Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3981

Appeal MA16-384

Peel Regional Police Services Board

December 9, 2020

Summary: The appellant submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Peel Regional Police Services Board (the police) for access to decisions relating to hearings held under the *Police Services Act* resulting from police Chief complaints and not reported to the Office of the Independent Police Review Director. Relying on the exclusion at section 52(3) (employment or labour relations) of the *Act*, the police denied access to the requested information, but advised the appellant that access to the records was available through alternative means. The appellant took the position that section 52(3) of the *Act* does not apply or that alternatively, section 52(3) is contrary to section 2(b) of the *Canadian Charter of Rights and Freedoms* and that the suggested alternative means of access does not satisfy the open court principle. In this order, the adjudicator finds that section 52(3) does not apply to the adjudicative records at issue in this appeal and that the appropriate remedy in the circumstances of this case is an order requiring the police to issue an access decision claiming any applicable exemptions and/or making any redactions in accordance with a proper application of the *Dagenais/Mentuck* test, as set out by Justice Morgan in *Toronto Star v. AG Ontario*.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 52(3); *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31, sections 65(6)1, 65(6)3 and 65(16); *Canadian Charter of Rights and Freedoms* : *The Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, sections 1 and 2(b); *Police Services Act*, R.S.O. 1990, c. P.15, sections 66(3), 68(5), 69(8), 76(1), 76(9), 76(1), 76(12), 80, 83(1) and 86; Code of Conduct, schedule to Ontario Regulation 208/10; *Statutory Powers Procedure Act*, RSO 1990, c S.22, section 9(1); *Tribunal Adjudicative Records Act, 2019*, sections 2(1) and 2(2); Ontario Regulation 211/19.

Orders Considered: Orders M-931, MO-1346, MO-1433-F, MO-1650, MO-2428, P-1345, P-1560, PO-2982 and PO-3686.

Cases Considered: *Dagenais v. Canadian Broadcasting Corp.,* 1994 CanLII 39 (SCC); *R. v. Mentuck*, 2001 SCC 76; *Baier v. Alberta*, 2007 SCC 31; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23; *Doré v. Barreau du Québec*, 2012 SCC 12; *Ontario (Ministry of Correctional Services) v. Goodis*, [2008] O.J. No. 289 (Div. Crt.); *Ontario (Ministry of Community and Social Services) v. John Doe*, [2014] O.J. No. 2362 (Div. Crt.); *Toronto Star and ARPA Canada and Patricia Maloney v. R*, 2017 ONSC 3285 (Ont. Div. Crt.); *Toronto Star v. AG Ontario*, 2018 ONSC 2586.

OVERVIEW:

[1] The appellant submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*) to the Peel Regional Police Services Board (the police) for access to decisions relating to hearings held under the *Police Services Act*[1] (*PSA*) and not reported to the Office of the Independent Police Review Director. The request read as follows:

> I request all Peel Regional Police hearing decisions made under the *Police Services Act* and not reported to the Office of the Independent Police Review Director. This would mean hearings that have resulted from Chief's complaints, as defined by the *Police Services Act*. I request all hearing decisions between January 1, 2010 and January 1, 2015.

[2] Relying on the exclusion at sections 52(3)1 and 52(3)3 (employment or labour relations) of the *Act*, the police denied access to the requested information.

[3] The appellant appealed the police's access decision.

[4] At the intake stage of the appeal, the appellant took the position that section 52(3) of *MFIPPA* does not apply or that alternatively, section 52(3) violates section 2(b) of the *Canadian Charter of Rights and Freedoms* [2] (*Charter*).

[5] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeals process where an adjudicator may conduct an inquiry under the *Act*.

[6] The appellant served the Information and Privacy Commissioner of Ontario (the IPC) and the Attorneys General of both Canada and Ontario with a Notice of Constitutional Question in which he sets out the grounds upon which he is asserting that sections 52(3)1 and 52(3)3 of *MFIPPA* are unconstitutional in respect of a request

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[1] *Police Services Act*, R.S.O. 1990, c. P.15.
[2] *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

for the adjudicative records of a disciplinary tribunal of the police. If the records are excluded under sections 52(3)1 and/or 52(3)3 of *MFIPPA*, the appellant seeks a finding, in effect, that these provisions are constitutionally inapplicable to the extent that they may be interpreted to remove the decisions in question from the scope of the *Act*.

[7] During my inquiry into these appeals, I sought and received representations from the police, the appellant and the Attorney General for Ontario (AG). Although invited to do so, the Attorney General of Canada did not provide representations. Representations were shared in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*.

[8] In this order, I find that section 52(3) does not apply to the adjudicative records at issue in this appeal and the appropriate remedy in the circumstances of this case is an order requiring the police to issue an access decision claiming any applicable exemptions and/or making any redactions in accordance with a proper application of the *Dagenais/Mentuck*[3] test, as set out by Justice Morgan in *Toronto Star v. AG Ontario*[4].

RECORDS:

[9] The records at issue are Reports of a Discipline Offence to the Police Services Board. They are a collection of decisions of a hearing officer reporting the outcome of disciplinary proceedings under the *PSA*.

ISSUES:

A. Does section 52(3) exclude the records from the *Act*?

B. Does the open court principle enshrined in section 2(b) of the *Charter* counsel an interpretation of section 52(3) that preserves the right of access to the records at issue under the *Act*?

DISCUSSION:

Issue A: Does section 52(3) exclude the records from the *Act*?

[10] Section 52(3) states:

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[3] *Dagenais v. Canadian Broadcasting Corp.*, 1994 CanLII 39 (SCC) and *R. v. Mentuck*, 2001 SCC 76. This test is discussed in detail in the analysis that follows.
[4] 2018 ONSC 2586. This case is also discussed in detail in the analysis that follows.

> 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.

[11] 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*.

[12] 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.[5]

[13] 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.[6]

[14] 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.[7]

[15] 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.[8]

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[5] Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Crt.).
[6] *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.
[7] Order PO-2157.
[8] *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.

[16] 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.[9]

[17] Here, the police rely on sections 52(3)1 and 52(3)3.

Section 52(3)1: court or tribunal proceedings

[18] 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 use 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.

[19] The word "proceedings" means a dispute or complaint resolution process conducted by a court, tribunal or other entity which has the power, by law, binding agreement or mutual consent, to decide the matters at issue.[10]

[20] For proceedings to be "anticipated", they must be more than a vague or theoretical possibility. There must be a reasonable prospect of such proceedings at the time the record was collected, prepared, maintained or used.[11]

[21] A "tribunal" is a body that has a statutory mandate to adjudicate and resolve conflicts between parties and render a decision that affects the parties' legal rights or obligations.[12]

[22] "Other entity" means a body or person that presides over proceedings distinct from, but in the same class as, those before a court or tribunal. To qualify as an "other entity", the body or person must have the authority to conduct proceedings and the power, by law, binding agreement or mutual consent, to decide the matters at issue.[13]

[23] The proceedings to which the paragraph appears to refer are proceedings related to employment or labour relations *per se* – that is, to litigation relating to terms and

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[9] *Ontario (Ministry of Correctional Services) v Goodis*, 2008 Canlii 2603 (Div. Crt.).
[10] Orders P-1223 and PO-2105-F.
[11] Orders P-1223 and PO-2105-F.
[12] Order M-815.
[13] Order M-815.

conditions of employment, such as disciplinary action against an employee or grievance proceedings. In other words, section 52(3)1 excludes records relating to matters in which the institution has an interest as an employer.

[24] The phrase "labour relations or employment-related matters" has been found to apply in the context of disciplinary proceedings under the *PSA*.[14]

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

[25] 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 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.

[26] 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.[15]

[27] The records collected, prepared maintained or used by the institution 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.

Section 52(4): exceptions to section 52(3)

[28] If the records fall within any of the exceptions in section 52(4), the *Act* applies to them. Section 52(4) states:

> This Act applies to the following records:
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> 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.

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[14] This is discussed in more detail below.
[15] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above.

> 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.

The police's representations

[29] The police asserted that any responsive records are excluded from the scope of the *Act* under sections 52(3)1 and 52(3)3.

[30] The police explain that disciplinary action in relation to the misconduct of a police officer is exclusively governed by Part V of the *PSA*, and that allegations of serious misconduct against a police officer are subject to a formal hearing process in a disciplinary tribunal, which is governed by that Part of the *PSA*, as well as the *Statutory Powers Procedures Act*[16].

[31] They submit that a hearing officer making a determination under the *PSA* is subject to the rules of administrative tribunals (including the requirement to be open to the public) and is making decisions pertaining to the employment of the subject police officer.

[32] The police refer to Orders M-931 and MO-1433-F and submit that the responsive records are a collection of disciplinary decisions:

> … prepared as a result of a hearing officer's review of internal misconduct investigations of sworn officers, and tribunal and party discussions/negotiations regarding penalty which usually includes either dismissal, demotion, suspension and/or the forfeiture of pay and/or time. Since the records are only a result of employment related actions and are in relation to a member's employment in general, the decisions themselves are clearly "in relation to" employment related documents.

[33] The police submit that a number of previous decisions of this office have found that disciplinary proceedings under the *PSA* are "labour relations or employment-related matters".[17]

[34] The police further submit that the responsive records do not fall within the scope of the section 52(4) exception to the exclusions.

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[16] RSO 1990, c S.22.
[17] The police refer to Orders MO-1346, MO-1650, MO-2428 and PO-2982 in support of this submission.

The appellant's representations

[35] The appellant notes that allegations of off-duty misconduct are also subject to *PSA* hearings with that legislation contemplating an internal discipline system for "non serious" misconduct. The appellant acknowledges that records relating to that type of conduct may be excluded from *MFIPPA* pursuant to section 52(3), but argues that this appeal concerns matters that have been classified as "serious" misconduct by the Chief of Police and there is an overriding public interest in their disclosure.

