

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3968

Appeal MA18-246-2

Toronto Police Services Board

October 28, 2020

Summary: The police denied the appellant access to two records regarding background checks conducted on her in respect of her application for employment with Toronto Community Housing Corporation. The police claimed the first record, containing background check notes, was excluded from the application of the *Municipal Freedom of Information and Protection of Privacy Act* under section 52(3) (employment or labour relations) and withheld it in its entirety. The police granted the appellant partial access to the second record, a CPIC queries list, but withheld two portions under section 52(3) and two other portions under the discretionary exemption in section 38(a) (discretion to refuse requester's own information), in conjunction with section 8(1)(c) (reveal investigative technique or procedures).

In this order, the adjudicator finds that neither section 52(3) nor section 38(a) applies to the CPIC queries list and she orders it disclosed in full. The adjudicator also finds that the police are equivalent to an employer in respect of their interest in the background check record, because of the number and significant nature of conditions of TCHC employment they control. As a result, she upholds the police's decision that section 52(3)3 applies to exclude the background check notes record from the application of the *Act*.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, the definition of "personal information" in section 2(1), and sections 8(1)(c), 38(a) and 52(3).

Orders and Investigation Reports Considered: Orders MO-3163, PO-3572, PO-3642 and PO-4047.

Cases Considered: *Ontario (Minister of Health and Long Term Care) v Mitchinson*, 2003 CanLII 16894 (ON CA), *Ontario (Solicitor General) v Ontario (Assistant Information and Privacy*

Commissioner), 2001 CanLII 8582 (ON CA), and *Ontario (Correctional Services) v Goodis*, 2008 CanLII 2603 (ON SCDC).

OVERVIEW:

[1] This appeal addresses an individual's right of access to records of police background checks conducted as part of an application for employment with Toronto Community Housing Corporation (TCHC). The Toronto Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to specific background check information. In her three-part request, the appellant sought access to:

The notes of a specified police constable in relation to a background check he conducted on behalf of TCHC.

The notes on background checks the police conducted on her in 2015 relating to the denial she received for the Municipal Law Enforcement Officer (MLEO) program with a specified municipal law enforcement agency.

Any Canadian Police Information Centre (CPIC) check done on her between 2011 and March 2, 2018, and the reason for it.

[2] In response, the police located background check notes relating to TCHC and a CPIC record listing queries about the appellant between 2011 and 2018. The police issued a decision granting the appellant partial access to the CPIC record. The police relied on the exclusion in section 52(3) (employment or labour relations) of the *Act* to deny access to the TCHC background check notes in their entirety and some of the withheld information in the CPIC record. The police also relied on the discretionary exemption in section 38(a) (discretion to refuse requester's own information), in conjunction with the law enforcement exemption in section 8(1)(c) (reveal investigative techniques and procedures) of the *Act*, to deny the appellant access to the remaining withheld information in the CPIC record.

[3] The appellant was not satisfied with the police's decision and appealed it to the Information and Privacy Commissioner (the IPC). During the IPC's mediation of the appeal, the police advised the appellant that there were no records responsive to the second part of her request, for background check notes about the MLEO Program denial she received. The appellant accepted this and asked that the appeal proceed to the adjudication stage. Another adjudicator conducted an inquiry at the adjudication stage and received representations from the appellant and the police. The appeal was then transferred to me to continue the adjudication process.

[4] In this order, I uphold the police's decision that section 52(3) excludes the TCHC background check notes from the application of the *Act*. I also find that the withheld information in the CPIC record is not excluded under section 52(3) or exempt under

section 38(a) of the *Act* and I order it disclosed.

RECORDS:

[5] The two records at issue in this appeal are the TCHC background check notes record titled "Background Investigator's Log Notes, Employment Unit" and the CPIC record titled "CPIC Person Queries."

DISCUSSION:

Does the section 52(3) exclusion apply to the background check notes and some of the withheld information in the CPIC record?

