Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3163

Appeal MA13-308

Toronto Police Services Board

February 23, 2015

Summary: The appellant sought access to a copy of an internal video message recorded by the Chief of Police for members of his service. The police located the video and disclosed portions of it. However, they took the position that the severed portions fell outside the scope of the *Act* pursuant to the exclusions for labour relations and employment-related information at section 52(3). This order finds that the exclusions at section 52(3) do not apply and orders the police to issue an access decision to the appellant.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 52(3) 1 and 3; *Police Services Act,* R.S.O. 1990, c. P.15, as amended, section 95.

Orders and Investigation Reports Considered: Orders P-1223, PO-2613, PO-2913 and PO-2928.

OVERVIEW:

[1] The appellant submitted an access request to the Toronto Police Services Board (the police) pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for a copy of a specific internal video message recorded by the Chief of Police for members of his service.

[2] The police granted partial access to the responsive record, denying access to portions of the video pursuant to the exclusions at section 52(3) (labour relations) of the *Act*. If any of the paragraphs in section 52(3) apply, the record at issue is excluded from the scope of the *Act* and, therefore, it falls outside of the jurisdiction of this office. The appellant appealed the police's decision.

[3] During mediation, the appellant advised that she disagrees with the police's claim that any of the exclusions at section 52(3) apply to exclude the records from the scope of the *Act*. She also advised that she takes the position that there is a public interest in the disclosure of the severed portions of the record and, therefore, that the public interest override provision at section 16 of the *Act* applies. She submits that any exemption that might be raised by the police would be overridden by that section.

[4] As a mediated resolution could not be reached, the appeal was transferred to the adjudication stage of the appeal process for an adjudicator to conduct an inquiry. I sent a Notice of Inquiry setting out the facts and issues to the parties who provided me with representations in response. The representations were shared in accordance with this office's *Code of Procedure* and *Practice Direction Number 7.* The police provided submissions in reply to the appellant's representations, and the appellant then provided representations in sur-reply.

[5] In this order, I find that none of the exclusions in section 52(3) for labour relations or employment related information apply to the video at issue. As I find that the record falls within the scope of the *Act,* I order the police to issue an access decision with respect to the portions of the record that have not yet been disclosed.

RECORDS:

[6] The record that is at issue in this appeal is a video recorded by Chief Blair for members of the Toronto Police Service dated March 25, 2013. The video is approximately 7 minutes long and portions of it have been severed.

PRELIMINARY MATTERS:

A. Section 95 of the *Police Services Act*

[7] In their representations, the police submit that they are "no longer relying solely on [section 52(3)] but also on an exemption found [in] the *Police Services Act* (*PSA*)." The police submit that section 95 of the *PSA*, under the heading "Confidentiality," reads as follows:

> Every person engaged in the administration of this Part shall preserve secrecy with respect to all information obtained in the course of his or her

> duties under this Part and shall not communicate such information to any other person except,
>
> (a) As may be required in consideration with the administration of this *Act* and the regulations;
>
> (b) To his or her counsel;
>
> (c) As may be required for law enforcement purposes; or
>
> (d) With the consent of the person, if any, to whom the information relates.

[8] The police submit that in the circumstances of this appeal they find that the "confidentiality provision" in the *PSA* bars the application of the *Act* with respect to the requested information.

[9] The issue of whether confidentiality provisions in other acts prevail over the provisions of the *Act* is specifically addressed in section 53(1) of the *Act*. That section reads:

> This Act specifically prevails over a confidentiality provision in any other Act unless the other Act or this Act specifically provides otherwise.

[10] Additionally, section 53(2) of the *Act* specifically lists two confidentiality provisions that prevail over the *Act*: subsection 88(6) of the *Municipal Elections Act, 1996* and subsection 53(1) of the *Assessment Act*.

[11] As section 95 of the *PSA* does not specifically provide that it prevails over the *Act,* and it is not specifically listed under section 53(2) of the *Act*, I do not accept that it is a confidentiality provision that prevails over the *Act* and find that it is not relevant to the determination of this appeal.

B: Section 16 – Public interest override

[12] The appellant takes the position that the public interest override provision at section 16 applies in the circumstances of this appeal. Section 16 reads:

> An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[13] The sole issue before me in this appeal is whether any of the exclusionary provisions in section 52(3) apply to the record at issue. As section 52(3) is an exclusion

rather than an exemption it cannot be overridden by the public interest override at section 16.