[36] The appellant takes the position that the decisions are primarily created to provide the parties and the public with findings of fact and reasons for a determination of guilt or non-guilt in allegations of serious police misconduct. Accordingly, the appellant submits that the responsive decisions cannot reasonably be framed as records related to "meetings, consultations, discussions or communications" on an employment matter.

[37] The appellant submits that the records requested in this appeal are limited to the written decisions rendered by a Hearing Officer following a public hearing. He submits that they are distinguishable from most of the orders cited in the police's representations and the Notices of Inquiry sent to the parties.

[38] The appellant submits that the notable exceptions are Order MO-1346 and Order MO-1650. However, and making passing reference to the cases he relies on in his *Charter* argument addressed below, the appellant submits that:

> When considering the above-noted orders due consideration should be placed on the following factors: (1) They are not binding authority; (2) They did not consider constitutional arguments; (3) They predate *ARPA*[18] and *Torstar*[19]; (4) They considered expansive requests that exceed the limited records of the current appeal; and (5) Order MO-1346 precludes automatic exclusion at page 9: " the order should not be read to mean that all records relating to police discipline hearing are automatically excluded from coverage by the *Act* under section 52(3)."

[39] The appellant submits that the Notices of Inquiry and the police's representations do not cite any binding authorities or provide any reasons to suggest that the specific records requested in this appeal qualify as being employment-related.

[40] The appellant also suggests that the IPC can wholly avoid the constitutional question raised in this appeal by departing from previous IPC orders and find in this appeal that police officers are not "employees" for the purposes of section 52(3).

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[18] *Toronto Star and ARPA Canada and Patricia Maloney v. R*, 2017 ONSC 3285 (Ont. Div. Crt).
[19] *Toronto Star v. AG Ontario*, 2018 ONSC 2586.

The police's reply representations

[41] In reply, the police maintain that the decisions are fundamentally employment records and further submit that they agree that:

> … misconduct hearings address both on and off duty conduct. This is in line with the unique roles and responsibilities of a police officer pursuant to the sworn officer Code of Ethics, which mandates that an officer not engage in improper conduct while off duty, and the public's reasonable expectation of a certain standard of behaviour from police, both on and off duty. Accordingly, irrespective of whether the misconduct occurs while the officer is on or off duty, all *PSA* Hearing Officer decisions are employment records because they flow from the officer's employment as a police officer.

[42] The police also rely on IPC orders, which have found that disciplinary proceedings under the *PSA* are "labour relations or employment-related matters". The police submit that while these orders are not binding, they are persuasive.

Analysis and finding

[43] In each of the orders cited by the police, above, it is not clear whether the records at issue included, in whole or in part, adjudicative records *per se* or the decisions of the adjudicative body within the police service in question.

[44] In Order M-931, the records at issue were computer data in a Public Complaints System containing the officers' names and rank, information about the charges or allegations made and the disposition of each complaint. In Order MO-1433F, the records related to allegations and investigations of misconduct by a former police officer where a hearing did not take place. In Order MO-1346, the responsive records consisted of "43 documents *reflecting the results* of hearings held under the *PSA*" which contained "the names and ranks of each police officer, the charges laid under the *PSA*, and the results or disposition of these charges." In Order MO-1650, "[t]he records consist of 300-350 public complaint files including the names of officers, charges and *results or disposition of charges*, as well as the internal investigations relating to each complaint." In Order MO-2428, the record at issue was a CD that contained recordings of 911 calls made by a police officer, which led to an investigation into the allegations of misconduct and disciplinary proceedings under the *PSA*. Finally, in Order PO-2982 the records consisted of correspondence and a case summary relating to a review by the Ontario Civilian Police Commission of the OPP Professional Standards Bureau's decision to dismiss the requester's complaint. None of these authorities indicate that the request was directed at the actual decisions of the hearing officer in question and, at any rate, it appears that no consideration was given to the issue of the treatment of adjudicative records that arises here.

[45] I note that previous orders of this office, discussed below, have held that the

parallel exclusion at section 65(6) of the *Freedom of Information and Protection of Privacy Act*[20] (*FIPPA*) does not extend to labour relations and employment related records held by an institution in its capacity as an adjudicative tribunal. The reasons given are that section 65(6)1 refers to cases where the institution appears before the tribunal in the capacity of a party and, further, that as an impartial, quasi-judicial decision-maker, the tribunal cannot be said to have an "interest" in the records in the sense intended by section 65(6)3.

[46] In Order P-1345, the Ontario Labour Relations Board (the OLRB) received a request under *FIPPA* for access to the records contained in two specified OLRB files. The requester was a party to a proceeding before the OLRB in relation to one of the files and an employee of Ontario Hydro (Hydro), which is also an institution for the purposes of *FIPPA*. The OLRB took the position that the records were excluded from *FIPPA* under section 65(6) of that statute. In finding that section 65(6) did not apply to the OLRB's records, the adjudicator wrote:

> Section 65(6)1 refers to the collection, preparation, maintenance or use of records by or on behalf of an institution in proceedings before a court, tribunal or other entity. In my view, this does not extend to situations where the records relate to proceedings where the institution's involvement is in the role of adjudicator. Rather, in order to qualify as a collection, preparation, maintenance or use by or on behalf of the Board as an institution, in relation to the proceedings, it would have to be an entity subject to the processes of the adjudication body (itself), such as a party to the proceedings or a witness called to produce evidence which is relevant to the proceedings. By necessary implication, the institution's role in such proceedings must be in its capacity as an employer or former employer in order to bring the records within the scope of section 65(6)1.
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> This interpretation is supported by references throughout section 65(6) to proceedings and negotiations relating to the "employment of a person by the institution", and in section 65(6)3, to "labour relations or employment-related matters in which the institution has an interest". In my view, an institution such as the Board, acting as an impartial adjudicator would not "have an interest" in a labour relations or employment-related matter before it, in the sense intended by section 65(6)3. Such an interest would be inconsistent with impartial adjudication.
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> Therefore, in my view, the records were not collected, prepared, maintained or used by or on behalf of the Board in relation to the proceedings before itself in the sense intended by section 65(6)1. I find

[20] RSO 1990, c F.31.

> that the application of this section, on the basis of the Board's role in the proceedings before it, has not been established. I also note that, because the Board does not "have an interest" in the proceedings in the sense intended by section 65(6)3, this section also does not apply.

[47] In Order P-1560, the requester made a request under *FIPPA* to the OLRB for access to all records relating to the requester. In coming to a similar conclusion to that in MO- 1345, the adjudicator wrote:

> I agree with Inquiry Officer Hale, and find that the records in this appeal were not collected, prepared, maintained or used by or on behalf of the OLRB in relation to the proceedings before it in the sense intended by section 65(6)1. Additionally, I find that the records were not collected, prepared, maintained or used in relation to negotiations or anticipated negotiations between the OLRB and a person, bargaining agent or party to a proceeding or anticipated proceeding in the sense intended by section 65(6)2. Finally, it is clear that the OLRB's role as independent and impartial adjudicator would be inconsistent with having "an interest" in the appellant's complaint in the sense intended by section 65(6)3.

[48] Judicial decisions discussing the purpose of the exclusion at section 65(6) of *FIPPA* also shed light on the intended scope of the parallel exclusion at section 52(3) of *MFIPPA*. In contrast to the requirement under the *Statutory Powers Procedure Act* (*SPPA*)[21] that adjudicative proceedings must be *accessible to the public* (which applies to the hearings at issue here), the Ontario courts have said that the exclusions are designed to preserve the *confidentiality* of sensitive labour relations and employment related information. Further, the exclusions are not designed to remove all records involving the institution's employees from the scope of the *Act*. For example, as explained in *Ontario (Ministry of Community and Social Services) v. John Doe*[22], it is not intended to exclude operational records where the institution is engaged in a capacity calling for public accountability.

[49] In *Ontario (Ministry of Community and Social Services) v. John Doe*, the Divisional Court observed that the scope of section 65(6) was informed by the legislative history indicating that "the type of records excluded from the Act by section 65(6) 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":[23]

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[21] *Statutory Powers Procedure Act*, RSO 1990, c S.22.
[22] [2014] O.J. No. 2362.
[23] *Ontario (Ministry of Community and Social Services) v. John Doe*, [2014] O.J. No. 2362 (Div. Crt.) at paras. 36-37, citing *Ontario (Ministry of Correctional Services) v. Goodis*, [2008] O.J. No. 289 (Div. Crt.)

> Section 65(6) was added to the Act by the Bill 7, An Act to restore balance and stability to labour relations and to promote economic prosperity and to make consequential changes to statutes concerning labour relations, 1st Sess., 36th Leg., Ontario, 1995. The explanatory note in respect of Bill 7 provided that the Act will not apply to "certain" records relating to labour relations and employment matters.
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> On first reading of the Bill, the Honourable David Johnson, then Chair of the Management Board of Cabinet, stated that the proposed amendments to the Act were "to ensure the confidentiality of labour relations information": see Ontario, Legislative Assembly, Official Report of Debates (Hansard), (4 October 1995) (Hon. Allan K. McLean). On proclamation of Bill 7, the Management Board of Cabinet responded with the following comments to the question of whether labour relations documents will be exempt from disclosure under the changes to the Act:
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> > Yes. This change brings us in line with the private sector. Previously, orders under the Act made some *internal labour relations information* available (e.g. grievance information, confidential information about labour relations strategy, and other sensitive information) *which could impact negatively on relationships with bargaining agents*. That meant that unions had access to some employer labour relations information while the employer had no similar access to union information: see Ontario, Management Board Secretariat, Bill 7 Information Package, Employee Questions and Answers, (10 November 1995).[24]

[50] In *Ministry of Community and Social Services*, the Court went on to distinguish the operational role the institution plays in discharging its institutional mandate from its role as employer:

> Accordingly, a purposive reading of the Act dictates that if the records in question arise in the context of a provincial institution's operational mandate, such as pursuing enforcement measures against individuals,

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at para 25: "This conclusion is reinforced by the legislative history of these provisions. Subsection 65(6) was added to the Act by the *Labour Relations and Employment Statute Law Amendment Act*, S.O. 1995, c. 1, s. 82. In introducing the bill, the Hon. Elizabeth Witmer, then Minister of Labour, described it as a 'package of labour law reforms designed to revitalize Ontario's economy, to create jobs and to restore a much- needed balance to labour-management relations' (Legislative Assembly of Ontario, Official Report of Debates (*Hansard*), October 4, 1995). The Hon. David Johnson, Chair of the Management Board of Cabinet, stated that the amendments to provincial and municipal freedom of information legislation were 'to ensure the confidentiality of labour relations information'".