[6] The police claim that section 52(3) excludes the background check notes record and two portions of the CPIC record from the application of the *Act*. Section 52(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:

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.
2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.
3. Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

[7] The application of any of paragraphs 1, 2 or 3 of section 52(3) to the background check notes record and the CPIC record will result in the records being excluded from the scope of the *Act*. The police claim that all three paragraphs of section 52(3) apply to the background check notes and the CPIC record severances. Based on my review of the records and the parties' representations, I am satisfied that paragraph 3 of section 52(3) applies to the background check notes record, while none of the paragraphs of section 52(3) applies to the CPIC record. Because I find below that the background check notes record is excluded under section 52(3)3 of the *Act*, I will address the parties' representations on that section alone for that record, while addressing the complete representations on all three paragraphs of section 52(3) in my consideration of the application of section 52(3) to the CPIC record. There is no

suggestion from the parties that any of the exceptions in section 52(4) of the *Act* applies to the records, and I find that none of them does.

The background check notes record qualifies for exclusion under section 52(3)3

[8] In order for me to find that section 52(3)3 applies to the background check notes record, the police must establish that:

1. the record was collected, prepared, maintained or used by an institution or on its behalf, and
2. this collection, preparation, maintenance or use 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.

The representations of the police

[9] The police submit that they collected, prepared and used the background check notes record themselves and on behalf of TCHC in relation to consultations, discussions and communications about employment-related matters in which they and THCH have an interest—namely, the appellant's appointment and hiring as a TCHC Special Constable. The police explain that under a 2002 Agreement between them and TCHC, they are legally obligated to conduct background checks on individuals applying to be TCHC Special Constables and to assist in determining an applicant's suitability for employment with TCHC. In support of their submission, the police provide a copy of the 2002 Agreement regarding the appointment of Special Constables and they refer me to section 53(1) of the *Police Services Act*, which gives the police the authority to appoint Special Constables.

[10] The police state that in carrying out their duty under the 2002 Agreement to conduct a background check to determine the appellant's suitability for employment with TCHC, one of their officers prepared the background check notes record while conducting a background check on the appellant. The police state that they used the information in the record to assist them in determining the appellant's suitability for the Special Constable position with TCHC and deciding whether they should appoint her as a Special Constable. The police assert the record is related to employment-related matters in which they have an interest because of their legal mandate to assist in determining the suitability of applicants. As well, applicants would be empowered, through them, to enforce federal and provincial statutes and potentially access highly sensitive personal information relating to individuals involved in various matters, including matters in which police intervention is required. The police add that although they would not employ the appellant directly if she were hired to be a TCHC Special Constable, they would have to appoint her as a Special Constable first in order for her to be hired and they would retain the authority to demote, dismiss, suspend or revoke

her appointment.

The appellant's representations

[11] The appellant asserts that section 52(3)3 does not apply to the record. In response to the police's submissions, she states that she did not apply to be a Special Constable. She states she applied to be a Community Patrol Officer, which does not have Special Constable Status. She adds that a Community Patrol Officer is not obligated to be a Special Constable and she could decide herself whether to pursue Special Constable Status.

Analysis and finding

[12] The background check notes record and the 2002 Agreement support the police's position that section 52(3)3 of the *Act* applies to the record. The record confirms the police's submission that a police officer prepared it for both the police and on behalf of TCHC in respect of the appellant's application for the position of Special Constable to determine whether she was suitable for the police to appoint her as a Special Constable. This preparation, maintenance and use of the record by the police for its consultations, discussions or communications about the appellant's suitability, satisfies the first two requirements of the section 52(3)3 exclusion.

[13] The only remaining requirement for the application of the exclusion is that the background check notes record be about employment-related matters in which the police have an interest. The police argue that their interest is employer-like because of their legal obligation to determine whether the appellant is a suitable applicant to be empowered to enforce federal and provincial statutes and by-laws and potentially have access to highly sensitive personal information of individuals involved in various matters, including those where they need to intervene.