[14] If any of the exclusions identified in section 52(3) are found to apply, the record falls outside of the scope of the *Act*, no exemptions need be applied and this office has no jurisdiction to determine whether information contained within in it should be disclosed.

[15] If none of the exclusions identified in section 52(3) are found to apply, the *Act* applies to the record and the police will be ordered to issue an access decision. The public interest override may be relevant in any subsequent appeal of such decision if one or more of the exemptions listed in section 16 are claimed to apply to exempt information contained in the record at issue from disclosure.

[16] Accordingly, I will not be addressing the possible application of the public interest override at section 16 of the *Act* in this order.

DISCUSSION:

Section 52(3) – labour relations and employment:

[17] The sole issue to be determined in this appeal is whether any of the paragraphs in section 52(3) apply to exclude the video from the scope of the *Act*. In their representations, the police do not specifically identify which paragraph of section 52(3) they are relying on and refer to the exclusion generally. From my review, only paragraphs 1 and 3 of section 52 might apply in the circumstances of this appeal. Those paragraphs 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.

[18] 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*.

[19] For the collection, preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in any of the paragraphs of this section, it must be reasonable to conclude that there is "some connection" between them.[1]

[20] 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. The meaning of "labour relations" is not restricted to employer-employee relationships.[2]

[21] 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.[3]

[22] 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.[4]

[23] Section 52(3) may apply where the institution that received the request is not the same institution that originally "collected, prepared, maintained or used" the records, even where the original institution is an institution under the *Act*.[5]

[24] 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.[6]

[25] 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.[7]

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[1] Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

[2] *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.); see also Order PO-2157.

[3] Order PO-2157.

[4] *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.

[5] Orders P-1560 and PO-2106.

[6] *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.).

[7] *Ministry of Correctional Services*, cited above.

Representations

[26] The police submit that section 52(3) applies to exclude the video from the scope of the *Act*. The police submit that there are claims of alleged misconduct with respect to some of the officers who are depicted in the video.

[27] The police explain that there are already both internal and external processes in place to address the alleged officer misconduct which is depicted in the severed portions of the video. They state that internally, misconduct is governed by the *PSA* and externally, misconduct is addressed by agencies such as the Ontario Civilian Police Commission (OCPC) and the Office of the Independent Police Review Director (OIPRD).

[28] Section 56(a) of the *PSA* states:

> A police officer is guilty of misconduct if he or she,
>
> Commits an offence described in a prescribed code of conduct.

[29] The police explain that the Chief of Police is obligated under section 58(1) of the *PSA* to investigate alleged misconduct by officers. He or she may delegate their powers and responsibilities under Part V of that act.

[30] The police point to Order P-1223, in which former Assistant Commissioner, Tom Mitchinson found that a Workplace Discrimination and Harassment Prevention Investigation Report (WDHP report) was excluded pursuant to section 65(6) of the *Freedom of Information and Protection of Privacy Act* (the provincial *Act*). In that decision, it was found that the report in question was collected, prepared, maintained or used by the Ministry of Agriculture, Food and Rural Affairs in relation to anticipated proceedings before a tribunal and that those anticipated proceedings related to labour relations. In that case the appellant had filed a grievance under the collective agreement between the Ontario Public Service Employees Union and the government arising from an alleged harassment issue.

[31] The police submit that in the current case:

> The records were investigated [sic] as a direct result of investigations into alleged criminal offences by members of the service, in contravention of the *PSA.* The records clearly contain the personal information of identifiable individuals as they pertain to the investigation, and for whom all disciplinary action has not been concluded.

[32] The police state that an investigation into the events depicted in the severed portions of the video is currently being investigated by the OCPC.