[24] *Ontario (Ministry of Community and Social Services) v. John Doe*, [2014] O.J. No. 2362 (Div. Crt.) at paragraphs 36 and 37 (emphasis added).

> rather than in the context of the institution discharging its mandate qua employer, the s. 65(6)3 exclusion does not apply. *Excluding records that are created by government institutions in the course of discharging public responsibilities does not necessarily advance the legislature's objective of ensuring the confidentiality of labour relations information. However, it could have the effect of shielding government officials from public accountability, an effect that is contrary to the purpose of the Act.* The government's legitimate confidentiality interests in records created for the purposes of discharging a government institution's specific mandate may be protected under exemptions in the Act, but not under s. 65(6).[25]

[51] Similarly, in its decision in *Ontario (Ministry of Correctional Services)*[26], the Divisional Court held that the exclusion does not extend to records related to the actions of its employees that may give rise to claims against the institution in its capacity of defendant based on vicarious liability. As the Court said, this would undermine the public accountability purpose of the *Act*:

> The exclusion in s. 65(6) 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....
>
> The interpretation suggested by the Ministry in this case would seriously curtail access to government records and thus undermine the public's right to information about government. If the interpretation were accepted, it would potentially apply whenever the government is alleged to be vicariously liable because of the actions of its employees. Since government institutions necessarily act through their employees, this would potentially exclude a large number of records and undermine the public accountability purpose of the Act.[27]

[52] Like the cases just described, the police as the institution in this case are serving in two capacities – first, as an employer when the Chief investigates police misconduct and initiates a complaint against a police officer; and, second, as an impartial adjudicator acting in a quasi-judicial capacity in determining, based on the facts and the evidence presented, whether the alleged misconduct occurred and, if so, whether the disciplinary penalty imposed or sought by the Chief is warranted.

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[25] *Ontario (Ministry of Community and Social Services) v. John Doe*, [2014] O.J. No. 2362 (Div. Crt.) at paragraph 39 (emphasis added).
[26] *Ontario (Ministry of Correctional Services) v. Goodis*, [2008] O.J. No. 289 (Div. Crt.).
[27] *Ontario (Ministry of Correctional Services) v. Goodis*, [2008] O.J. No. 289 (Div. Crt.) at paragraphs 20 and 26.

[53] The interpretive question before me therefore asks whether the underlying purpose of section 52(3) – to preserve the confidentiality of certain employment related information held by the police in the capacity of "employer" – also extends to a distinct body within the police acting as an impartial "adjudicator" of the alleged misconduct. The public hearing provisions of the *SPPA*[28] indicate that preserving confidentiality of information generated in the hearing process should not be a consideration with respect to adjudicative records. Accordingly, the confidentiality concerns underlying the purpose of section 52(3) do not appear to be present here.

[54] Although the authorities referred to above provide some guidance when considering how adjudicative records might be treated in this appeal, I note that this office has held that certain categories of records pertaining to disciplinary proceedings of police officers relate to labour relations or employment–related matters and are subject to exclusion under section 52(3) of the *Act*.[29]

[55] In *Toronto Star*, a media requester sought access to documents filed with a number of administrative tribunals that hold adjudicative hearings. In *Toronto Star*, Justice Morgan of the Superior Court declared that sections 21(1) to 21(3) and related sections of the *Freedom of Information and Protection of Privacy Act* (*FIPPA*)[30] (the equivalent provision to sections 14(1) and (3) of *MFIPPA*) pertaining to the presumption of non-disclosure of "personal information" in adjudicative records held by a number of administrative tribunals, infringed section 2(b) of the *Charter* and was not justified under section 1.[31] The Court's declaration of invalidity was suspended in order to give the legislature an opportunity to respond.

[56] To the extent that the previous rulings of this office on the application of section 52(3) may be considered to be in conflict with the openness principle articulated in

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[28] Discussed further below.

[29] See for example, Orders M-835, MO-1346, MO-1650, MO-2482 and MO-3505. However, as set out above, it is not clear whether the records at issue in those orders included, in whole or in part, adjudicative records per se or the decisions of the adjudicative body within the police service in question, nor did they consider the constitutional issue raised here.

[30] RSO 1990, c F.31.

[31] Section 1 reads: The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. In his decision, Justice Morgan refers to *R. v. Oakes*, CanLII 46, [1986] 1 S.C.R. 103, which, at paragraph 70 of the decision, set out the test for whether an established *Charter* breach would survive a constitutional challenge because of section 1 of the *Charter*. This could occur if the objective is pressing and substantial, and if it passes the following "proportionality" test: "First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair 'as little as possible' the right or freedom in question. [Citation omitted.] Third, there must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of 'sufficient importance'."

Toronto Star, this appeal calls upon me to determine whether section 52(3) is amenable to an interpretation that renders it constitutionally compliant with the openness principle applicable to adjudicative records under section 2(b) of the *Charter.* The discussion above outlines the statutory contours of this interpretive issue.[32]

[57] I now turn to the constitutional question, which is whether the open court principle counsels an interpretation of section 52(3) that preserves the right of access to the records at issue under the *Act*.

Issue B: Does the open court principle enshrined at section 2(b) of the *Charter* counsel an interpretation of section 52(3) that preserves the right of access to the records at issue under the *Act*?

[58] The constitutional issue raised in this appeal is whether the decisions are excluded from the scope of the *Act* by section 52(3), or whether, instead, the open court principle enshrined in section 2(b) of the *Charter* counsels an interpretation of section 52(3) that preserves the right of access under the *Act*.

[59] The appellant takes the position that the reliance on section 52(3) of *MFIPPA* to deny access to the full text of the decisions at issue infringes the *Charter* and in particular, the open court principle relating to access to adjudicative records, as discussed in *Toronto Star v. AG Ontario*[33] (*Toronto Star*). Relying on *Doré v. Barreau du Québec*,[34] (*Doré*) and Order PO-3686,[35] the appellant submits that the IPC can consider constitutional questions.

[60] The police take the position that notwithstanding the application of the exclusion, the appellant has a right to access the records outside of the *FIPPA* process, and under the *PSA*. The police submit that they are prepared to review and disclose the responsive records pursuant to the *PSA*, "subject to any assessment of privilege and confidentiality." For that reason, the police submit that the application of the section 52(3) exclusion here does not infringe the appellant's *Charter* rights or the open court principle.

[61] I note here that the *PSA* does not on its face provide a public right of access to hearing decisions arising out of Chief-initiated complaints. That right is limited to

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[32] Given the approach I have taken to interpreting section 52(3) in light of its purpose and in conjunction with the openness principle under 2(b) of the *Charter*, my findings with respect to whether the records are excluded from *MFIPPA* under section 52(3) are set out below.
[33] 2018 ONSC 2586.
[34] 2012 SCC 12.
[35] The appellant refers to Adjudicator John Higgins' analysis at paragraphs 83 to 103 of his order.

hearing decisions arising out of complaints initiated by the public.[36]

[62] The Attorney General takes the position that there is no live controversy between the parties regarding section 2(b) of the *Charter*. It argues that section 2(b) of the *Charter* is not engaged because the police have not denied the appellant access to the requested documents. It submits that the IPC should not pronounce upon legal issues that do not arise on the facts.

Doré v. Barreau du Québec

[63] In *Doré* the Supreme Court of Canada reviewed the decision of the Tribunal des professions in an appeal from a disciplinary decision taken by the Disciplinary Council of the Barreau du Québec. The issue before the Supreme Court of Canada was whether a reprimand issued to a member of the Barreau for critical remarks about a judge constituted a violation of the member's right to freedom of expression as guaranteed under section 2(b) of the *Charter*. The Tribunal des professions found that the lawyer had exceeded the objectivity, moderation and dignity expected of him and that the decision to sanction the lawyer was a minimal restriction on his freedom of expression.

[64] *Doré* focuses on the appropriate methodology for a court to apply when reviewing an administrative tribunal's decision applying the *Charter*. The Court's reasons compare the assessment of whether a law violates the *Charter* with the similar but distinct issue of whether the decision of the Disciplinary Council did so.

[65] The "administrative law" approach involves consideration of the statutory objectives and balancing those against the extent to which they interfere with a *Charter* right.

[66] In deciding to apply the "administrative law" approach on judicial review where *Charter* issues arise, the Court stated:[37]

> … Normally, if a discretionary administrative decision is made by an adjudicator within his or her mandate, that decision is judicially reviewed for its reasonableness. The question is whether the presence of a *Charter* issue calls for the replacement of this administrative law framework with the *Oakes* test, the test traditionally used to determine whether the state has justified a law's violation of the *Charter* as a "reasonable limit" under s. 1.
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> It seems to me to be possible to reconcile the two regimes in a way that protects the integrity of each. The way to do that is to recognize that an

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[36] See the discussion below.
[37] *Doré*, at paragraphs 3 to 7.

adjudicated administrative decision is not like a law which can, theoretically, be objectively justified by the state, making the traditional s. 1 analysis an awkward fit. On whom does the onus lie, for example, to formulate and assert the pressing and substantial objective of an adjudicated decision, let alone justify it as rationally connected to, minimally impairing of, and proportional to that objective? On the other hand, the protection of *Charter* guarantees is a fundamental and pervasive obligation, no matter which adjudicative forum is applying it. How then do we ensure this rigorous *Charter* protection while at the same time recognizing that the assessment must necessarily be adjusted to fit the contours of what is being assessed and by whom?

