



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-1729

Appeal MA-020017-1

London Police Services Board



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NATURE OF THE APPEAL:

The requester made a request to the London Police Services Board (the Police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

...the complete London Police Force Policy, including policies of police conduct, police arrest, police use of force and police community relations. Basically, the same policy information that a police officer would receive pertaining to [the] London Police.

The Police issued a decision letter to the requester, granting partial access to the requested information. The Police denied access to the remaining information on the basis that it qualified for exemption under the following provisions of the *Act*:

- sections 8(1)(c), (e), (i) and (l) (law enforcement);
- section 15(a) (information published or available);

The requester (now the appellant) appealed the Police's decision to deny access.

During mediation, the appellant narrowed his request to two chapters in the Police's Procedure Manual entitled "Use of Force" and "Power of Search and Seizure." The Police then issued a new decision letter, granting partial access to these chapters. The Police subsequently clarified that they were still claiming sections 8(1)(c), (e), (i) and (l) for the remaining information, and that they were withdrawing their section 15(a) claim.

Mediation did not resolve this appeal, and the file was transferred to adjudication. This office sent a Notice of Inquiry to the Police, initially, outlining the facts and issues and inviting the Police to make written representations. The Police submitted representations in response to the Notice. In their representations, the Police for the first time took the position that some of the information at issue is excluded from the *Act* pursuant to section 52(3)3 (labour relations and employment). They also claimed for the first time that the exemption at section 7(1) (advice or recommendations) applies to some of the information. This office then sent a Notice of Inquiry to the appellant, together with a copy of the non-confidential portions of the Police's representations. The appellant, in turn, provided representations. Finally, this office sought representations from the Police in reply to the appellant's representations on section 52(3)3, and the Police provided representations on this issue.

RECORDS:

Portions of the following two chapters of the *London Police Service Procedure Manual* dated January 16, 2002 (the Manual) remain at issue:

- "Use of Force" (Part 1, Chapter B); and

- “Power of Search and Seizure” (Part 1, Chapter D).

BRIEF CONCLUSION:

The *Act* applies to the records. Portions of the records are exempt from disclosure, while the remaining portions are not and must be disclosed.

DISCUSSION:

LABOUR RELATIONS AND EMPLOYMENT RECORDS

The Police take the position that some portions of the Manual fall outside the scope of the *Act* by virtue of section 52(3)3, which reads:

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.

Section 52(4) reads:

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.

General Principles

If section 52(3)3 applies to the records, and none of the exceptions found in section 52(4) applies, the records are excluded from the scope of the *Act*.

The term “in relation to” in section 52(3) means “for the purpose of, as a result of, or substantially connected to” (Order P-1223).

The term “labour relations” refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships (Order PO-2157, *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.)).

The term “employment-related matters” refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship (Order PO-2157).

If section 52(3) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date (*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507).

Section 52(3)3: matters in which the Police have an interest

For section 52(3)3 to apply, the Police must establish that:

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

Representations

The Police submit:

Before any subject matter, policy, procedure, etc. becomes part of the [Manual], a [Police] Supervisor will first draft the “document”. The draft is then submitted to the Corporate Planning Branch where a “policy” committee is struck which includes the Inspector, Sergeant, Planner Analyst and support staff, to develop the document relevant to the [Police], looking at any risk management and

organizational issues. The “document” is then forwarded to all [Police] Senior Officers for their input and approval and/or any revisions or corrections necessary. The “document” is also commented on, relative to liability issues and other legal issues, by the on staff lawyer for the [Police].

Further, the [Manual] is, clearly, not limited to what one might equate to being policy or procedure, as this manual includes written communications, both sensitive and confidential to the [Police] in relation to employment-related matters. Clearly, the developing of any subject matter, policy or procedure that becomes part of the manual, involves the collecting and preparing of the records as a result of meetings, consultations and discussions. The resulting topics, policies and procedures, etc. are then maintained and referenced by the [Police], in relation to employment-related matters.

...

... it would appear that where [this office] has dealt with and interpreted section 52(3) ..., it has involved a specific circumstance that has arisen in relation to a labour relations or employment-related matter. [The Police] would respectfully submit that the section reads much broader and may be interpreted to include records that address and give instruction and guidance and commentaries, if you will, for both potential and eventual circumstances, such as the records ... in this particular appeal. The [Police] also submit that the severed portions are both sensitive and confidential to the [Police] in relation to employment-related matters. [Police’s emphasis]

The appellant submits that section 52(3)3 does not apply to the records. Among other things, he submits that:

... every document ever issued or prepared by or on behalf of any institution is or was of interest to some degree with respect to labour relations, inter-institutional agreements, court proceedings, negotiations, meetings and discussions about labour relations and employment matters.