[33] The appellant explains that in response to her request for access to the video, she was granted access only to the portions that depict the Chief of Police's message at the beginning of the video. She submits that two short clips shown at the end of the video were severed. In her representations, the appellant provides some context to the portions of the video to which she seeks access:

> [The Chief of Police] recorded a video message and sent it to 8,000 member of his service, including two video clips he called examples of "behaviours" that he said "damages (the police's) relationship with the people of Toronto." [8]
>
> It is clear from his message that [the Chief] was using these two video clips as an example of misconduct by officers of his force – behaviour that has direct implications, as he stated, for their relationship with the public.
>
> One of the two video clips, viewed by Toronto Star reporter [named individual],[9] is the dashboard camera footage previously released and broadcast through court proceedings.[10]
>
> The contents of the second video are unknown, other than it is said to show TPS [Toronto Police Service] officers using "sexist, racist and profane language," according to a police sources.[11]

[34] The appellant submits that the police have not provided a substantive reason as to why the disclosure of either of the video clips could hinder any ongoing proceedings and that it is not clear if the officers involved in either incident are still subject to investigation. She goes on to submit that the first video clip is already available to the public through the "court system" and that given its availability, the police's refusal to disclose it "seemingly defies common sense, as it is not reasonable to believe its release could have any additional impact on proceedings or personal privacy."

[35] Addressing the second severed video clip, the appellant submits that it was selected by the Chief of Police to be widely distributed and has already been seen by the majority of the officers' colleagues ahead of any anticipated proceedings, if there are in fact any scheduled. She submits that those most likely to recognize the officers as one of their colleagues have already had unfettered access to the footage.

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[8] Appellant references Toronto Star article "Toronto Police Chief Bill Blair blasts officers for 'unacceptable behaviour,'" March 25, 2013.

[9] See note 8, above.

[10] Appellant references Toronto Star article "Toronto Police Chief Blair reprimands officers in video released to Star," June 6, 2013.

[11] See note 8, above.

[36] The appellant submits that the Chief of Police, by his "strongly-worded message" has indicated that there is an overwhelming public concern displayed in both of the video clips which highlights a great public interest in viewing these clips and scrutinizing them in connection to his message condemning the unacceptable behaviour displayed.

[37] In reply, the police submit that the denied portions of the video "arose from allegations of criminal offences by identifiable member[s] of the service." They submit that "these officers are being investigated by external agencies and still continue to be subject to internal repercussions." They argue that the potential for further litigation, both internal and external, still exists.

[38] The police indicate that they are not attempting to prevent the appellant from obtaining the contents of the first video clip, which is available to the public through the "court system." It submits:

> While these allegations continue to be reviewed by the respective agencies, we would respectfully submit that the appellant pursue the clipping via a more readily accessible access point that does not deprive any citizen, uniform or civilian, of their rights to a fair trial.

Analysis and findings

[39] Having reviewed the video message in its entirety, including the two video clips that have been withheld, I do not accept that it is excluded from the scope of the *Act* as a result of the application of the exclusion in either paragraph 1 or paragraph 3 of section 52(3).

Section 52(3)1: in relation to proceedings before a court, tribunal or other entity

[40] For section 52(3)1 to apply, the institution 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.

Part 1: collected, prepared, maintained or used

[41] Having considered the representations of the police and having reviewed the record, I find that the video at issue in this appeal was prepared, maintained and used by the police, thereby meeting part 1 of the test for section 52(3)1.

Part 2: in relation to proceedings before a court or tribunal

[42] For the exclusion at paragraph 1 of section 52(3) to apply, it must be established that the video was collected, prepared, maintained or used by the police in relation to proceedings or anticipated proceedings before a court, tribunal or other entity. As previously noted, for the collection, preparation, maintenance or use of a record to be "in relation to" the proceedings mentioned in section 52(3)1, it must be reasonable to conclude that there is "some connection" between them.[12] In the circumstances of this appeal, I do not accept that the video at issue was either collected, prepared, maintained or used by the police "in relation" to proceedings or anticipated proceedings before a court, tribunal or other entity.

[43] In Order PO-2613, Adjudicator Frank DeVries considered whether a database of job positions, descriptions, evaluations and classification standards held by the former Ministry of Government Services[13] was excluded from the scope of section 65(6) of the *Freedom of Information and Protection of Privacy Act* (the provincial *Act*), the provincial equivalent of section 53(2). Although Adjudicator DeVries found that the record at issue met part 1 of the test in that it was collected, prepared, maintained or used by the ministry, he found that part 2 could not be established. He stated:

> In my view, the record at issue does not fit within the parameters of section 65(6)1, as it was not collected, prepared, maintained or used "in relation to" the proceedings or anticipated proceedings. It may be that portions of the record regularly form part of the evidence tendered in various proceedings, including grievance proceedings. In my view, however, this does not mean that the entire record was collected, prepared, maintained or used "in relation to" those proceedings or anticipated proceedings. Many different types of records may ordinarily form part of the evidence in proceedings, for example, certain ministry policies or procedures may regularly be tendered as evidence in grievance proceedings; however, that does not mean that these entire records are excluded from the scope of the Act.