We do it by recognizing that while a formulaic application of the *Oakes* test may not be workable in the context of an adjudicated decision, distilling its essence works the same justificatory muscles: balance and proportionality. I see nothing in the administrative law approach which is inherently inconsistent with the strong *Charter* protection - meaning its guarantees and values - we expect from an *Oakes* analysis. The notion of deference in administrative law should no more be a barrier to effective *Charter* protection than the margin of appreciation is when we apply a full s. 1 analysis.

In assessing whether a law violates the *Charter*, we are balancing the government's pressing and substantial objectives against the extent to which they interfere with the *Charter* right at issue. If the law interferes with the right no more than is reasonably necessary to achieve the objectives, it will be found to be proportionate, and, therefore, a reasonable limit under s. 1. In assessing whether an adjudicated decision violates the *Charter*, however, we are engaged in balancing somewhat different but related considerations, namely, has the decision-maker disproportionately, and therefore unreasonably, limited a *Charter* right. *In both cases, we are looking for whether there is an appropriate balance between rights and objectives, and the purpose of both exercises is to ensure that the rights at issue are not unreasonably limited.*

… In the *Charter* context, the reasonableness analysis is one that centres on proportionality, that is, on ensuring that the decision interferes with the relevant *Charter* guarantee no more than is necessary given the statutory objectives. If the decision is disproportionately impairing of the guarantee, it is unreasonable. If, on the other hand, it reflects a proper balance of the mandate with *Charter* protection, it is a reasonable one.

[Emphases added]

[67] The Court also observed that:[38]

> It goes without saying that administrative decision-makers must act consistently with the values underlying the grant of discretion, including *Charter* values. … [Citations omitted.] The question then is what framework should be used to scrutinize how those values were applied?

[68] This analysis is primarily directed at the approach to be taken by a reviewing court, rather than an administrative law decision-maker such as myself. However, it is evident from these comments by the Court that, in adjudicating *Charter* issues, an administrative law decision-maker such as myself must achieve an appropriate balance between rights and objectives.

[69] The Court provided further guidance on this point later in its reasons.[39] It stated:

> How then does an administrative decision-maker apply *Charter* values in the exercise of statutory discretion? He or she balances the *Charter* values with the statutory objectives. In effecting this balancing, the decision-maker should first consider the statutory objectives. . . .
>
> Then the decision-maker should ask how the *Charter* value at issue will best be protected in view of the statutory objectives. This is at the core of the proportionality exercise, and requires the decision-maker to balance the severity of the interference of the *Charter* protection with the statutory objectives. . . .

[70] Against this framework, I will consider the parties' positions and the impact of *Toronto Star*.

Toronto Star, the open court principle and the "opt out" model

[71] As mentioned above, in *Toronto Star*, a media requester sought access to documents filed with a number of administrative tribunals that hold adjudicative hearings. The Superior Court declared that sections 21(1) to 21(3) and related sections of *FIPPA* (the equivalent of *MFIPPA*) pertaining to the presumption of non-disclosure of "personal information" in adjudicative records held by a number of administrative tribunals, infringed section 2(b) of the *Charter* and was not justified under section 1. The Court's declaration of invalidity was suspended in order to give the legislature an opportunity to respond.

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[38] Ibid, at paragraph 24.
[39] Ibid, at paragraphs 55 and 56.

[72] The *Toronto Star* decision outlined how the open court principle applies to contemporary administrative tribunal proceedings. Justice Morgan wrote that the open court principle has been recognized as "one of the hallmarks of a democratic society … [and] is inextricably tied to the rights guaranteed by section 2(b) of the Charter". [40] Justice Morgan explained that Canadian courts have historically recognized that, "it is of vast importance to the public that the proceedings of courts of justice should be universally known.[41]"

[73] The subjects of the application in *Toronto Star* were 13[42] tribunals governed by the *Statutory Powers Procedure Act*[43] (*SPPA*) and designated as institutions under *FIPPA*[44]. One of the 13 tribunals was the Ontario Civilian Police Commission (OCPC), which, among other functions, hears appeals of decisions from police disciplinary hearings concerning complaints about police conduct made by members of the public or initiated by chiefs of police.

[74] In *Toronto Star*, Justice Morgan ruled that sections 21(1) and (3) and related provisions of *FIPPA* creating a presumption of non-disclosure of "personal information" violated the open court principle embedded in section 2(b) of the *Charter* and are unconstitutional insofar as they apply to adjudicative records held by administrative tribunals. In place of these provisions, Justice Morgan approved of the *Dagenais/Mentuck*[45] test - developed in the context of publication bans in criminal proceedings - as the appropriate mechanism for determining what information may be withheld. The Court suspended its declaration to give the legislature time to act or, alternatively, for tribunals and the IPC to develop principled bases for implementing the test.

[75] The *Toronto Star* decision left in place *FIPPA*'s procedures for making access requests for adjudicative records containing personal information, as well as the right to appeal to the IPC from tribunal decisions refusing access. Justice Morgan said the following about the timeliness of access in holding that delays occasioned by *FIPPA*'s processes, while in breach of section 2(b), were justified under section 1 of the *Charter*:

> All of this is to say that much as *FIPPA*'s various notice periods, times for submissions, and potential extensions of those times burden the exercise of s. 2(b) rights when it comes to access to Adjudicative Records, on a

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[40] *Toronto Star* at paragraph 54, citing *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 SCR 480 at paragraph 26.
[41] *Toronto Star* at paragraph 4, citing *Gazette Printing Co. v. Shallow*, 1909 CanLII 46 (SCC).
[42] Originally 14, but the Toronto Star abandoned its claim against the Workplace Safety and Insurance Appeals Tribunal.
[43] RSO 1990, c S.22.
[44] In the schedule to Regulation RRO 1990, Reg 460.
[45] *Dagenais v. Canadian Broadcasting Corp.*, 1994 CanLII 39 (SCC) and *R. v. Mentuck*, 2001 SCC 76.

> systemic basis the impairment is minimal. While there may be individual cases of unjustifiable delay and impairment of rights which could lead to an individual remedy, those cases are left for another day.[46]

[76] In the course of his decision, Justice Morgan also discussed the efficacy and validity of tribunals opting out of *FIPPA*, and the procedures adopted at some of the 13 tribunals for making adjudicative records available to the public:

> It is noteworthy that both sides agree that there are a number of tribunals included in this Application whose process entails no delay at all. As discussed further below, these tend to be the institutions that have fashioned their own method of handling document requests outside of the *FIPPA* process. Thus, for example, the OSC posts its docket lists and its unredacted decisions on its website and allows public access to Adjudicative Records without requiring any *FIPPA* request at all. The ERT and the OMB do the same, as do the FST and the OCPC except that the names of individuals are typically anonymized (with the exception of police officers, whose names are disclosed by the OCPC).
>
> …
>
> Since 8 of the listed tribunals apparently answer requests for Adjudicative Records directly and do not require requesters to engage the *FIPPA* process, little or no change is needed for them. Each must examine its procedures to ensure that the presumption of openness and disclosure required by s. 2(b) of the *Charter* is adhered to in responding to requests to inspect or copy Adjudicative Records, but nothing about their procedures is otherwise impugned by this ruling. Other tribunals may follow this model and by-pass the *FIPPA* process altogether by dealing with requests for Adjudicative Records directly and in conformity with the openness that the *Charter* requires.[47]

[77] Finally, he discussed the application of the *Dagenais/Mentuck*[48] test in non-*FIPPA*- related contexts to the determinations relevant to providing access to adjudicative records:

> In other, non-*FIPPA*-related contexts, the grounds for issuing a publication ban - i.e. for overriding the open court principle on a case by case basis - are contained in what has become known as the *Dagenais/Mentuck* test.

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[46] *Toronto Star,* at paragraph 109.
[47] *Toronto Star, supra*, paragraphs 22 and 133.
[48] *Dagenais v. Canadian Broadcasting Corporation*, 1994 CanLII 39 (SCC), [1994] 3 SCR 835; *R v. Mentuck*, 2001 SCC 76 (CanLII), [2001] 3 SCR 442.

[footnote omitted] As the Supreme Court has explained, the openness principle is contained within s. 2(b) of the Charter, and so can only be limited in accordance with s. 1 of the Charter. Any test that seeks to limit a constitutionally entrenched principle must, therefore, incorporate the essential elements of the reasonable limits analysis within it. [footnote omitted] The *Dagenais/Mentuck* test does this in a way that "mirror[s] the minimal impairment and proportionality steps in the s. 1 analysis set out in *R. v. Oakes*". [footnote omitted] Under *Dagenais/Mentuck*, a publication ban may be issued if the following conditions are met:

> a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
>
> b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice. [footnote omitted]

As the test states, the reasons for overriding the openness principle must pose a serious risk, and not just an inconvenience to the parties or the adjudicative body. That said, although the *Dagenais/Mentuck* analysis has been characterized as a "stringent test", it has also been observed that it should not be "applied mechanistically". [footnote omitted] As it applies to judicial proceedings, the test has been "tailored…to fit a variety of discretionary actions, such as confidentiality orders, judicial investigative hearings, and Crown-initiated applications for publication bans." [footnote omitted] Thus, the names of police informants can be expunged from public accessibility, [footnote omitted] and information contained in search warrants and other investigative instruments can be withheld from publication, [footnote omitted] but only where the specific circumstances show that "the public interest in effective law enforcement and privacy" outweighs the principle of "accountability and the transparency of the legal system". [footnote omitted]

What is clear from the case law is that it is the openness of the system, and not the privacy or other concerns of law enforcement, regulators, or innocent parties, that takes primacy in this balance. This, then, impacts directly on the onus of proof. In order for an adjudicative system to comply with s. 2(b) of the Charter, "The burden of displacing the general rule of openness lies on the party making the application." [footnote omitted] As other courts across the country have stated, publicity is the order of things and "any exceptions" – including those specifically provided by statute – "must be substantiated on a case by case basis."

