Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4469

Appeal MA21-00353

Sault Ste. Marie Police Services Board

December 11, 2023

Summary: The appellant sought access to the monthly number of internal disciplinary measures applied to members of the Sault Ste. Marie Police Services Board (the SSMPS) between January 2015 and April 2021. Relying on section 52(3)3 of the *Act*, SSMPS took the position that the responsive record is excluded from the scope of the *Act*. In this order the adjudicator finds that the *Act* does not apply to the record, upholds SSMPS's decision and dismisses the appeal.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990, c M.56, section 52(3)3.

Orders Considered: Orders MO-1345, MO-4019 and PO-3572.

Cases Considered: *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC); *Ontario (Ministry of Community and Social Services) v. Doe*, 2014 ONSC 239, appeal dismissed *Ontario (Ministry of Community and Social Services) v. John Doe* 2015, ONCA 107.

BACKGROUND:

[1] The Sault Ste. Marie Police Services Board (the police or SSMPS) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*)[1] for access to the monthly number of internal disciplinary measures applied to police members between January 2015 and April 2021.

[1] RSO 1990, c M.56.

[2] The police identified responsive information and denied access to it (in full) on the basis of the exclusion at section 52(3)3 (employment or labour relations) and the personal privacy exemption at section 14(1) of the *Act*.

[3] The requester (now the appellant) appealed the police's access decision to the Information and Privacy Commissioner of Ontario (the IPC).

[4] In his appeal materials submitted at intake and during mediation, the appellant took the position that there is a public interest in the disclosure of the requested information. Accordingly, the possible application of the public interest override at section 16 of the *Act* was added as an issue in the appeal.

[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] I sought and received representations from the parties. Representations were shared in accordance with Practice Direction 7 of the IPC's *Code of Procedure*.

[7] In this order, I find that the *Act* does not apply to the record. I uphold SSMPS's decision not to disclose the record and I dismiss the appeal.

RECORD:

[8] At issue in this appeal is the information contained in a three-page document containing the following subject line: "Monthly Internal Disciplinary Measures from January 2015 to April 2021". The record sets out the monthly number of internal disciplinary measures applied to SSMPS members between January 2015 and April 2021 in chronological order. It does not contain information such as the name of the individual disciplined, their rank (if applicable), or the nature of the disciplined conduct.

DISCUSSION:

[9] The police take the position that the record at issue is excluded from the *Act* under section 52(3)3 of *MFIPPA*. The appellant asserts that it is not excluded. I find that the record is excluded from the *Act* under section 52(3)3.

[10] Section 52(3) excludes certain records held by an institution that relate to labour relations or employment matters. If the exclusion applies, the record is not subject to the access scheme in the *Act*, although the institution may choose to disclose it outside of the *Act*'s access scheme.[2]

[11] The police rely on section 52(3)3, which states:

[2] Order PO-2639.

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

[12] 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*. None of the exceptions apply in the appeal before me.

[13] If section 52(3) applied at the time the record was collected, prepared, maintained or used, it does not stop applying at a later date.[3]

[14] The type of records excluded from the *Act* by section 52(3) are those relating to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue.[4]

[15] Section 52(3) does not exclude all records concerning the actions or inactions of an employee of the institution simply because their conduct could give rise to a civil action in which the institution could be held vicariously liable for its employees' actions.[5]

[16] For the collection, preparation, maintenance or use of a record to be "in relation to" one of the three subjects mentioned in this section, there must be "some connection" between them.[6]

[17] The "some connection" standard must, however, involve a connection relevant to the scheme and purpose of the *Act*, understood in their proper context. For example, given that accountability for public expenditures is a core focus of freedom of information legislation, accounting documents that detail an institution's expenditures on legal and other services in collective bargaining negotiations do not have "some connection" to labour relations.[7]

[18] The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to similar relationships. The meaning of "labour relations" is not restricted

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[3] *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. 509.
[4] *Ontario* (*Ministry of Correctional Services*) *v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.). The CanLII citation is "2008 CanLII 2603 (ON SCDC)."
[5] *Ministry of Correctional Services*, cited above.
[6] Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).
[7] Order MO-3664, *Brockville* (*City*) *v. Information and Privacy Commissioner, Ontario*, 2020 ONSC 4413 (Div Ct.).

to employer-employee relationships.[8]

[19] 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.[9] 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.[10]

[20] The phrase "labour relations or employment-related matters" has been found to apply in the context of disciplinary proceedings under the *Police Services Act* (*PSA*).[11]

[21] For section 52(3)3 to apply, the SSMPS 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.