[44] Previous decisions issued by this office have held that section 52(3) is record-specific and fact-specific.[14] Therefore, the record must be examined as a whole. In the

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[12] *Supra*, note 1.
[13] Now the Ministry of Government and Consumer Services.
[14] Order P-1242.

circumstances of this appeal, it may be that some portions of the video-taped message, (specifically, the undisclosed portions of the video clips depicting officers engaging in inappropriate behaviour), were or are being used in proceedings or anticipated proceedings regarding the discipline of the specific officers that appear within them. However, following the reasoning outlined in Order PO-2613, I do not accept that the video-taped message itself, which is the record at issue, is excluded from the scope of the *Act*, even if portions of it may have formed part of the evidence in such proceedings.

[45] In my view, the context surrounding the preparation, maintenance or usage of the video-taped message from the Chief of Police cannot be said to be connected to the disciplinary proceedings of the officers depicted in the two severed video clips. The record as a whole, the video-taped message, is more accurately described as a training video that was prepared, maintained or used for the purpose of serving as an instructional tool for the purpose of providing all officers with examples of types of behaviour that are considered to be inappropriate. Although the video includes clips of other records that might have been used in the disciplinary proceedings of the officers that they depict, I do not accept that the specific training video that is at issue in this appeal was, in and of itself, collected, prepared, maintained or used by the police "in relation" to proceedings or anticipated proceedings before a court, tribunal or other entity as required by part 2 of the test for the exclusion at section 52(3)1 to apply.[15]

[46] As all three parts of the section 52(3)1 test must apply for the operation of the exclusion, it is not necessary for me to go on to determine whether part 3 has been met.

Section 52(3)3: matters in which the institution has an interest

[47] For section 52(3)3 to apply, the institution 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] See also orders MO-927 and MO-2556.

Part 1: collected, prepared, maintained or used

[48] As noted above, having considered the representations of the police and having reviewed the record, I find that the video at issue in this appeal was prepared, maintained and used by the police. Therefore, part 1 of the test for section 52(3)3 has been met.

Part 2: meetings, consultations, discussions or communications

[49] The video was prepared, maintained and used by the police for the purpose of instructing or training officers on acceptable and unacceptable behaviours. I find, and previous orders have held that training is a form of communication within the meaning of section 52(2)3.[16] These communications were between the police and their employees, the officers who were receiving instruction through the communication of this video. Therefore, I am satisfied that the ministry prepared, maintained and used the video in relation to communications within the meaning of part 2 of the section 52(2)3 test.

Part 3: labour relations or employment-related matters in which the institution has an interest

[50] The phrase "labour relations or employment-related matters" has been found to apply in the context of:

- a job competition[17]
- an employee's dismissal[18]
- a grievance under a collective agreement[19]
- disciplinary proceedings under the *Police Services Act*[20]
- a "voluntary exit program"[21]
- a review of "workload and working relationships"[22]

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[16] Order PO-2928.
[17] Orders M-830 and PO-2123.
[18] Order MO-1654-I.
[19] Orders M-832 and PO-1769.
[20] Order MO-1433-F.
[21] Order M-1074.
[22] Order PO-2057.

- the work of an advisory committee regarding the relationship between the government and physicians represented under the *Health Care Accessibility Act*.[23]

[51] The phrase "labour relations or employment-related matters" has been found *not* to apply in the context of:

- an organizational or operational review[24]

- litigation in which the institution may be found vicariously liable for the actions of its employee.[25]

[52] The phrase "in which the institution has an interest" means more than a "mere curiosity or concern", and refers to matters involving the institution's own workforce.[26]

[53] The records collected, prepared maintained or used by the police … are excluded only if [the] meetings, consultations, discussions or communications are about labour relations or "employment-related" matters in which the institution has an interest. Employment-related matters are separate and distinct from matters related to employees' actions.[27]

[54] I must now determine, first, whether the communications in the video are about "labour relations or employment-related matters," and, if so, whether these are matters in which the police have "an interest."

