

Information and Privacy Commissioner,  
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,  
Ontario, Canada

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## ORDER MO-2676

Appeal MA11-9, MA11-10, MA11-11 and MA11-12

Toronto Police Services Board

December 5, 2011

**Summary:** The four appellants sought access to records relating to their arrest by the Toronto Police during the G20 disturbances. The police denied access to the responsive records, noting that the records were provided to the Office of the Independent Police Review Director in response to complaints made against the officers under the *Police Services Act*. As a result, the police argue that the records were excluded from the operation of the *Act* under section 52(3) (labour relations and employment records). Following the Divisional Court decision in *Goodis* and previous orders, the adjudicator determined that because the records addressed the initial police investigation of the appellants only, they were not excluded from the operation of the *Act* under section 52(3).

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, s. 52(3)

**Orders and Investigation Reports Considered:** MO-2556, MO-2131 and M-927

**Cases Considered:** *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.); *Ontario (Solicitor General) v. Ontario (Information and Privacy Commissioner)*, (2001), 55 O.R. (3d) 355 (C.A.)

### OVERVIEW:

[1] The Toronto Police Services Board (the police) received four requests under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to

information about the arrest and detention of four individuals who were arrested during the G20 Summit in June 2010. The police located records responsive to all four requests and issued decisions denying access to all of the responsive information, citing the application of the exclusionary provision in section 52(3) of the *Act*.

[2] The appellants, through their counsel, appealed these decisions. Mediation was not successful and the appeals were moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*. I sought and received both initial and reply representations from the police, in addition to those of the appellants, which were shared in accordance with Practice Direction 7 of the IPC *Code of Procedure*.

[3] Because the issues in all four appeals (MA11-9, MA11-10, MA11-11 and MA11-12) are identical and the records are similar, I will address them in a single order.

### **RECORDS:**

[4] The records at issue in each of the four appeals consist of a Record of Arrest, Supplementary Record, photograph and police officers' memorandum books relating to the arrest of the four appellants.

### **ISSUES:**

[5] The sole issue for determination in this appeal is whether the records are excluded from the *Act* due to the operation of section 52(3)1 and/or 3 of the *Act*.

### **DISCUSSION:**

#### **Are the records excluded from the operation of the *Act* under section 52(3)?**

[6] Section 52(3)1 and 3 state:

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:

1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.

...

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

[7] If section 52(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*.

[8] For the collection, preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in paragraph 1, 2 or 3 of this section, it must be reasonable to conclude that there is "some connection" between them. [Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).]

[9] The term "employment of a person" refers to the relationship between an employer and an employee. 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].

[10] The exclusion in section 52(3) does not exclude all records concerning the actions or inactions of an employee simply because this conduct may give rise to a civil action in which the Crown may be held vicariously liable for torts caused by its employees [*Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.)].

[11] The type of records excluded from the *Act* by section 52(3) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees' actions [*Goodis*, cited above].

### ***Analysis and findings***

[12] In the Notice of Inquiry provided to the police at the beginning of my inquiry, I posed the following:

The application of section 52(3) to records that relate to arrest documentation, was addressed in a decision of the Ontario Superior Court of Justice (Divisional Court) in *Ontario (Correctional Services) v. Goodis*, 2008 CanLII 2603 and a number of previous orders of this office, including MO-2504, copies of which are attached to this Notice. In these decisions, a distinction is clearly made regarding the application of the exclusion in section 52(3) to responsive records that relate exclusively to

the initial criminal investigation, as is the case in each of the four appeals before me, and records collected as part of a later proceeding. Please address this distinction in your representations.

[13] For section 52(3)1 to apply, the police must establish that:

1. the record was collected, prepared, maintained or used by an institution or on its behalf;
2. this collection, preparation, maintenance or usage was in relation to proceedings or anticipated proceedings before a court, tribunal or other entity; and
3. these proceedings or anticipated proceedings relate to labour relations or to the employment of a person by the institution.

[14] 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.

[15] In their representations, the police indicate that the officers who undertook the arrest of the appellants and created the records that are the subject of these appeals are now the subject of an investigation with respect to their actions by the Office of the Independent Police Review Director (OIPRD). These investigations have been initiated pursuant to the *Police Services Act* (the *PSA*) as a result of complaints filed by the appellants in these appeals about the conduct of the officers. As part of its investigation, the police state that the records at issue have been "collected, prepared and disclosed to the OIPRD as part of the formal complaint process surrounding the conduct of Toronto Police members."