[14] The courts have repeatedly affirmed that the reference to "employment-related matters" in the provincial counterpart to section 52(3)3 excludes from the *Act* records relating to an institution's own workforce.¹ In accordance with the courts' interpretation, previous IPC orders have found that some institutions do not bear the hallmarks of being an employer in a manner that is sufficient to bring them within an equivalent relationship with respect to the application of the exclusion.² Applying the court's interpretation here, the record would have to relate to the police's workforce for it to qualify for exclusion. Although TCHC would ultimately employ the appellant as a Special Constable or Community Patrol Officer, the police are responsible for significant and numerous conditions of employment with TCHC such that I am persuaded they should

¹ *Ontario (Correctional Services) v Goodis*, 2008 CanLII 2603 (ON SCDC); *Ontario (Solicitor General) v Ontario (Assistant Information and Privacy Commissioner)*, 2001 CanLII 8582 (ON CA); and *Ontario (Minister of Health and Long Term Care) v Mitchinson*, 2003 CanLII 16894 (ON CA).

² Order PO-4047 is a recent example.

be considered an employer for the purposes of section 52(3). Below, I set out the significant conditions of Special Constable employment that the police control that lead me to conclude they are equivalent to an employer in satisfaction of the last requirement of section 52(3)3.

[15] The 2002 Agreement confirms that the police have complete control over background checks for TCHC applicants, and sole responsibility and authority to appoint applicants who meet the qualifications and who have been put forward by TCHC for appointment as Special Constables. The 2002 Agreement also confirms that hiring by TCHC is conditional on appointment by the police, who may suspend, terminate or revoke the appointment of a Special Constable at their sole discretion. In respect of the appellant's statement that she applied to be a Community Patrol Officer and not a Special Constable, the 2002 Agreement confirms that upon appointment as a Special Constable, an applicant shall be identified as a TCHC Community Patrol Officer.

[16] The 2002 Agreement includes additional duties and powers for the police in respect of the TCHC employment process. It states that the police prescribe training standards for TCHC Special Constables and have the exclusive authority to exempt individuals from training requirements. The 2002 Agreement also requires the police to confer the powers of a police officer, subject to certain limitations, on TCHC Community Patrol Officers to enforce the *Criminal Code of Canada*, the *Provincial Offences Act* and four other provincial statutes. Finally, it imposes reporting requirements that TCHC Community Patrol Officers must fulfill daily, annually and as requested by the police.

[17] Considering the background check, appointment and recruitment process the police and TCHC are jointly required to conduct, as set out in the 2002 Agreement, and the many significant employer-type powers the police hold over TCHC Special Constables and Community Patrol Officers, I accept that the police have an employment-related interest in the background check notes record. The police control the fundamental appointment power, which they must exercise in order for an applicant to be considered for employment, and the sole authority to demote, suspend, dismiss, train and exempt from training, and impose reporting requirements on Special Constables and Community Patrol Officers. Accordingly, I find that the police prepared, maintained and used the background check notes record in relation to consultations, discussions or communications about employment-related matters in which the police have an interest—namely, their recruitment of the appellant to carry out law enforcement and security functions under their authority—in satisfaction of the third requirement for the application of section 53(3)3. I find, therefore, that section 52(3)3 of the *Act* applies to the background check notes record and excludes it from the scope of the *Act*.

The CPIC record does not qualify for exclusion under section 52(3)

[18] The police submit that two portions of the CPIC record are excluded because they relate to CPIC queries the police conducted regarding the appellant's application for employment with TCHC and as an MLEO with a municipal law enforcement agency. The appellant asserts that the CPIC record is not excluded under section 52(3) but she

provides no further submissions.

