

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3428

Appeal MA15-361

Hamilton Police Services Board

April 24, 2017

Summary: The police received a request under the *Municipal Freedom of Information and Protection of Privacy Act (the Act)* for invoices sent to the police association for relating to the association president's salary and benefits, for four identified years. The police denied access to the responsive records, advising that due to the application of the exclusion at section 52(3)3 for records related to labour relations and employment-related matters, the records fall outside of the scope of the *Act*. The requester appealed the police's decision. In this order, the adjudicator finds that the exclusion at section 52(3)3 applies and she upholds the police's decision that the records fall outside of the scope of the *Act*.

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

Orders and Investigation Reports Considered: Orders MO-3018 and MO-3414.

Cases Considered: *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, 2003 CanLII 16894 (ON CA), [2003] O.J. No. 4123.

OVERVIEW:

[1] The Hamilton Police Services Board (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 salary and benefits of the police association's president. Specifically, the requester sought copies of the "actual invoice for the salary of the president of the association for the years 2011, 2012, 2013 and 2014, including gross salary, and the breakdown of employer share costs." The requester specified that he requested "actual copies of the invoices [sent] directly to the association for the

association president's salary cost recovery" and asked that the account that is credited with the repayment for the years 2011, 2012, 2013 and 2014 be identified.

[2] The police advised that the responsive records are excluded from the scope of the *Act* as a result of the application of the exclusion for records related to labour relations and employment-related matters at section 52(3). Accordingly, they took the position that the *Act* does not apply. The police stated that, in the alternative, if the exclusion at section 52(3) is found not to apply and therefore, that the responsive records fall within the scope of the *Act*, they would continue to deny access to them as a result of the application of the mandatory personal privacy exemption at section 14(1) of the *Act*.

[3] The requester, now the appellant, appealed the police's decision to deny access to the responsive records.

[4] During mediation, the president of the association (at the time of the request) and the former president of the police association were notified of the request (the affected parties). Both affected parties take the position that as the association is a non-profit organization its records are not subject to the *Act*.¹ However, both affected parties agree that the police are the appropriate institution to respond to the request and advised that they defer to the police's decision regarding the disclosure of the records.

[5] 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 began my inquiry by sending a Notice of Inquiry setting out the facts and issues on appeal, to the police, initially. In that Notice of Inquiry I requested that the police only provide me with representations on whether the exclusion at section 52(3) applies. The police responded with representations which were shared with the appellant pursuant to this office's sharing practices set out in *Practice Direction 7*. The appellant provided representations in response which were in turn shared with the police. The police responded briefly in reply. They also, subsequently, provided additional information similar to that which they provided earlier.

[6] The sole issue addressed in this order is whether the exclusion for labour relations and employment-related records at section 52(3)3 applies to the requested records. In this order, I find that the exclusion at section 52(3)3 applies and that the requested records fall outside the scope of the *Act*. Accordingly, I uphold the police's decision and dismiss the appeal.

¹ It should be noted that although the police association is not an institution subject to the *Act*, the records are clearly in the custody or control of the police services board which is an institution under the *Act*. As, pursuant to section 4(1) of the *Act*, "[e]very person has a right of access to a record or a part of a record in the custody or under the control of an institution..." the fact that the police association is not an institution under the *Act* does not, by itself, exclude the records from the scope of the *Act*.

RECORDS:

[7] The records at issue are the invoices for the salary and benefits of the president of the police association for the years 2011, 2012, 2013 and 2014. The invoices are prepared on a yearly basis. The police have provided me with four invoices, one for each year.

DISCUSSION:

Are the records labour relations and employment related records that are excluded from the scope of the *Act* pursuant to the exclusion at section 52(3)?

[8] The police take the position that the invoices detailing the salary and benefits of the president of the police association are subject to the exclusion for labour relations and employment-related information at section 52(3)3 of the *Act*.

[9] If any of the paragraphs in section 52(3) apply to the records, and none of the exceptions found in section 52(4) apply, the records are excluded from the scope of the *Act*. Section 52(3)3 states:

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.

[10] For the collection, preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in paragraphs 1, 2, or 3 of this section, it must be reasonable to conclude that there is "some connection" between them.²

[11] 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.³

[12] 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 arising from the relationship between an employer and

² Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

³ *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.

employees that do not arise out of a collective bargaining relationship.⁴

[13] 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.⁵

[14] 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*.

[15] 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.⁶

Representations

[16] In their representations, the police do not address the specific components of the exclusion at section 52(3)3. However, their representations provide some background about the requested records as well as the nature of the relationship between the police and the police association with respect to the payment of the president’s salary and benefits.

[17] The police submit that the records at issue relate to “labour relations” because there is a collective bargaining relationship between the police and the police association (Active Police Personnel Collective Agreement). They also submit that the records relate to the “employment of a person” because they relate to a relationship between an employer and an employee.