> [footnote omitted] This onus is necessary "in light of the…Charter principles which inform the [*Dagenais/Mentuck*] test". [footnote omitted]
>
> I acknowledge, as any court must, that the openness principle and the analysis that accompanies a request to override it, must "tak[e] into account the particular characteristics and circumstances of the…proceedings." [footnote omitted] The judicial considerations of the *Dagenais/Mentuck* test have tended to arise in the course of criminal prosecutions, which raise unique factors that may not apply to the regulatory contexts of most administrative tribunals.
>
> A decision about revealing a police informant's identity in a record supporting a search warrant will obviously entail very different considerations than a decision about revealing a tenant's identity in a record filed in evidence in LTB hearing. The decision-maker contemplating a limitation on the openness principle must take the differing contexts and the statutory objectives of the particular administrative body into account. [footnote omitted] The particular institution and circumstances of the particular case may require the most stringent application of the *Dagenais/Mentuck* test or a modified and more relaxed version of the test. There is no 'one size fits all' application of the openness principle.[49]

[78] Justice Morgan did not say that *FIPPA* did not apply in its entirety to adjudicative records of administrative tribunals, only that *FIPPA* infringes section 2(b) of the *Charter* in two respects: a) substantively in terms of section 21 and related sections that contain the presumption of non-disclosure for producing adjudicative records containing "personal information" as defined in section 2(1); and b) procedurally in terms of the notice provisions, timelines, and authorization for institution heads and the IPC to make decisions about access to adjudicative records.[50] He found that the Attorney General met the onus under section 1 of the *Charter* to justify the procedural infringements, but failed to meet the onus of justification with respect to the substantive breach.[51]

[79] The remedy applied by Justice Morgan was to interfere with the legislative scheme as little as possible. He simply made a declaration that the application of sections 21(1) to (3) and related sections of *FIPPA* pertaining to the presumption of non-disclosure of personal information to adjudicative records infringed section 2(b) of the *Charter* and was not justified under section 1.[52] The effect of his decision in this regard was to leave in place the balance of *FIPPA*, including the right of access, the

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[49] *Toronto Star, supra* at paragraphs 89 to 93.
[50] *Toronto Star*, *supra* at paragraph 72.
[51] *Toronto Star*, *supra* at paragraph 130.
[52] *Toronto Star*, *supra* at paragraph 143.

statute's procedural mechanisms and the reviewing authority of this office.

[80] He also provided some time to establish appropriate protocols and/or responses to address issues regarding the disclosure of tribunals' adjudicative records. In articulating his reasons for suspending his declaration of invalidity, Justice Morgan plainly envisioned a continuing role for this office in resolving disputes over access to tribunals' adjudicative records:

> For those adjudicative tribunals that rely on the *FIPPA* process to determine access to Adjudicative Records, the need to revamp a relatively complex piece of legislation in order to make it *Charter* compliant presents practical difficulties. In effect, it leaves a procedural system intact but with a substantive void to be filled in on the fly by institution heads and the IPC. *Requests for Adjudicative Records can continue to be dealt with procedurally in the way they have been until now, except that each institution head in the first instance, and the IPC on appeal, must make their decisions by applying the Dagenais/Mentuck test* in whatever modification the particular tribunal in the particular context of a given request requires.
>
> The concern is that this may put a difficult burden on decision-makers to adapt overnight to a new task without substantive statutory guidance. As has been described in other legislative contexts, "moving abruptly from a situation where [the disclosure process] is regulated to a situation where it is entirely unregulated would be a matter of great concern".[footnote omitted] The courts should be reluctant to place administrative decision-makers in that situation.
>
> This case therefore calls for some time period in which the invalidity of *FIPPA*'s application to Adjudicative Records is suspended. During oral submissions, counsel for the Attorney General suggested one year. That seems to me to be an appropriate length of time for the relevant portions of *FIPPA* to be re-worked should the legislature choose to do so. *Alternatively, it will provide time for institution heads and the IPC to establish a principled, tribunal-specific and context-specific basis for adapting and implementing the Dagenais/Mentuck test in response to requests under FIPPA for access to Adjudicative Records*.[53] (emphasis added)

[81] In response to Justice Morgan's decision, Ontario enacted the *Tribunal*

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[53] *Toronto Star, supra* at paragraphs 120 to 122.

Adjudicative Records Act, 2019[54] (*TARA*) which came into force on June 30, 2019. Section 2(1) of *TARA* provides that each tribunal prescribed at Schedule 1 of Ontario Regulation 211/19 shall make available to the public, adjudicative records in its possession that relate to proceedings commenced after coming into force,[55] subject to the tribunal's authority to make confidentiality orders on certain grounds specified in section 2(2). While not applicable or determinative in the case before me, because it does not apply to the tribunal that issued the responsive decisions[56], *TARA* is instructive in its approach to access to adjudicative records applying the *Dagenais/Mentuck* test.

[82] Section 2(2) of *TARA* reads:

> A tribunal may, of its own motion or on the application of a person referred to in subsection (3), order that an adjudicative record or portion of an adjudicative record be treated as confidential and that it not be disclosed to the public if the tribunal determines that,
>
> (a) matters involving public security may be disclosed; or
>
> (b) intimate financial or personal matters or other matters contained in the record are of such a nature that the public interest or the interest of a person served by avoiding disclosure outweighs the desirability of adhering to the principle that the record be available to the public.

[83] Notably, the public availability and confidentiality exceptions at section 2 of *TARA* largely mirror the open hearing requirements and confidentiality exceptions found at section 9(1) of the *Statutory Powers Procedure Act*.[57] Section 9(1) reads:

> An oral hearing shall be open to the public except where the tribunal is of the opinion that,
>
> (a) matters involving public security may be disclosed; or
>
> (b) intimate financial or personal matters or other matters may be disclosed at the hearing of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure thereof in the interests of any person affected or in the public interest outweighs

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[54] SO 2019, c 7, Sch 60.
[55] *TARA*, section 2(1).
[56] Note also: An exclusion at section 65(16) of *FIPPA* came into effect on June 30, 2019 which states: "This Act does not apply to adjudicative records, within the meaning of the *Tribunal Adjudicative Records Act, 2019*, referred to in subsection 2 (1) of that Act." There is no similar provision in *MFIPPA*.
[57] RSO 1990, c S.22.

> the desirability of adhering to the principle that hearings be open to the public,
>
> in which case the tribunal may hold the hearing in the absence of the public.

[84] Against this backdrop, I now turn to the parties' representations.

The police's representations

[85] In response to the appellant's position that section 52(3) violates section 2(b) of the *Charter*, the police issued a supplementary decision letter maintaining that the records are excluded from the *Act* by section 52(3) and advising that the appellant could request this information through an identified Executive Officer "at which time access *may* be granted." The police submitted that this was because "the decisions are available to the public pursuant to section 86 of the *PSA*".[58]

[86] The police submit that the appellant chose not to make the request pursuant to that section of the *PSA* because he took the position that this method does not guarantee him access to the decisions, does not guarantee that future requesters will not face barriers, and prevents third party oversight. The police submit that the appellant has a right to access the responsive records through the *PSA,* but does not also have "an unfettered constitutional right to access the requested records in the forum of his preference".

[87] The police submit:

> The Legislature has explicitly exempted these records from the scope of *MFIPPA* by virtue of section 52, and at the same time provided access through the *PSA*. If the appellant takes issue with the constitutionality of that decision, this is not the appropriate forum for such a determination.
>
> It is submitted that *MFIPPA* does not contain a provision to address constitutional questions. Moreover, the IPC does not have jurisdiction to offer declaratory relief. Such relief can only be offered by a court of inherent jurisdiction.

[88] The police submit that while *Doré* dealt with the review of a discretionary decision that engaged a *Charter* right, it in no way stands for the proposition that where an administrative decision is unreasonable, an appropriate remedy is to strike down the legislation pursuant to which the decision was made.

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[58] As discussed below, section 86 of the *PSA* does not apply to decisions arising out of the chief initiated complaints at issue here.

[89] The police submit that in offering up a remedy in *Toronto Star*, the Court suggested a procedure in which administrative tribunals do not require requesters to engage the *FIPPA* process, but rather respond to requests for adjudicative records directly, outside of the *FIPPA* process. They submit that this is the precise procedure offered to the appellant in the circumstances here and is therefore constitutionally sound.

[90] With respect to any portion of the decisions that they decide to withhold under this process, the police submit that "this assessment would be with a view to protecting information subject to legal privilege, as well as any unrelated confidential third party information", and that the appellant has not given the police the opportunity to conduct its assessment.

[91] The police submit that the appellant has tendered no evidence to explain how his section 2(b) *Charter* rights were breached by the police's letter indicating that he may access the requested decisions through its Executive Officer. The police submit that the appellant's refusal to pursue access to those decisions on a principled basis does not establish a *Charter* breach.

The appellant's representations

[92] The appellant's objective is to gather and analyze a complete profile of the disciplinary decisions rendered by several large police services. He believes that this would offer insight into the disciplinary process for allegations of serious police misconduct and provide a valuable source of information for interested parties, including researchers and journalists.

[93] He states that he attempted alternative methods of accessing the records with most of the police services and that his efforts were met with varying levels of success. He states that the process differed between police services, as did the amount of information released, fees incurred and timelines for processing. The appellant disagrees that the records are easily available through alternative means and submits that the police have "attempted to block, delay and limit the appellant's access to the decisions and infringed his section 2(b) rights in the process".

[94] He submits that if the police had a genuine desire to follow their asserted *PSA* obligations they ought to have responded to his request by pre-emptively providing the decisions or clarifying that they would be released in their entirety. The appellant submits that, in any event, the Chief of Police's *PSA* obligation to make decisions publicly available only applies to decisions resulting from public complaints initiated through the Independent Police Review Director. He submits that Chief's complaints do not have an equivalent provision in the *PSA*.

[95] He adds that the police's representations indicate that disclosure through the *PSA* will engage a "review" and "assessment" of the decisions for "privilege and confidentiality," presumably with an eye to redacting or withholding certain decisions,

but that the police do not fully explain the criteria they would apply to such an assessment, its statutory basis or even an internal directive or policy that would govern it.