For example, an institution’s fire-safety policy is of interest to all. It is of real interest that is neither simply curious or trifling, for employees to know that their employment premises [conform] to all fire-safety regulations, and that their safety is assured in the event of an emergency. Additionally, the institution bears a legal interest in the fire-safety policy due to its relationship with its employees. ...

One recognizes, however, that a fire-safety policy does not purport to address a definite event, nor an anticipated definite event, but a postulatory one. A fire may never occur. An institutional fire-safety policy is not [excluded] from the reach of the *Act*. [appellant’s emphasis]

In reply, the Police submit:

The procedure manual is created solely for the use and reference of London Police Service employees. All employees of the [Police] are tasked with the responsibility of remaining versed and updated on the procedures, and, are accountable for adherence to the procedures. ...

...

... Ontario Regulation 3/99, of the *Police Services Act*, which addresses Adequacy and Effectiveness of Police Services, is now the driving force for police services to establish procedures.

...

The manual is used by the [Police] as part of their management of the workforce – the manual is considered the source document for all procedures of the [Police]. Clearly, the manual outlines the overall operation of the [Police], including addressing the procedures and processes that shall be established, under Ontario Regulation 3/99, of the *Police Services Act*. [Police’s emphasis]

The manual is written to guide and advise employees on particular functions, processes, investigations, etc., but it is also a document that directs, orders, and “controls”, for lack of a better word, the way employees will perform their duties.

...

The manual was prepared and is maintained by the [Police]. The manual is used by all employees of the [Police]. The preparation and usage of this manual is as a result of meetings, consultations, discussions and communications. The procedures found in the manual are enforced and failure to not follow procedure or violation of procedure would result in some form of discipline by the employer [the Police] ...”

Finally, the Police submit that “these are employment-related matters, in which the [Police have] an interest.”

Findings

Exceptions to section 52(3)

None of the exceptions in section 52(4) applies in this case.

Part 1: collected, prepared, maintained or used

I find that the Police prepared, maintained and used the Manual. Accordingly, the Police have satisfied the first part of the three-part test.

Part 2: meetings, consultations, discussions or communications

I also find that the Police prepared, maintained and/or used the Manual “in relation to ... meetings, consultations, discussions or communications.”

Part 3: labour relations or employment-related matters in which the Police have an interest

I find, however, that the Police have not satisfied the third part of the test, which requires two things: first, that the Police’s meetings, consultations, discussions or communications be about labour relations or employment-related matters; and secondly, that the Police have an interest in these matters.

In this case, any meetings, consultations, discussions or communications among the Police were held for the purpose of developing the Manual. The Police submit that the Manual establishes procedures and processes as required by Regulation 3/99 made under the *Police Services Act*. I have reviewed Regulation 3/99 and among other things it requires chiefs of police and/or police boards to establish policies, procedures and/or processes for a number of specific matters in relation to crime prevention, law enforcement, victims’ assistance, public order maintenance and emergency response services, as well as the investigation of complaints. In addition, section 37 of Regulation 3/99 reads:

- (1) Every board shall evaluate the adequacy and effectiveness of the services provided by its police force by comparing those services with the requirements of this Regulation.
- (2) Upon completing the evaluation under subsection (1), every board shall prepare a plan setting out the steps needed to be taken by the board and the police force in order to meet the requirements of this Regulation by January 1, 2001.

The title of Regulation 3/99 (“Adequacy and Effectiveness of Police Services”), together with the Regulation’s contents, demonstrate that its main objective is to prescribe standards for, and monitor, the quality of policing services provided by municipal police forces (and in some cases the Ontario Provincial Police). It is not aimed at addressing issues relating to the management of the Police’s workforce, as required by section 52(3)3 generally (see *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, *supra*).

By the same token, the two chapters in the Manual at issue in this appeal (“Use of Force” and “Power of Search and Seizure”) set out various procedures governing how the Police carry out some of their duties. They are not “about labour relations or employment-related matters;” any

connection they might have to workforce-related issues is merely incidental (see also Order PO-2093-I).

I do not accept the Police's submission that section 52(3)3 should be given a "much broader" reading to extend to the records at issue. In my view, section 52(3)3 is not directed at records of this nature. Whether or not portions of the Manual are "sensitive and confidential" is irrelevant and does not affect my finding in this regard.

Accordingly, the two chapters at issue do not meet the requirements of Part 3 of section 52(3)3 and they are subject to the *Act*. I must therefore now review whether the exemptions claimed by the Police apply to these two chapters.

