

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4529

Appeal MA21-00109

Durham Regional Police Services Board

June 6, 2024

Summary: The appellant made a request under the *Act* for records relating to the internal police investigation of a named police officer. The police denied access to the responsive records on the basis that the records are excluded from the *Act* pursuant to the labour relations and employment exclusion at section 52(3)1. In this order, the adjudicator finds that the responsive records are excluded from the application of the *Act* by section 52(3)1. She dismisses the appeal.

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

Orders Considered: Orders MO-4469, MO-4354, MO-4287, MO-4029, MO-3503, MO-2428, MO-2216, M-835, M-927 and PO-4428.

OVERVIEW:

[1] This order determines whether the labour relations and employment exclusion at section 52(3)1 of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) excludes records relating to the investigation of a police officer from the application of the *Act*.

[2] The Durham Regional Police Services Board (the police) received an access request pursuant to the *Act* for records relating to an internal police investigation of a named police officer, arising from a specified incident that the requester identified by date. The requester is the spouse of an individual who was a party to the incident.

[3] The police denied access to the responsive records, citing section 38(a) of the *Act* (discretion to refuse requester's own information), read with the law enforcement exemptions at sections 8(1)(a) (law enforcement matter) and 8(1)(b) (law enforcement investigation). In support of their decision, the police asserted that there is an ongoing Professional Standards Unit (PSU) investigation, and that disclosure of the records could interfere with that investigation.

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

[5] During mediation, the police issued a revised decision asserting that the responsive records are not subject to the *Act*, citing the exclusion at section 52(3) which removes records related to labour relations or employment matters from the scope of the *Act*.¹

[6] As mediation did not resolve the appeal, the file was transferred to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry under the *Act*.

[7] The adjudicator originally assigned to the appeal sought and received representations from the police and the appellant. The appeal was subsequently transferred to me to complete the inquiry and issue an order. After reviewing the parties' representations, I determined that I did not need to hear from the parties further before issuing an order.

[8] For the reasons that follow, I find that all of the records at issue are excluded from the application of the *Act* pursuant to section 52(3)¹ and dismiss the appeal.

RECORDS:

[9] At issue are records relating to the internal police investigation of a named police employee, arising from a specified incident that the appellant identified by date.

DISCUSSION:

[10] The sole issue to be determined in this appeal is whether the records relating to the investigation of a named police officer are excluded from the application of the *Act* pursuant to section 52(3).

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

¹ The police explained that their initial decision to deny access, citing an ongoing PSU investigation, was based on incorrect information. The police indicated that upon confirming that the investigation and tribunal into this matter had in fact concluded, they issued the revised decision stating that the responsive records are excluded from the application of the *Act* pursuant to section 52(3).

the *Act's* access scheme.² The purpose of this exclusion is to protect some confidential aspects of labour relations and employment-related matters.³

[12] The police claim that all of the responsive records are excluded from the scope of the *Act* pursuant to section 52(3). Specifically, the police rely on paragraph 1 of the section 52(3) exclusion, which states:

Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:

1. Proceedings or anticipated proceedings before a court, tribunal, or other entity relating to labour relations or to the employment of a person by the institution.

[13] 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*.

[14] 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.⁴

[15] 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.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 The "some connection" standard must, however, involve a connection relevant to the scheme and purpose of the *Act*, understood in their proper context.⁷

[17] 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 to employer-employee relationships.⁸

² Order PO-2639.

³ *Ontario (Ministry of Community and Social Services) v. Doe*, 2014 ONSC 239 (CanLII) (*John Doe*).

⁴ *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 509.

⁵ *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)."

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.) (*Brockville (City)*).

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.

[18] The term "employment of a person" refers to the relationship between an employer and an employee.⁹

[19] For section 52(3)1 to apply, the police 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 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.

Representations

The police's representations

[20] The police submit that the responsive records include records relating to the internal PSU investigation, wherein the misconduct complaint was investigated, and a determination was made that charges under the *Police Services Act*¹⁰ were warranted. The police indicate that these records were turned over to the Chief of Police following the investigation. The police further submit that the responsive records also include records relating to the Chief of Police's complaint, wherein *Police Services Act* charges were laid, as well as records relating to the subsequent tribunal proceeding that took place to determine the outcome of said charges.

[21] The police submit that the responsive records are excluded from the application of the *Act* pursuant to section 52(3)1. Specifically, the police submit that the records were collected, prepared, maintained, and used by the PSU as part of an internal investigation into the named police officer's conduct. The police argue that these records were then used as evidence in a recommendation to the Chief of Police that *Police Services Act* charges be laid, and that this resulted in a tribunal to determine the named officer's future employment with the police.

[22] The police submit that the tribunal proceedings clearly relate to labour relations or the employment of the named police officer by the police. The police submit that the investigation and subsequent proceeding was held to determine whether the conduct of the named officer was proper, with the named officer possibly subject to penalties, charges under the *Police Services Act*, or dismissal.