[96] He submits, however, that even if the *PSA* compels the release of the decisions, it has no bearing on the statutory jurisdiction of this office under *MFIPPA*:

> Presumably, the [police's] position that it has the right to assess (and redact or withhold) decisions for "confidentiality" is based on the wording of section 87[59] of the *PSA* which states that the Chief must make decisions publicly available "in the manner that he or she considers appropriate in the circumstances." Section 53(1)[60] of *MFIPPA* contemplates circumstances where a conflict exists between two acts on the disclosure of public records and in those instances, *MFIPPA* prevails. In other words, the Legislature enacted *MFIPPA* for this purpose and its adjudicative process is designed to protect the appellant's right of access and ensure [the police] comply with *MFIPPA*'s provisions when withholding records on the vague basis of "confidentiality."

[97] The appellant submits that there are no provisions within the *PSA* that grant authority to the police to withhold decisions on the basis of a "privilege or confidentiality" assessment.

[98] With respect to an access procedure outside *MFIPPA*, the appellant takes issue with what he views as a limited right to access the decisions to be exercised through an informal process not subject to oversight by an administrative tribunal.

[99] The appellant asserts that the mere possibility that an alternative process exists to access the records is insufficient to protect his rights. He notes that in *ARPA*, the Province of Ontario unsuccessfully argued that a judicial review of the constitutionality of a *FIPPA* provision was moot, as the requested records were provided through an informal process "outside the *FIPPA*." He adds that *Toronto Star* left the *FIPPA* procedure intact and that its process was not rendered inoperative by the decision and can still be utilized to request Adjudicative Records.

Representations of the Attorney General of Ontario

[100] The AG submits that, in the circumstances, it is not necessary for me to consider the *Charter* section 2(b) issue raised by the appellant, because it is moot. It argues that section 2(b) of the *Charter* is not engaged, as the police have not denied the appellant

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[59] It would appear that the appellant meant to refer to section 86(2) of the *PSA*.
[60] Section 53(1) of *MFIPPA* reads as follows: This Act prevails over a confidentiality provision in any other Act unless the other Act or this Act specifically provides otherwise.

access to the requested documents. It submits that the IPC should not pronounce upon legal issues that do not arise on the facts.

[101] The AG explains that:

> … The appellant is not being denied access to the requested documents. He is only being denied access to the records under a particular statutory platform. Section 2(b) of the *Charter* does not provide a positive right of access to a particular statutory platform for expression, except in exceptional circumstances that are not applicable in this case. The constitutionality of what the [police] discloses to the appellant outside of the *Act* is not within the jurisdiction of [the IPC].

[102] With respect to the appellant's reliance on *Toronto Star* to argue that section 2(b) of the *Charter* is engaged, since he is requesting access to decisions of an administrative tribunal, the AG submits:

> … In finding that the application of *FIPPA* to the adjudicative records of the 14 tribunals was justified under s. 1 of the *Charter*, Justice Morgan held that imposing a particular process on tribunals for disclosure of documents could result in an unintended burden on tribunals that is not constitutionally required - as such, the decision does not prescribe any particular manner of disclosure of adjudicative records.[61] Justice Morgan held that s. 2(b) of the *Charter* required presumptive access to adjudicative records of tribunals, but that access could be tempered on a case-by-case basis by other serious considerations.[62]

[103] The AG adds that the Supreme Court of Canada has held in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association* ("*CLA*")[63] that access to information is a derivative right under section 2(b) that may arise if the claimant can establish that: (a) without the access sought, meaningful public discussion and criticism on a matter of public interest would be "substantially impeded"; and (b) the section 2(b) protection is not removed by countervailing considerations inconsistent with production.[64]

[104] The AG argues that even assuming the records at issue are adjudicative records subject to the open court principle as discussed in *Toronto Star* or that, alternatively, the test in *CLA* would be met if the requested records were denied, section 2(b) of the *Charter* is not engaged on the facts. The AG submits that this is because the police are

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[61] The AG references *Toronto Star*, supra at paragraphs 103 to 105.
[62] The AG references *Toronto Star*, supra at paragraph 107.
[63] 2010 SCC 23.
[64] The AG references paragraphs 37 and 38 of the decision.

not denying access to the requested records.

[105] The AG submits that the police's position is that the appellant has a right to access the requested records under the *PSA* and that the police are prepared to release the records subject to any assessment of privilege and confidentiality, albeit outside of the *Act*. As such, it submits that there is no live controversy with respect to the open court principle or the appellant's rights under section 2(b) of the *Charter*.

[106] The AG notes the appellant's allegation that in *ARPA* the Court rejected Ontario's argument that the constitutional question was moot and preferred to provide the legal safeguards available through *FIPPA*. On this point, the AG submits that in *ARPA*, the Court held that selective informal disclosure of statistical information concerning abortion was insufficient to provide for meaningful pubic discussion and criticism on that issue and, as such, the first step of the *CLA* test was met.[65] In this case, however, the AG states that the police are not proposing selective informal disclosure. Rather, and as argued by the police, the appellant has a right to access the records under the *PSA*. The AG submits that the police are "prepared to review and release them pursuant to the *PSA*, subject to any assessment of privilege and confidentiality".

[107] The AG adds that the question of whether the appellant is entitled to the documents under the *Act* is a question of statutory interpretation that does not require resort to the *Charter*. It submits:

> … Whether [the IPC] finds that the appellant is, or is not, entitled to the requested records under the *Act*, section 2(b) of the *Charter* and the open court principle are not engaged – since in either event the appellant has a path to access the requested records. As noted above, the *Toronto Star* decision does not mandate any particular path to accessing adjudicative records.

[108] The AG states that the appellant takes the position that: (a) the police have not consented to the full disclosure of the requested records; and (b) in any event, he requires access to the complete records under the *Act*, because the *Act* affords oversight in the process.

[109] In response, relying on *Baier v. Alberta*[66] (*Baier*) the AG submits:

> … These allegations do not give rise to a Charter s. 2(b) claim before this Tribunal because: (a) the constitutionality of what the [police] will/will not disclose outside of the *Act* is not within [the IPC's] jurisdiction; and (b) s.

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[65] The AG relies on paragraphs 40 to 42 of *ARPA* in support of this submission.
[66] 2007 SCC 31.

> 2(b) of the *Charter* does not provide a positive right to access to a particular statutory platform.

[110] The AG submits that this appeal is a prime example of a claim of under-inclusion founded on the assertion of a right of access to a particular statutory platform rather than on a fundamental *Charter* freedom - and, as such, the requirements of *Baier* are not met, submitting that:

> … The appellant's concern is that the [police] may not disclose to him all the requested documents and he will not have a right of review by [the IPC] of what the [police] disclose outside of the *Act*. However, section 2(b) of the *Charter* does not guarantee a right of review by the IPC of a decision about access to records made outside of the *Act*. Further, the constitutionality of what the [police] may or may not disclose outside of the *Act* is not within the jurisdiction of [the IPC].

[111] The AG submits that the appellant's assertions that there are no provisions in the *PSA* that compel the release of the responsive decisions and that there is an "onus of providing" a "policy or legislative provision which would allow interested parties to rely on voluntary disclosure", are immaterial to the question of whether section 2(b) of the *Charter* is engaged in this case, given that the police have stated that the appellant has a right of access to the requested records under the *PSA*.

The appellant's response to the AG's representations

[112] The appellant submits that neither the police nor the ministry have met the onus of providing a "policy or legislative provision which would allow interested parties to rely on voluntary disclosure." The appellant submits that:

> … The [ministry's] vague claims that the appellant can access the records through the *PSA* [are] insufficient to render this matter moot. In fact, in contrast to *ARPA* the Police have not even proactively supplied the records in good faith despite ample opportunity to do so. Instead [they have] suggested that they "may" be released and in the [AG's] representations a qualification based on a "privilege and confidentiality" assessment is added. Even if the police did release the decisions it does not render the appeal moot if the police still maintain exemption from *MFIPPA*. The Superior Court is clear that public institutions cannot release requested records "outside" the *MFIPPA* process and then strategically argue mootness.[67]

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[67] It would appear that the appellant is relying on *ARPA* in support of this statement.

The AG's final representations

[113] The AG submits that the appellant's assertions that there are no provisions in the *PSA* that compel the release of the responsive decisions and that there is an "onus of providing" a "policy or legislative provision which would allow interested parties to rely on voluntary disclosure", are immaterial to the question of whether section 2(b) of the *Charter* is engaged in this case, given that the police have stated that the appellant has a right of access to the requested records under the *PSA*.

Analysis and finding

[114] This office has the jurisdiction to address constitutional questions[68], although it cannot strike down a provision of a statute or declare it invalid.

[115] I would also observe that, although the appellant and the ministry provided submissions regarding the application of the derivative rights analysis set out by the Supreme Court of Canada in *CLA*, in *Toronto Star,* Justice Morgan explicitly rejected that analysis as the wrong test when it comes to adjudicative records. He wrote:

> The *CLA* case ... did not deal with Adjudicative Records such as those in issue here; and since the documents were investigative and were not part of a record before an adjudicative tribunal, the open court principle did not apply. …
>
> As already indicated, *FIPPA* does not distinguish between Adjudicative Records and non-adjudicative records. But the open court principle in s. 2(b) of the *Charter* only applies to Adjudicative Records. This very point lies at the core of the Supreme Court's reasoning in *CLA*: "Access to documents in government hands is constitutionally protected only where it is…compatible with the function of the institution concerned."[69] Government agencies and public administrative bodies that hold investigative reports, personnel records, business and accounting records, and the like other than in an Adjudicative Record, are not subject to the open court principle. [footnote omitted]. They are obliged under *CLA* to implement transparency only where disclosure of their records is necessary for democratic process.
>
> Adjudicative Records, on the other hand, like court records, are not only entirely compatible with transparency but require it for the sake of the integrity of the administration of justice. [footnote omitted] The rationale for maintaining confidentiality over records accumulated by law

[68] See, for example Order PO-3868 at paragraph 83.
[69] *CLA*, supra, at paragraph 5.

