment-related matters in which the Police "have an interest". Instead, the only labour relations or employment-related interest being engaged was that of the University, which is not an institution under either *Act*.

By way of summary, I find that the Police do not have the requisite interest in the records for the purposes of section 52(3)3. The records do not relate to "labour relations or employment-related matters" in which the Police have an interest. As a result, I find that the *Act* applies to the records at issue and I will order the Police to issue a decision respecting access to them under section 19 of the *Act*.

ORDER:

1. The records at issue are not excluded from the *Act* as a result of the operation of section 52(3)3.

2. I order the Police to provide the appellant with a decision letter respecting access to the records pursuant to section 19 of the *Act*.

Original signed by: June 19, 2003
Donald Hale
Adjudicator