[19] As noted above, the police have already disclosed most of the CPIC record to the appellant. The information in the CPIC record that the police seek to exclude under section 52(3) is the group of CPIC queries that correspond to the police's background check of the appellant following her application for employment as an MLEO in 2015, and the group of CPIC queries following her application to be a Special Constable with TCHC in 2017. The police have not claimed that the entire CPIC record is excluded under section 52(3) of the *Act*.

[20] The application of an exclusion to part of a record has been addressed in previous IPC orders. The IPC has consistently taken the position that the whole record must be considered when determining the application of the exclusions in section 52(3) and its provincial counterpart.³ Consonant with this position, the IPC has found that the use of some information in a record for an excluded purpose is not sufficient to bring the record, as a whole, within the scope of the claimed exclusion.⁴ I follow the whole-record approach in this appeal.

[21] The CPIC record is a list of all CPIC queries conducted by the police on the appellant over many years for various purposes. The police prepared the CPIC record in response to the appellant's request and in accordance with her date parameters. Only some of the queries in the CPIC record are connected to employment-related matters. The majority of the CPIC queries in the CPIC record, which have been disclosed to the appellant, relate to issues that are entirely unrelated to employment matters. Based on all of this, I conclude that the CPIC record's collection, preparation, maintenance and use, as a whole, is not sufficiently connected to any of the excluded employment purposes under any of the paragraphs of section 52(3) so as to remove it entirely from the scope of the *Act*. I find that the CPIC record, as a whole, and therefore the portions withheld by the police in the CPIC record, do not qualify for exclusion under section 52(3) of the *Act*. Accordingly, the CPIC record is subject to the application of the *Act*.

Does the discretionary exemption in section 38(a), in conjunction with section 8(1)(c), apply to two withheld portions of the CPIC record?

[22] Section 38(a) gives an institution the discretion to refuse to disclose to an individual her personal information if section 8 would apply to the disclosure of that personal information. Section 8(1)(c) states that an institution may refuse to disclose a record if disclosure could reasonably be expected to reveal investigative techniques and procedures currently in use or likely to be used in law enforcement.

[23] The police's representations on this exemption claim are brief and include

³ Orders MO-3163, PO-3572 and PO-3642.

⁴ Orders MO-3163, PO-3572 and PO-3642.

confidential information that I cannot repeat in this order. The police assert that section 38(a) applies because the CPIC record contains the appellant's personal information, while 8(1)(c) applies because the withheld portions of the CPIC record contain information that would disclose investigative techniques or procedures to the public and could reasonably be expected to hinder or compromise their effective use.

[24] The police explain that CPIC has been the legacy system for the centralized communication of public safety and criminal justice information in Canada and it is essential for accurate, current electronic information retrieval and sharing. The police state that they are a user agency of CPIC, which they regularly use when conducting background checks along with their own data management system, investigative data banks and the Police Information Portal.

[25] These representations from the police, along with their confidential representations, do not identify the information in the CPIC record the police believe would reveal investigative techniques, and no such information is apparent to me on my review of the record. The police also do not explain how disclosure of the withheld information could reasonably be expected to reveal investigative techniques or procedures. The police bear the onus of establishing that the section 38(a) exemption applies and their representations are not sufficient to satisfy it. I find that section 38(a), in conjunction with section 8(1)(c), does not apply to the two withheld portions of the CPIC record.

[26] Having found that the withheld information in the CPIC record is not excluded from the scope of the *Act* and is not exempt from disclosure, I will order it disclosed.

ORDER:

1. I uphold the police's decision that section 52(3)3 excludes the background check notes record from the application of the *Act*.
2. I do not uphold the police's decision to withhold portions of the CPIC record under sections 52(3) or 38(a), and I order the police to disclose the entire CPIC record to the appellant by **December 2, 2020**, but not before **November 25, 2020**.
3. The timelines in order provision 2 may be extended if the police are unable to comply in light of the Covid-19 situation, and I remain seized to consider any resulting extension request.

Original signed by: _____

Stella Ball
Adjudicator

October 28, 2020 _____