[22] 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.[12]

[23] The records 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. Matters related to the actions of employees, for which an institution may be responsible are not employment-related matters for the purpose of section 52(3).[13]

The police's representations

[24] The police submit that the record was collected, prepared, or used for employment related matters and as an employer, it has an inherent interest in internal discipline and in the results thereof. They submit that the record in question only exists because there is a relationship between the employer and the employee(s) and without this relationship, there is no cause for "internal disciplinary measures." They submit

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[8] *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.
[9] Order PO-2157.
[10] *Ontario* (*Solicitor General*) *v. Ontario* (*Assistant Information and Privacy Commissioner*), cited above.
[11] RSO 1990, c P.15. See in this regard Order MO-1433-F.
[12] *Ontario* (*Solicitor General*) *v. Ontario* (*Assistant Information and Privacy Commissioner*), cited above.
[13] *Ministry of Correctional Services*, cited above.

that, as a result, the record is not just an aggregate statistic. Accordingly, the police take the position that the record at issue falls within the scope of the section 52(3)3 exclusion.

[25] The police add that, based on the searches they conducted, it is not common practice for other institutions to make "the monthly (or annual) number of internal disciplinary measures" publicly available.

[26] The police also submit that the monthly internal disciplinary numbers can be linked to a disciplinary proceeding or to a police officer who has been disciplined. The police submit that by requesting "internal" information the appellant is seeking to know what happened in employee related matters that don't involve him or affect him. The police explain that:

> "Internal" discipline is not necessarily related to a complaint by a member of the public. It can be initiated by a co-worker, supervisor, Human Resources, or senior levels of the institution. It is related to the rules, policies, and standards of the institution. Internal discipline and its measures also do not relate solely to the police officers in this establishment but also its civilian members who work in administrative and/or operational roles.

[27] Referencing Order PO-3572, the police submit that the determination in this appeal should not be solely based on the record's title or the description of the request but should consider the source of the information and the purpose for which the record was created.

[28] The police explain that:

> In this case, the majority of the institution's discipline records were created, prepared and maintained by the Professional Standards Bureau of the institution. Without a breach of the institution's standards, policies, or code of conduct there would be no internal investigation, no involvement of Human Resources and/or the Professional Standards Bureau, and no internal discipline record created/required. An employee could be late repeatedly over successive weeks and months. This leads to the creation of a log of the tardiness of the employee, possibly citing a reason for the tardiness, a determination of whether the misconduct is culpable or not, meetings between the employee and their supervisor(s), informal or formal discipline that the employee receives (e.g. a letter on their personnel file up to and including dismissal depending upon the severity of the misconduct).
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> How was the record used? The employee's misconduct was therefore documented, meetings were held involving employees, supervisors,

> Human Resources, and investigators of the Professional Standards Bureau; some of which resulted in grievance hearings/arbitration or a discipline hearing under the *Police Services Act*. These proceedings lead to informal or formal discipline.
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> … In any matter that is discipline related in the institution, an employee, their supervisor, and Human Resources are involved. There would be no record of discipline if the three were not minimally involved as employers have the right to set the standards for which employees must follow.

[29] The police add that a line of IPC orders, including MO-1345[14], have established several principles which they submit are relevant to my consideration of the record at issue in this appeal. The police say that they have applied those principles to the record at issue and submit:

- The record was collected, prepared, maintained, or used by the SSMPS in the context of *Police Services Act* hearings as well as informal hearings.
- The preparation, maintenance, and use of the records was for the specific purpose of complying with an employment related statutory duty namely the administration of the internal discipline system.
- The SSMPS as an employer, has an inherent interest in internal discipline and in the results thereof.

The appellant's representations

[30] The appellant points out that some statistics related to police discipline (that are the result of public complaints) are already publicly available via the Ontario Civilian Police Commission (OCPC), the Office of the Independent Review Director (OIPRD) and the Special Investigation Unit (SIU).