[18] The police submit that the invoices detailing the salary and benefits of the president of the police association are prepared on a yearly basis and contain the salary and benefit information of the president, whom they describe as a seconded employee. The police explain that the collective agreement between the police and the association stipulates in Article 8 that the association is the employer of the President during the time of his or her term and that their salary is paid by the association which is not subject to the *Act*.

[19] The appellant makes the following submissions in his representations:

I have requested copies of certain invoices prepared by Hamilton Police Services during the period 2011 to 2014 inclusive for payment by the Hamilton Police Association. The invoices are for the gross amount of the

⁴ Order PO-2157.

⁵ *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.

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

salary of the Police Association president(s) together with their benefits and employer's share of benefits.

The records are not exempted by section 52(3) of the Act because the association president is on leave of absence from [the police] while serving as the association president. The president is not an employee of [the] Hamilton Police Services nor is there a bargaining relationship between Hamilton Police Services and the president as the president's salary is determined by the association.

The invoices are documents prepared by Hamilton Police Services and are the property of Hamilton Police Services in the same manner as any other invoice prepared by Hamilton Police Services....The invoices are therefore not exempted. They are governed by the Act and are required to be released under FOI.

Analysis and findings

[20] On my review of the representations and the other material before me, I find that the invoices that are at issue are about labour relations or employment-related matters in which the police have an interest. As a result, I accept that the exclusion at section 52(3)3 applies and the records fall outside of the scope of the *Act*.

Collected, prepared, maintained or used in relation to meetings, consultations, discussions or communications

[21] Based on both the representations submitted by the police, as well as my review of the records themselves, it is clear that the invoices, which are on police letterhead and addressed to the association, were prepared and used by the police for the purpose of communicating with the police association with respect to recovering the cost of the salary of the police member fulfilling the role of the association's president.

In relation to meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest

[22] I also find that the invoices were prepared and used in relation to communications with the police association about labour relations or employment-related matters in which the police have an interest, specifically, the recovery of the salary and benefits of the police member.

[23] As indicated above, the phrase "in relation to" in section 52(3) and its provincial equivalent has been interpreted to mean that there is "some connection" between the collection, preparation, maintenance or use of a record and the subjects mentioned in paragraphs 1, 2, or 3 of that section.⁷ The term "has an interest" has been described as something more than a "mere curiosity or concern." In this appeal, the evidence

⁷ *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.), adopted in Orders MO-2589, MO-3018 and others.

before me establishes that there is more than “some connection” between the invoices, which relate to the reimbursement of salary and benefits, and labour relations or employment-related matters in which the police “have an interest.”

[24] In considering the application of section 52(3)3 in the specific circumstances of this appeal, I considered the analysis and findings of Assistant Commissioner Sherry Liang in Order MO-3018. In that order, Assistant Commissioner Liang found that records relating to Toronto Hydro’s surveillance of one of its union officials acting as a Health and Safety Representative (a position that is governed by a collective agreement), were about labour relations or employment related matters in which Toronto Hydro has an interest.

[25] In reaching her finding, Assistant Commissioner Liang found a number of factors to be persuasive in establishing that Toronto Hydro had a labour relations or employment-related interest in the records at issue and concluded:

In these circumstances, it is not accurate to suggest that Toronto Hydro has no employment or labour relations interest in the HSR [Human Safety Representative] position, or in whether the individual in that position is fulfilling his or her responsibilities Toronto Hydro’s interest in the position is recognized in the job description as well as the collective agreement. As stated in the HSR job description, the primary function of the HSR requires working with the employer to “embed a culture of health and safety.” Further, the collective agreement recognizes the employer’s interest in having the HSR work performed by providing for a wage refund to Toronto Hydro for time not spent on HSR functions.

...

[T]he fact that an individual holding the HSR position is granted leave from regular bargaining unit duties does not erase Toronto Hydro’s employment and labour relations interest in the work performed by that individual. Neither does the fact that the selection of the individual is made through a vote of the Union’s membership. The provisions of the Union’s Constitution, for example, refers to the job description which was agreed to by the Union and Toronto Hydro and which contains a number of provisions reflecting Toronto Hydro’s interest in this position.

[26] In Order MO-3018, Assistant Commissioner Liang found that the evidence before her demonstrated that there was “some connection” between the records at issue and labour relations and employment-related matters in which Toronto Hydro had an interest. As a result, she found that the records were excluded from the *Act* under section 52(3)3. I find her reasoning to be relevant and helpful in my consideration of the circumstances of this appeal.

[27] During my inquiry into this appeal, the police provided me with excerpts of the uniform collective agreement that exists between the police and the police association.