> enforcement and forensic examiners at the investigation stage of a complaint or dispute does not, absent some special circumstance, continue into the open hearing or post-hearing stage of proceedings. [footnote omitted] Thus, while access to government business records, including the content of personnel and investigative audits, is granted or withheld subject to the *CLA* test of "meaningful public discussion", the question of access to documents filed in the Adjudicative Record before administrative tribunals must be answered in accordance with the *Charter*, [footnote omitted] including s. 2(b) and the open court principle.[70]

Complaints under the PSA

[116] From my review of the *PSA*, there appears to be three types of complaint processes pertaining to rank and file police officers. These are set out at sections 66, 68 and 76 of the *PSA*. There is a fourth process for chiefs and deputy chiefs set out at section 69 of the *PSA*. All of these processes may result in disciplinary hearings, as follows:

i. section 66(3) - public complaints referred to the chief by the Independent Police Review Director (IPRD) for investigation and, where the chief decides a complaint is well-founded, for hearing

ii. section 68(5) - public complaints retained by the IPRD for investigation and report before referral to the chief for hearing, unless the chief decides on an informal resolution

iii. section 69(8) - public complaints about a chief or deputy chief referred by the IPRD to the police services board for investigation and, where the board decides the complaint is well-founded, for hearing

iv. section 76(9) - chief-initiated complaints referred for internal investigation and, where the chief decides a complaint is well- founded, for hearing.

[117] The types of misconduct are set out at section 80 of the *PSA*. In addition, a Code of Conduct containing examples of misconduct is set out as a schedule to Ontario Regulation 268/10.[71]

[118] The appellant's request was for access to decisions arising out of chief-initiated complaints set out at section 76(9) of the *PSA* at item (iv), above.

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[70] *Toronto Star, supra,* at paragraphs 61 to 63.

[71] Section 30(1) of O/Reg 268/10 provides that any conduct described in the code of conduct, set out in the Schedule, constitutes misconduct for the purpose of section 80 of the *PSA*.

[119] Section 76 of the *PSA* reads, in part:

> 76 (1) A chief of police may make a complaint under this section about the conduct of a police officer employed by his or her police force, other than the deputy chief of police, and shall cause the complaint to be investigated and the investigation to be reported on in a written report.
>
> …
>
> (9) Subject to subsection (10), if at the conclusion of the investigation and on review of the written report submitted to him or her the chief of police believes on reasonable grounds that the police officer's conduct constitutes misconduct as defined in section 80 or unsatisfactory work performance, he or she shall hold a hearing into the matter.
>
> (10) If at the conclusion of the investigation and on review of the written report submitted to him or her the chief of police is of the opinion that there was misconduct or unsatisfactory work performance but that it was not of a serious nature, the chief of police may resolve the matter informally without holding a hearing, if the police officer consents to the proposed resolution.
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> …
>
> (12) If an informal resolution of the matter is attempted but not achieved, the following rules apply:
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> 1. The chief of police shall provide the police officer with reasonable information concerning the matter and shall give him or her an opportunity to reply, orally or in writing.
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> 2. Subject to paragraph 3, the chief of police may impose on the police officer a penalty described in clause 85
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> (1) (d), (e) or (f) or any combination thereof and may take any other action described in subsection 85 (7) and may cause an entry concerning the matter, the penalty imposed or action taken and the police officer's reply to be made in his or her employment record.
>
> 3. If the police officer refuses to accept the penalty imposed or action taken, the chief of police shall not impose a penalty or take any other action or cause any entry to be made in the police officer's employment record, but shall hold a hearing under subsection (9).
>
> …

[120] Under section 83(1) of the *PSA*, all disciplinary hearings conducted by the chief

under sections 66(3), 68(5) and 76(9) of the *PSA*, and by the police services board under section 69(8) of the *PSA*, are to be conducted in accordance with the *Statutory Powers Procedure Act*[72], affirming that they are adjudicative proceedings.

[121] In their submissions, the police referred to section 86 of the *PSA*. That section reads:

> 86 (1) The chief of police shall ensure that every decision made after a hearing held under subsection 66 (3) or 68 (5) is made available to the public in the manner that he or she considers appropriate in the circumstances, and shall give a copy of every such decision to the Independent Police Review Director.
>
> (2) The board shall ensure that every decision made by it after a hearing held under subsection 69 (8) is made available to the public in the manner that it considers appropriate in the circumstances, and shall give a copy of every such decision to the Independent Police Review Director.
>
> (3) On receiving a copy of a decision from the chief of police or board, the Independent Police Review Director shall publish the decision by posting it on the Internet.

[122] The police are correct in stating that all decisions reached following chief or board hearings disposing of public complaints under sections 66(3), 68(5) and 69(8) of the *PSA* are required to be made public under sections 86(1) or (2) of the *PSA*, as the case may be, and under section 86(3) all such decisions are required to be published by the IPRD on the internet.

[123] However, section 86(1) of the *PSA* does not apply to decisions reached following hearings into chief-initiated complaints under 76(9). Accordingly, there is no requirement under the *PSA* to make the decisions that the appellant seeks "available to the public", nor is there a formal mechanism under the *PSA* for him to make a request for them.

The constitutional issue

[124] The constitutional issue raised by the appellant in the circumstances of this appeal is whether, in light of the open court principle under section 2(b) of the *Charter*, the exclusion at section 52(3) of *MFIPPA* should be interpreted in a way that conforms with section 2(b). This issue presents a choice between two competing interpretations of the exclusion - one which would preserve the confidentiality of labour relations and employment related information and one which would promote openness and

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[72] *Statutory Powers Procedure Act*, RSO 1990, c S.22.

accountability in adjudicative records "compatible with the function of the institution"[73] in its capacity as an adjudicative tribunal. In my view, the circumstances of this case make it abundantly clear that the correct interpretations is one that does not favour confidentiality, but promotes openness and accountability in adjudicative records.

[125] Justice Morgan makes a similar point in *Toronto Star* where he distinguishes between "investigative reports [and] personnel records" held by government agencies that "are not subject to the open court principle" and adjudicative records that *are* subject to the open court principle. He observed that there is a clear confidentiality interest in the first categories of records which, applying the derivative right of access analysis, may only be overcome by demands of "transparency" where disclosure "is necessary for democratic process."[74] In contrast, Justice Morgan stated that "the rationale for maintaining confidentiality over records ... at the investigation stage of a complaint or dispute *does not, absent some special circumstance, continue into the open hearing or post-hearing stage of proceedings*." Further, he emphasized that access rights to adjudicative records are compatible with transparency.[75]

[126] Viewed from this perspective, the rationale for the exclusion of employment and labour relations records from the *Act* – to ensure their confidentiality – is not present when it comes to the adjudicative records at issue in this appeal. Such records are produced in or generated following a hearing process that is to be open to the public pursuant to section 9(1) the *SPPA*. Further, the open court principle requires that such records be made publicly available, subject to the application of the *Dagenais/Mentuck* test.

[127] In short, the constitutional imperative of the open court principle at section 2(b) counsels an interpretation of section 52(3), which does not extend its scope to the adjudicative records of a tribunal – even a tribunal that exists within the same institution – notwithstanding that the records arise in an employment context. Like the "operational" records at issue in the *Ministry of Community and Social Services* and *Ministry of Correctional Services* cases, referred to above, the records at issue in this appeal are held by the institution in a capacity requiring transparency and public accountability – as an impartial, quasi-judicial adjudicative tribunal and not as an "interested" employer.

[128] In my view, this outcome is consistent with the wording of section 52(3). Paragraph 1 of section 52(3) contemplates that records subject to the exclusion are ones that are collected, prepared, maintained or used by the institution in its capacity as a party/employer "in proceedings or anticipated proceedings *before* a court, tribunal

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[73] *Toronto Star*, supra paragraph 62.
[74] *Toronto Star*, supra paragraph 62.
[75] *Toronto Star*, supra paragraph 63.

or other entity." On my reading of paragraph 1, it does not apply where, as in this case, a distinct entity within the institution serves in a tribunal capacity as impartial adjudicator of a dispute between the institution as a party/employer and the employee in question. Further, in my view, paragraph 3 of section 52(3) contemplates that the institution has an "interest" in the employment related matter as an employer. Again, the wording of section 52(3) is inconsistent with the quasi-judicial role of a *disinterested* and impartial adjudicator.[76]

[129] Further, this interpretation finds support in Orders P-1345 and P-1560, referred to above, holding that the exclusion at section 65(6) of *FIPPA* does not extend to what would now be called the adjudicative records of a tribunal. Section 52(3) continues to exclude employment related records held by the police as employer, including any personnel or investigative records that are not adjudicative records, but it cannot be relied upon by the police to deny access to the decisions of an adjudicative body within the police service. To the extent that any prior orders of this office may be considered to be in conflict with my conclusion[77], I decline to follow them.[78]

[130] Finally, following the analysis articulated in *Doré*, I have considered whether my decision interpreting and applying section 52(3) to the adjudicative records at issue, in a manner that is consistent with the *Charter*'s openness principle, is somehow in conflict with the statutory objectives. I conclude that there is no conflict.