[16] The police submit that the OIPRD has the authority to recommend the laying of charges against the subject officers under the *PSA* which may result in disciplinary action. Accordingly, the police argue that the records that are the subject of these appeals "constituted materials collected, prepared, maintained or used on behalf of an institution for the purposes of a tribunal relating to labour relations or employment", thereby falling within the ambit of the exclusion in section 52(3)1.

[17] The police go on to explain that the records at issue in these appeals:

. . . are the only recorded documentation of the allegations made by [sic] the identified officers; regardless of the originated factor for the creation of these records, they are maintained and prepared for the potential disciplinary actions against a Service member. [emphasis by the police]

[18] The appellants submit that “although some or all of the documents requested may have been provided by the Toronto Police Service to the OIPRD, the documents themselves do not relate to the employment of the officers.”

[19] As noted above, the application of the exclusionary provision in section 52(3) to records documenting a requester’s arrest by police has been the subject of several decisions of this office, as well as the Divisional Court in *Goodis*, referred to above. In Order MO-2556, Adjudicator Frank DeVries reviewed in detail the jurisprudence relating to the distinction that has been made between records that document what he describes as “the initial, day-to-day police investigation into circumstances involving the appellant” and those which find their way into files relating to “subsequent complaint investigations and/or other proceedings.” Specifically, Adjudicator DeVries articulates the distinction that has been made in previous orders and the *Goodis* decision as follows:

As the records at issue in this appeal relate to the initial, day-to-day police investigation into circumstances involving the appellant, which occurred within the jurisdiction of the Police, they do not fall within the exclusionary provision in section 52(3). Although it may well be that subsequent complaints about the actions of the investigating officer resulted in further investigations and/or the creation of additional files (of which I have very little evidence), the original records that relate to the original investigations into the appellant’s actions are not removed from the scope of the *Act* simply because they were reviewed or considered as part of a review of the officer’s conduct under other legislation. Any such review does not alter the character of the original records, which were prepared for the purposes of the investigations conducted by the officer (see also Order MO-2504). Accordingly, I find that the original incident sheet and general occurrence report that form the records at issue in this appeal are not excluded from the operation of the *Act* simply because of their possible inclusion or review in subsequent complaint investigations and/or other proceedings.

Based on the foregoing discussion, I find that the exclusionary provisions in sections 52(3)1 and 3 have no application to the records at issue in this appeal. It is clear from the language used by the Court of Appeal in

[*Ontario (Solicitor General) v. Ontario (Information and Privacy Commissioner)*, (2001), 55 O.R. (3d) 355 (C.A.)] that the exclusionary provisions only apply to records that relate to matters “involving the institution’s own workforce.” These include records pertaining to proceedings or anticipated proceedings relating to labour relations or to the employment of a person *by the institution* (paragraph 1) or records relating to a miscellaneous category of events ‘about labour relations or employment related matters in which the institution has an interest’ (paragraph 3).

In conclusion, I find that the records at issue fall within the ambit of the *Act* and I will order the Police to provide the appellant with a decision letter respecting access to them.

[20] In the current appeals, the records relate directly and exclusively to the arrest of the appellants by members of the police, setting out the circumstances surrounding the activities of the appellants and the arresting officers’ perceptions of those activities. The records do not include any reference whatsoever to any later proceedings that may involve a complaint into the conduct of the arresting officers; nor do they hint at any such proceedings being contemplated.

[21] I adopt the approach taken by Adjudicator DeVries in Order MO-2556 for the purpose of the current appeals. In my view, all of the records at issue in each of these four appeals relates only to the initial police investigation into the appellants’ activities at the time they were arrested. Again, as was the case in Order MO-2556, copies of these records may have later found their way into another file related to certain complaints made by the appellants against the officers who arrested them.

[22] Because these records served to document the appellants’ arrest and relate to the original investigation into possible criminal charges against them, I find that they are not excluded from the scope of the *Act* under either section 52(3)1 or 3. Based on the statements of the Divisional Court in *Goodis* and other decisions of this office, including Order MO-2556, MO-2131 and M-927, I conclude that the exclusionary provisions do not apply to the records that are the subject of these requests and appeals. Accordingly, I find that the records responsive to the requests fall within the scope of the *Act* and I will order the police to issue decision letters to the appellants respecting access to them.

## **ORDER:**

I order the police to provide the appellants with decision letters respecting access to the records they have identified as responsive to the requests, in accordance with the

requirements described in sections 19 and 22 of the *Act*, and without recourse to a time extension under section 20 of the *Act*.

Original Signed by: \_\_\_\_\_  
Donald Hale  
Adjudicator

\_\_\_\_\_ December 5, 2011