Section 8.6 of that collective agreement states:

Two members of the Association shall be granted an indefinite leave of absence without pay on four (4) weeks' notice from the Association to the Board. The terms of the leave of absence shall be as follows:

- a) During the leave of absence such members shall be paid directly by the Association at a salary to be negotiated between the member and the Association. The Association shall identify to the Board the salary level applicable to pension contributions or any other benefits under the Board's supervision.
- b) The Board will advise the City of Hamilton that such members, or other Association staff, may continue or obtain, as the case may be, coverage under the benefit package as relates to major medical, dental, group life insurance and pension benefits on the clear understanding that the costs that accrue in each of these areas will be charged back to the Association and become its responsibility for payment directly to the Region.
- c) The Association will at all times be the employer of the members during the leave of absence for the purposes of the Workers' Compensation Act and any other member legislation.
- d) Any seniority that accrues to the members during their leave of absence will be credited as if they were performing active police duty.
- e) If the member wishes to return to active service with the Service, the Association shall provide the Board with four (4) weeks' written notice prior to the proposed date of return.
- f) The Board will continue to provide sick leave credits as provided to all members in accordance with the Agreement as amended from time to time but all other costs, including salary etc. are borne by the Association.
- g) The member while performing duties for the Association shall not be subject to discipline, or to charges under the Police Services Act of Ontario.
- h) The member shall have the same rights as any citizen in terms of access to police buildings.
- i) It is agreed and understood that at no time shall there be more than two (2) persons who qualify for the terms and conditions of

Article 8.6 from both the Police Officer's and the Civilian's bargaining unit combined.

[28] From my review of the records themselves and the terms of the collective agreement in light of the issue before me, there are a number of factors that inform my finding that there is "some connection" between the police's preparation and use of the invoices and communications with the police association about labour relations or employment-related matters in which the police "have an interest." Specifically, although the president is considered to be on leave from his position as member of the police, there is a connection with respect to certain employment-related matters that is maintained between the police and the president. In my view, this connection is sufficient to establish that the invoices regarding the president's salary and benefits relate to employment-related matters in which the police have an interest.

[29] Based on the provisions in the collective agreement that discuss the maintenance of benefits, the payment of pension contributions, the provisions of sick leave credits and the accumulation of seniority during the leave, I accept that an employment-related connection between the police and the member on leave with the association is maintained during the duration of that leave. In my view, these provisions ensuring the maintenance of certain benefits that the individual enjoys as a member of the police confirms that there are employment-related matters in which the police have an interest that continue to exist during the time that the member is on leave to perform his role as president of the police association.⁸

[30] I accept that some of the clauses of section 8.6 of the Collective Agreement [for example, clauses (c), (g) and (h)] support the view that the employment relationship between the Police Services Board and the president of the association is not continued on the same terms as a regular employee of the board. However, in the circumstances, these clauses are not sufficient to find that there is not "some connection" between the records at issue and an employment-related matter in which the board has an interest.

[31] Additionally, a review of the records themselves reveals clearly that they are prepared by the Hamilton Police Service and invoiced to the Hamilton Police Association for the reimbursement of the annual salary and benefits paid to the member who is on secondment to the police association. In my view, the fact that the police are invoicing the association for the reimbursement of salary and benefits of the member acting as the president of the association, as well as the fact that the language on the invoices refers to the leave that is being granted to the member as a "secondment" are also factors that confirm that the police have continued employment-related matters with respect to the member, even while he is on leave to act as president of the association.

⁸ It should be noted that while the courts have stated that, generally speaking, police officers are not employees, the Legislature has made it clear in the *Police Services Act* that what police officers do for police services boards constitutes employment and therefore certain records relating to officers can be said to relate to the "employment of a person by [an] institution within the meaning of section 52(3) of the Act" (Order M-899).

[32] In *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*,⁹ the Court of Appeal stated that the phrase "labour relations" should not be read too narrowly and that "there is no reason to restrict the meaning of "labour relations" to employer/employee relationships; to do so would render the phrase 'employment-related matters' redundant." This direction from the Court of Appeal supports a finding that as a result of the terms set out in the collective agreement and evidence gleaned from the records themselves, the police retain some degree of employment or labour relations relationship with and interest in the president of the association, despite him being considered to be "on leave."

[33] In sum, I find that even though the individual elected as president of the association is "on leave" from the police during his term as association president, there is sufficient evidence to support a conclusion that the police's recovery of the president's salary and benefits amounts to a labour relations or employment-related matter in which the police "have an interest." I also find that there is "some connection" between the police's interest in these matters and the preparation and use of the invoices themselves. In my view, this finding is consistent with the content of the records, the terms of the collective agreement, the findings in Order MO-3018 and the suggested direction of the Court of Appeal in *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)* not to interpret the terms "labour relations" and "employment-related matters" too narrowly.

[34] Accordingly, I find that the invoices at issue in this appeal were prepared and used by the police in relation to communications about labour relations or employment-related matters in which they have an interest. As I have found that the requisite components of the section 52(3)3 exclusion have been established and there is no evidence before me to suggest that any of the exceptions to the exclusion set out in section 52(4) can be established, I find that the invoices are excluded from the scope of the *Act* under section 52(3)3 and I uphold the police's decision not to disclose them to the appellant.

ORDER:

I uphold the police's decision that the records are excluded from the scope of the *Act* and dismiss the appeal.

Original Signed By: _____

Catherine Corban
Adjudicator

April 24, 2017

⁹ 2003 CanLII 16894 (ON CA), [2003] O.J. No. 4123.