LAW ENFORCEMENT

The Police initially claimed the discretionary exemptions at sections 8(1)(c), (e), (i) and (l). In their representations, they rely on sections 8(1)(c), (e) and (i) only. These sections read:

A head may refuse to disclose a record if the disclosure could reasonably be expected to,

- (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
- (e) endanger the life or physical safety of a law enforcement officer or any other person;
- (i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;

The term "law enforcement," which appears in sections 8(1)(c) and (e), is defined in section 2(1) of the *Act* as follows:

"law enforcement" means,

- (a) policing,
- (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and
- (c) the conduct of proceedings referred to in clause (b);

Because sections 8(1)(c), (e) and (i) are discretionary exemptions, even if the information falls within the scope of these sections, the institution must nevertheless consider whether to disclose the information to the requester.

I note that in their decision letter, the Police claimed these law enforcement exemptions for all the information at issue, but in their representations they appear to claim them for certain portions only. In the circumstances, I have reviewed all the information at issue to see whether it qualifies for these exemptions.

The Police submit:

[The information at issue] clearly document[s] police investigative techniques and procedures and strategies, as well as other courses of action. Release of the [information] would reveal investigative techniques, etc. that if known could put the police in harm's way and also endanger the security of a vehicle carrying items, which, subsequently, (in both cases), could jeopardize the safety of the public – **these techniques/procedures, etc. are effected to ultimately protect the public.**

...

The police must be afforded some latitude in favour of non-disclosure with many law enforcement issues/procedures. The protection of these “procedures” etc. is not intended to conceal “something” from the public. The protection of these “procedures” is to ensure the safety of all **and** to ensure the enforcement of the law. If the public was privy to all law enforcement procedures, the police would be constrained in their efforts to enforce the law, arrest suspects, collect evidence, etc. [Police’s emphasis]

The Police also make certain confidential representations that I am not at liberty to disclose in this order.

The appellant submits that the Police have not met their burden of proof under sections 8(1)(c), (e) or (i).

In order to qualify as an “investigative technique or procedure” under section 8(1)(c), the institution must show that disclosing the technique or procedure to the public could reasonably be expected to hinder or compromise its effective utilization. The section 8(1)(c) exemption normally will not apply where the technique or procedure is generally known to the public (Orders P-170, P-1487). In addition, the techniques or procedures must be “investigative.” The exemption will not apply to “enforcement” techniques or procedures (Orders PO-2034, P-1340).

I find that none of the information at issue qualifies for exemption under section 8(1)(c), as it is not of an “investigative” nature and much of it is already generally known to the public.

I find, however, that two specific portions in the chapter entitled "Use of Force" (on page 9) qualify for exemption under both sections 8(1)(e) and (i). I am satisfied that disclosing this information could reasonably be expected to endanger the life or physical safety of a law enforcement officer or any other person (section 8(1)(e)) or endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required (section 8(1)(i)). I am also satisfied that the Police have properly exercised their discretion in denying access to this information.

I find that the remaining information does not qualify for exemption under either section 8(1)(e) or section 8(1)(i).

I am enclosing with the copy of this order being sent to the Police a copy of page 9 of the chapter entitled "Use of Force" highlighting those portions that the Police must not disclose.

ADVICE OR RECOMMENDATIONS

As noted above, the Police have claimed the discretionary exemption at section 7(1) for the first time in their representations. This section reads:

A head may refuse to disclose a record if the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

This office has established a process for institutions to follow in making new discretionary exemption claims. Section 11.01 of this office's *Code of Procedure* provides:

In an appeal from an access decision, excluding an appeal arising from a deemed refusal, an institution may make a new discretionary exemption claim only within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

When the appellant initiated his appeal in this case, this office sent the parties a Confirmation of Appeal setting the date by which the Police could claim additional discretionary exemptions. The Police claimed section 7(1) well beyond this date, after mediation had concluded and once the inquiry was already underway.

In the circumstances, I would not be inclined to allow the Police's section 7(1) claim at such a late stage. In any event, it is not necessary for me to decide whether to allow the Police's late claim. I have reviewed the information at issue and the Police's representations and I find that the information does not qualify for exemption under section 7(1), based on previous decisions of this office that manuals or guidelines for how employees perform their work do not constitute

“advice or recommendations” within the meaning of that section (for example, Orders P-811 and PO-1928).

ORDER:

1. I order the Police to disclose all the information at issue to the appellant, except for the portions of the chapter entitled “Use of Force” (on page 9) that I found to be exempt under sections 8(1)(e) and (i), by **January 13, 2004**. I am attaching a highlighted version of page 9 with the copy of this order being sent to the Police, identifying the portions that they must not disclose.
2. In order to verify compliance with the terms of Provision 1, I reserve the right to require the Police to provide me with a copy of page 9 that is disclosed to the appellant, upon request.

Original signed by: _____
Shirley Senoff
Adjudicator

_____ December 18, 2003