[55] In Order PO-2913, Adjudicator Laurel Cropley considered the application of section 65(6)3 of the provincial *Act* to training material prepared for use at the Ontario Provincial Police [OPP] Academy in training police officer recruits, instructing them on the safe use of firearms, tasers and restraints. She found that the provincial *Act* applies to these and other generic training materials. She determined that whether or not section 65(6) of the provincial *Act* applies to a record rests with the nature of circumstances in which the particular record is used.

[56] In particular, Adjudicator Cropley found that the records would be excluded under section 65(6)3 (or its municipal *Act* equivalent, section 52(3)3), if they were prepared or used in relation to communications about the employment-related training or qualifications of a particular individual. In that situation, their use was about the employment of the individual by an institution. She found that records relating to

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[23] *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above.
[24] Orders M-941 and P-1369.
[25] Orders PO-1722, PO-1905 and *Ontario (Ministry of Correctional Services) v. Goodis*, cited above.
[26] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above.
[27] *Ministry of Correctional Services*, cited above.

matters in which institutions are acting as employers and the terms and conditions of the employment of specifically identified individuals are at issue fall within the ambit of the section 65(6)3 exclusion.

[57] With respect to generic training materials akin to the record at issue in this appeal, Adjudicator Cropley found section 65(6)3 is not directed at records of this nature because these records are communications about operational procedures to be followed by the institution's employees generally, and do not relate to specific employees. She determined that the training materials at issue in that appeal contained information about:

> …OPP-wide procedures used to establish consistency in, and adequacy of training. As well, they are tools for ensuring that the OPP as an organization meets its statutory mandate as a police agency, as noted by the Ministry. In addition, although not determinative of the issue, I would suggest that the establishment of training standards is one facet of holding the police accountable to the public with respect to the overall performance and behaviour of its officers, and particularly with respect to the use of force, including the use of firearms, tasers and restraints.
>
> Previous orders have found that where records are prepared in the course of routine procedures, such as police officers' notes or occurrence reports, they would not typically fall under the exclusion in section 65(6). However, when allegations of misconduct are made, the records subsequently retrieved from the case file for the purposes of the investigation have been excluded from the *Act* [See, for example: Orders MO-2428 and PO-2628]. I accept that once a performance issue arises as a result of a particular police officer's actions, records that describe the training that the officer received may well engage the interests of the institution in its capacity as employer.
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> However, I am not persuaded that the records at issue, which consist of generic training materials, relate to matters in which the Ministry is acting as an employer and the terms and conditions of the employment of specifically identified individuals are at issue. For this reason, the communications represented by the records are not "about" employment-related matters" within the meaning of section 65(6)3. Accordingly, I find that the records at issue do not meet the requirements of part 3 of section 65(6)3 and they are subject to the *Act*.

[58] In Order PO-2928, Adjudicator Diane Smith considered records, specifically a DVD, used to train police officers on how to respond to individuals exhibiting signs and risks of excited delirium. In that order, Adjudicator Smith adopted Adjudicator Cropley's findings in Order PO-2913 and found that:

> The DVD at issue in this appeal is a generic tool for police officers. Therefore, it is more accurately described as a communication about operational procedures to be followed by the institution's employees. As a result, the record is not "about employment-related matters" within the meaning of section 65(6)3, and it does not meet the requirements of part 3 of section 65(6)3.

[59] Similarly, the video at issue in the appeal before me is, in my view, most accurately described as generic training material disseminated to all police officers to remind them generally of the conduct that they are expected to follow and to provide them with examples of behaviour that is considered to be inappropriate. The video is neither directed at the training of a particular officer, nor does it depict a particular officer's training. In keeping with the reasoning expressed by Adjudicators Smith and Cropley in Orders PO-2913 and PO-2928 outlined above, I find that the video at issue is not "about employment-related matters" as contemplated by the third requirement of section 52(2)3. Accordingly, I find that the exclusion does not apply.

Summary

[60] I have found that none of the exclusions listed in section 52(3) addressing information dealing with labour relations and employment-related matters apply to the video at issue. Accordingly, the record falls within the scope of the *Act* and I will order the police to issue a decision respecting access to the withheld portions.

ORDER:

1. I do not uphold the police's decision that section 52(3) applies to exclude the record from the scope of the *Act*.

2. I order the police to provide the appellant with a decision respecting access to the portions of the record that have not yet been disclosed, as contemplated by section 19, 21 and 22 of the *Act*, treating the date of this order as the date of the request.

Original signed by: February 23, 2015
Catherine Corban
Adjudicator