[131] In my view, it cannot be presumed that by enacting section 52(3), the legislature intended to impinge on the rights of members of the public - enshrined in section 2(b) of the *Charter* - to access adjudicative records generated in a public hearing process simply because they deal with employment related issues. On the contrary, and as the Ontario courts have observed, the purpose of section 52(3) is to protect the *confidentiality of certain* sensitive labour relations and employment information that could impact negatively on employer-employee relations.[79] Neither the police nor the AG argue that the confidentiality of the records at issue must be preserved for purposes related to employment or labour relations. In fact, both agree that the records *should be made public*, subject to vetting for other unspecified privilege and confidentiality concerns. They only resist disclosure under the mechanism of the *Act*. Consequently, without the benefit of persuasive submissions from the police or the AG on this subject, I can find no rational basis for adopting an interpretation of section 52(3) that would

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[76] While paragraph 2 of section 52(3) does not appear to be implicated by the records at issue in this case, similar considerations and limitations would apply to this paragraph of the exclusion.
[77] Which is not apparent on the face of the orders to which I have referred or referenced by the parties in this appeal.
[78] In *Weber v. Ontario Hydro* [1995] 2 SCR 929, 1995 CanLII 108 at paragraph 14, the Supreme Court of Canada affirmed that tribunals are not constrained by past precedent.
[79] See in this regard, *Ontario (Ministry of Community and Social Services) v. John Doe*, [2014] O.J. No. 2362.

exclude this specific category of adjudicative records from the scope of the *Act*.[80]

[132] On the issue of my authority to address constitutional issues, I note that my interpretation of section 52(3) reads this provision in a manner that is constitutionally compliant with the open court principle at section 2(b) of the *Charter.* It should be apparent from these reasons that it is not necessary to strike down or declare section 52(3) to be invalid in order to achieve this result.

[133] I now turn to the issue arising out of the *Toronto Star* case, as articulated by Justice Morgan: whether the police have effectively "opted out" of *MFIPPA* by applying the open court principle to the adjudicative records sought by the appellant, namely, decisions arising out of hearings into chief-initiated complaints.

"Opting out" of the FIPPA process

[134] There is no dispute that the proceedings in question are adjudicative in nature and the decisions at issue are adjudicative records.

[135] In my view, the arguments advanced by the police and the AG that there is no live issue before me and that the question is moot because the police have not refused access, are answered by examining whether the police have taken steps to effectively by-pass the processes under the *Act.*

[136] At the outset, I observe that these arguments might carry some weight if the police had already released the records or a portion of them to the appellant under the alternative avenue proposed by the police, even if the appellant did not want to pursue access in that manner. As it stands, the appellant is left in a kind of limbo. On the one hand, he is faced with an argument that the records are excluded by section 52(3) of *MFIPPA*, indicating that the police still consider the provisions of *MFIPPA* to be in play in relation to the records. On the other hand, he is being told that he must abandon his *MFIPPA* request in order to gain access to the records.

[137] *Toronto Star* contemplates that tribunals may validly by-pass *FIPPA* (and by extension *MFIPPA*) "by dealing with requests for Adjudicative Records directly and in conformity with the openness that the *Charter* requires." In order to so, Justice Morgan states that tribunals can "follow the model" of other tribunals and "ensure that the presumption of openness and disclosure required by section 2(b) of the *Charter* is adhered to in responding to requests to inspect or copy Adjudicative Records."

[138] Justice Morgan cites the practices of specific tribunals named in the application who "have fashioned their own method of handling document requests outside of the

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[80] Where the legislature intended to exclude adjudicative records from the scope of freedom of information legislation, it did so explicitly pursuant to section 65(16) of *FIPPA*.

FIPPA process" and "whose process entails no delay at all." He gives the example of one tribunal that "posts its docket lists and its unredacted decisions on its website and allows public access to Adjudicative Records without requiring any *FIPPA* request at all." He observes that four other tribunals "do the same" and typically anonymize only the names of individuals (with the exception of police officers whose names are disclosed by the OCPC).

[139] As I read Justice Morgan's reasons, the minimal requirements for effectively by-passing *FIPPA* are that the tribunal must fashion a "method of handling document requests" using a "process that entails no delay at all," particularly as regards to its decisions. In other words, the tribunal in question must adopt a regularized system of timely access to adjudicative records, including decisions like those at issue here. While no specific process is mandated, whatever method is adopted must ensure that the presumption of disclosure required by section 2(b) of the *Charter* is adhered to in responding to requests.

[140] Significantly, nowhere in his reasons does Justice Morgan suggest that a tribunal may simply ignore a request for adjudicative records because it is made under *FIPPA.* It may only by-pass *FIPPA* (and by extension *MFIPPA*) where it shows that it has followed the *Charter* compliant model of the other tribunals.

[141] I find that the police have not shown that they have done so here and, consequently, they are not entitled to rely on the opting out mechanism described by Justice Morgan in *Toronto Star*.

[142] The police have said they are prepared to release the decisions subject to privilege or confidentiality considerations, but after the passage of four years since the appellant's request was first made, they have not done so. In my view, it does not lie in the mouth of the police to claim that they have effectively opted out of *MFIPPA*, and thereby obviate the access rights, procedures and remedies available to members of the public under *MFIPPA*, without having taken steps to implement appropriate "procedures to ensure that the presumption of openness and disclosure required by section 2(b) of the *Charter* is adhered to in responding to requests to inspect or copy Adjudicative Records." In short, where the police do not have in place a regularized system of timely access to adjudicative decisions that approximates the model described by Justice Morgan in *Toronto Star*, and where they have taken no steps whatsoever to grant access to the adjudicative records at issue here outside of *MFIPPA*, the appellant is not obliged to pursue access outside the process prescribed in the *Act* or to effectively abandon his appeal to this office.

[143] To that extent, the AG's statement that the decision in *Toronto Star* "does not prescribe any particular manner of disclosure of adjudicative records" has it backwards. In the passages from *Toronto Star* cited by the AG, Justice Morgan was giving his reasons for *rejecting* the applicant's argument that *FIPPA's* procedures should be declared inapplicable to adjudicative records. Justice Morgan's reasons make it clear that, absent either a legislative response or the tribunal's implementation of appropriate

measures "in conformity with the openness that the *Charter* requires", *FIPPA*'s processes (and by extension *MFIPPA*'s processes), including the right of appeal to this office, remain the valid and subsisting statutory mechanism by which the right of access to the adjudicative records of tribunals is secured.

[144] I have already determined that the police have not taken the necessary steps to by-pass *MFIPPA.* With reference to a possible legislative response, it is clear that the public access provisions of *TARA* do not apply. Further, as set out above, the *PSA* is silent on making hearing decisions arising out of chief-initiated complaints under section 76(9) publicly available. The decisions at issue here are *not* required to be made public by the chief or published by the IPRD under section 86. To that extent, any reliance on publication under the *PSA* is misplaced.

[145] Before leaving this subject, I am also concerned that the stated intention of the police to redact unspecified "privileged" information and "unrelated confidential third party information" may not conform with even "a modified and more relaxed version" of the *Dagenais/Mentuck* test.[81] While I do not rule out the possibility, it is difficult to see how any form of "privilege" *per se* could attach to the decisions of an adjudicative tribunal. As for unrelated "confidential" third party information, Justice Morgan emphasized that information of this nature may only be withheld where the burden of displacing the openness principle is satisfied in accordance with the *Dagenais/Mentuck* test:

> What is clear from the case law is that it is the openness of the system, and not the privacy or other concerns of law enforcement, regulators, or innocent parties, that takes primacy in this balance. This, then, impacts directly on the onus of proof. In order for an adjudicative system to comply with s. 2(b) of the *Charter*, "The burden of displacing the general rule of openness lies on the party making the application." [footnote omitted] As other courts across the country have stated, publicity is the order of things and "any exceptions" – including those specifically provided by statute – "must be substantiated on a case by case basis." [footnote omitted] … [82]

[146] Finally, as noted above, Justice Morgan's decision explicitly contemplates that this office has a role to play in "establish[ing] a principled, tribunal-specific and context-specific basis for adapting and implementing the *Dagenais/Mentuck* test in response to requests under *FIPPA* for access to Adjudicative Records."[83] The failure of the police to implement the openness principle in the circumstances of this case - by withholding the

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[81] *Toronto Star*, at paragraph 93.
[82] Toronto Star, at paragraph 91.
[83] *Toronto Star* at paragraphs 140 and 142.

decisions and undertaking to disclose them in redacted form only if the appellant abandons his request - suggests that the oversight mechanism of the *Act* may be what is needed to ensure compliance with the *Dagenais/Mentuck* test.

Issue C: What is the remedy?

[147] *Toronto Star* did not declare that *FIPPA* as a whole (or by extension *MFIPPA*) is constitutionally inapplicable to adjudicative records, just the application of sections 21(1) to (3) and related sections of *FIPPA* pertaining to the presumption of non-disclosure of personal information. As set out above, *Toronto Star* contemplates that *FIPPA* (and by extension *MFIPPA*) would remain applicable to adjudicative records absent a legislative response or unless the tribunal opted out of *FIPPA* (*MFIPPA*) by properly applying the open court principle.

[148] In light of the purposes and wording of the exclusion and the constitutional imperatives of the openness principle at section 2(b) of the *Charter*, I find that section 52(3) does not apply to the adjudicative records at issue in this appeal. As these records are not excluded from the scope of *MFIPPA*, the right of access in *MFIPPA* applies to them.

[149] Accordingly, the appropriate remedy in the circumstances of this case is an order requiring the police to issue an access decision claiming any applicable exemptions and/or making any redactions in accordance with a proper application of the *Dagenais/Mentuck* test, as set out by Justice Morgan in *Toronto Star*.

[150] I will remain seized of this appeal to address any issues that may arise with respect to the police's issuance of an access decision.

ORDER:

1. I do not uphold the police's access decision.

2. I order the police to issue an access decision, without relying on section 52(3) of the *Act*, claiming any applicable exemptions and/or making any redactions in accordance with a proper application of the *Dagenais/Mentuck* test, as set out by Justice Morgan in *Toronto Star*, without recourse to a time extension, in accordance with the requirements of sections 19, 21, 22 and 45 of the *Act*, as applicable, treating the date of this order as the date of the request, and to send me a copy of the decision letter when it is sent to the appellant.

3. The timelines noted in order provision 2 may be extended if the police are unable to comply in light of the current COVID-19 situation, and I remain seized to consider any resulting extension request.

4. I also remain seized of this appeal to address any other issues that may arise with respect to the police's issuance of an access decision.

Original Signed by: December 9, 2020

Steven Faughnan
Adjudicator