[31] With respect to the potential application of the section 52(3)3 exclusion, the appellant submits that:

> … Reference is made to PO-3572 in an attempt to make the case for a contextual approach, emphasizing the putative connection between the aggregate statistics requested and the purpose and the source of the records that make up the aggregate statistics requested. However, PO-3572 much more importantly highlights the fact that the IPC tribunal has consistently considered exemptions of this type on a "record-specific and fact-specific" basis (para. 34). I believe that this approach would not exclude the responsive records from the *Act*.

[14] The police also reference Orders MO-1166, MO-1433-F and MO-2242.

> Reference is likewise made to MO-1345, and it is quoted extensively by the SSMPS. This order related to a request for "all records that would tell me the results of all the *Police Act* hearings involving members of your service in the past five years." Perhaps the most relevant finding in this order is this:
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> > "In my view, quite apart from the circumstances of any particular disciplinary investigation, the Chief has a continuing interest in the efficacy of this process and it is this factual context which gives the Police an ongoing interest in the employment-related matters to which the records relate, as required under section 52(3)3."

[32] The appellant submits that the information in the record cannot be linked to a member of the SSMPS, or a specific discipline proceeding.

[33] The appellant submits that:

> Taking a 'record and fact-specific' approach, I believe the question is whether or not section 52(3) applies to the responsive records at issue, not other records that are much wider in scope.

[34] The appellant submits that the primary characteristic of internal disciplinary measures is that they are precisely not related to a court or tribunal proceeding, which is arguably why they are mostly shielded from public scrutiny (i.e., conducted internally and/or informally). Further, he submits that the responsive record is not technically related to "proceedings", rather it represents a collection of aggregate statistics based on disciplinary measures that are applied within the statutory discretion of the institution, occurring well outside the walls of courts, tribunals, or other entities that are related to police oversight in Ontario.

[35] The appellant further submits that an aggregate statistic cannot be construed as "meetings, consultations, discussions or communications." The appellant takes the position that an aggregate statistic can be publicly disclosed without disclosing any relevant context that would relate to "meetings, consultations, discussions or communications." In support of this submission the appellant references Order MO-4019, where the Adjudicator found that "the 'some connection' standard requires a connection that is relevant to the statutory scheme and purpose, understood in their proper context".[15]

[36] The appellant submits that given the extraordinary powers granted to police services across Canada, the public is justified in advocating for robust oversight, accountability, and transparency through the disclosure of information like the information at issue in this appeal.

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[15] The appellant also refers to *Brockville* (*City*) *v Information and Privacy Commissioner of Ontario*, 2020 ONSC 4413 in support of this submission.

[37] The appellant submits that public debates about policing and reform efforts demonstrate that there is attention paid to police misconduct in Ontario and that there is a vital public interest at stake in policing more broadly. Therefore, public scrutiny is not just warranted in the name of public interest and government accountability. It is absolutely essential to maintain the esteem and trust invested in the institution of policing in Ontario.

[38] The appellant says that he seeks this information for academic and journalistic purposes and that disclosure would enhance public awareness. He submits that aggregate statistics related to police disciplinary measures are about the activities of government and ought to engender public scrutiny in a way that is minimally intrusive, as he says is the case with the request at issue in this appeal. He also disputes the police's statement that similar institutions have not released similar records and states that other police services have provided the same aggregate statistics to investigative journalists in the past. He asserts that police services in Ontario have not proactively disclosed statistics related to internal disciplinary measures, despite the great public interest at stake.

Analysis and findings

[39] Based on my review of the record and the parties' representations, I find that it is excluded from the *Act* under section 52(3)3.

[40] The record at issue in this appeal sets out by month the number of internal disciplinary measures applied to SSMPS members between January 2015 and April 2021 in chronological order. It does not contain information such as the name of the individual disciplined or the rank (if applicable), or the nature of the disciplined conduct. The information on the record also does not reveal if it relates to the discipline of a police officer or another member of the police service or otherwise distinguish between them.

[41] Above, I set out the three-part test that must be satisfied in order for section 52(3)3 to apply. For the reasons that follow, I find that the three-part test has been met and that the record is excluded from the scope of the *Act*.

Part 1

[42] I find that the information in the record was collected, prepared, maintained or used by the SSMPS. Accordingly, the first part of the section 52(3)3 test has been met.

Part 2

[43] I find that the information in the record was collected, prepared and maintained or used by the SSMPS in relation to meetings, consultations, discussions or communications by the SSMPS pertaining to internal disciplinary matters some of which resulted in grievance hearings/arbitrations or disciplinary hearings under the *Police*

Services Act. Accordingly, the second part of the section 52(3)3 test has been met.

Part 3

[44] Based on my review of the record, I am also satisfied that, as required by the third part of the section 52(3)3 test, these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

[45] Whether the record is excluded from the *Act* turns on the meaning and scope of the exclusion set out in section 52(3)3. Statutory interpretation starts with Professor Driedger's "modern approach" set out by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd. (Re)*[16] as:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[46] In *Ontario* (*Ministry of Community and Social Services*) *v. Doe* (*John Doe*),[17] the Divisional Court upheld an IPC decision that found, in part, that records containing the full names of employees of the Family Responsibility Office (FRO) in the file of an individual who was subject to enforcement action by FRO were not excluded from the *Act* by section 65(6) of the *Freedom of Information and Protection of Privacy Act* (*FIPPA*),[18] the provincial equivalent of section 52(3). In reaching its decision, the Court considered the legislative history of section 65(6) and the purposes of *FIPPA* and stated:

> . . . [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, 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

[16] 1998 CanLII 837 (SCC).
[17] 2014 ONSC 239, appeal dismissed *Ontario* (*Ministry of Community and Social Services*) *v. John Doe*, 2015 ONCA 107 (*John Doe*).
[18] RSO 1990, c F.31.

> purposes of discharging a government institution's specific mandate may be protected under exemptions in the *Act*, but not under s. 65(6).[19]

[47] Furthermore, in *John Doe*, the Divisional Court found that the dictionary definition of the word "about" in section 65(6)3 of *FIPPA* requires that the record do more than have some connection to, or some relationship with, a labour relations or employment related matter. It stated that "about" means "on the subject of" or "concerning."[20] This means that to qualify for exclusion, the subject matter of the record must be a labour relations or employment-related matter.[21] It further stated:

> Adopting the Ministry's broad interpretation of "about" would mean that a routine operational record or portion of a record connected with the core mandate of a government institution could be excluded from the scope of the *Act* because such a record could potentially be connected to an employment-related concern, is touched upon in a collective agreement, or could become the subject of a grievance. This interpretation would subvert the principle of openness and public accountability that the *Act* is designed to foster.[22]

[48] I adopt and agree with this analysis that is equally applicable to the application of section 52(3)3 in the appeal before me.

[49] Considering the record at issue in this appeal, by its very nature the subject matter of the record is about a labour relations or employment-related matter in which the SSMPS has an interest, as it identifies the number of internal disciplinary measures the SSMPS addressed with respect to its employees.

[50] This is in keeping with *John Doe* and Order MO-4019*,* because it is not a routine operational record having no connection to an employment related matter. Nor is it simply in the nature of statistics, divorced from an employment-related matter. Rather, the very subject matter of the record is the number of SSMPS employees disciplined on a monthly basis, an employment-related matter that relates to SSMPS's workforce. I accept that employee discipline is an employment-related matter in which the SSMPS has an interest.

[51] In the result, I find that all three parts of the section 52(3)3 test have been met and record at issue is excluded from the scope of the *Act* under that section. In that regard, I am applying the specific provision of *MFIPPA* and the fact that this type of information has been disclosed in other jurisdictions does not alter my finding.

[52] Finally, the fact that other Ontario institutions may have disclosed similar

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[19] *John Doe* at paragraph 39.
[20] The Divisional Court referenced the Concise Oxford English Dictionary, 11th ed., 2004, s.v. "about".
[21] *John Doe* at paragraph 29.
[22] *John Doe* at paragraph 30.

information also does not impact my findings. SSMPS, like any other Ontario institution, is free to disclose the record to the appellant outside the *Act* if it wishes to do so.

[53] As I have found that the *Act* does not apply to the record at issue it is not necessary for me to consider that possible application of sections 14(1) or 16 of the *Act*.

ORDER:

I uphold SSMPS's decision that the *Act* does not apply to the record and dismiss the appeal.

Original Signed by: December 11, 2023

Steven Faughnan
Adjudicator