[23] While the police note that the investigation involved several other officers,

⁹ Order PO-2157.

¹⁰ On April 1, 2024, the *Community Safety and Policing Act (CSPA)* came into force and the *Police Services Act* was repealed.

including the appellant's spouse, the police indicate that the appellant is not named or mentioned in the records at issue, or otherwise involved in the incident in any way.

[24] Finally, the police submit that none of the section 52(4) exceptions apply.

The appellant's representations

[25] The appellant argues that the information she is requesting is a matter of public record. The appellant emphasizes throughout her representations that the records relate to a hearing that would have been open to the public and that she would have attended, were it not for the COVID-19 lockdowns. The appellant alleges that the records have been released to media on at least two occasions.

[26] The appellant submits that the police's initial decision to deny access was not based on their incorrect understanding that the PSU investigation was still ongoing but was instead an act of reprisal for various complaints that she has filed against the police with other agencies. The appellant claims that the police's decision to deny her request after allegedly releasing the records to media is clear evidence of reprisal. The appellant alleges that she has been denied police assistance, also as an act of reprisal. The appellant claims that her spouse is also facing reprisal as a result of his involvement in the specified incident, and that the incident and subsequent events have caused her spouse irreparable damage.

[27] Regarding the police's application of section 52(3)1, the appellant appears to accept that the police collected, prepared, maintained, or used the records in relation to tribunal proceedings that were held to address charges under the *Police Services Act*. However, the appellant disputes that the proceedings relate to labour relations or employment. The appellant instead submits that the real purpose of the proceedings, which concluded several years ago, was to protect the named officer and hide the truth of their wrongdoing, alleging that the named officer has not faced professional consequences following the incident.

[28] The appellant acknowledges that she is not mentioned in the requested records but argues that this should not be relevant as the media organizations which allegedly received the records are also not mentioned in them. The appellant reiterates that the incident and subsequent events have had a significant negative impact on her spouse's life, and that she is directly involved as both a close family member and as a result of her own interactions with the police.

Analysis and findings

[29] For the reasons that follow, I find that the responsive records are excluded from the application of the *Act* by the labour relations and employment exclusion at section 52(3)1. As previously indicated, a three-part test must be met for section 52(3)1 to apply.

Part 1: collected, prepared, maintained or used

[30] The police submit that the records, which include but are not limited to officers' notes, statements from police and civilian witnesses, and video footage of the incident, were collected, prepared, maintained, and used by the police as part of an investigation into and subsequent tribunal about the named officer's conduct. The appellant does not appear to dispute this position. I have reviewed the records, and I am satisfied that part 1 of the test under section 52(3)1 has been met as the records were collected, prepared, maintained, and used by the police.

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

[31] The police submit that a portion of the responsive records were collected, prepared, maintained, and used by the PSU in order to investigate an internal complaint against the named officer. The police further submit that these and the remainder of the responsive records were then used in a tribunal proceeding that took place to determine the outcome of *Police Services Act* charges that were laid as a result of the investigation. The appellant does not appear to dispute this position, stating in her representations that the records were used by the police at the tribunal and by the Chief of Police to address *Police Services Act* charges.

[32] The word "proceedings" means a dispute or complaint resolution process conducted by a court, tribunal or other entity that has the power, by law, binding agreement, or mutual consent, to decide the matters at issue.¹¹ This office has consistently found that disciplinary hearings under the *Police Services Act* constitute proceedings before a "tribunal or other entity" for the purposes of section 52(3)1.¹² As a result, I accept that the matter is a proceeding for the purposes of section 52(3)1. The remaining question for the purposes of this part of the test is whether the collection, preparation, maintenance, or use of the records was in relation to the proceedings.

[33] Previous IPC orders have highlighted a distinction between operational records created and kept in accordance with an institution's core mandate, and copies of those records that are collected and used for a different purpose in a different file or location.¹³ Where a request is for operational records which are created in connection with an institution's core mandate, this office has found that these records may not be excluded by section 52(3)1 of the *Act* (or the section 65(6)1 equivalent in the provincial *Act*), even if they are subsequently collected, prepared, maintained, or used by the institution in proceedings or anticipated proceedings. On the other hand, where a request is for copies of operational records that are collected, prepared, maintained, or used for a different purpose, for instance in a discipline file or an investigation file into a police officer's conduct, then the copies of the records may be excluded from the *Act* by section 52(3)1.

¹¹ Orders P-1223 and PO-2105-F.

¹² See, for example, Orders MO-4029, MO-3503, MO-2428, MO-2216.

¹³ See, for example, Orders MO-4469, MO-4354, M-927, PO-4428.

[34] This distinction avoids an unduly broad application of the section 52(3)1 exclusion, which would run contrary to the transparency purpose of the *Act*. As explained in Order M-927 by Senior Adjudicator John Higgins, it also avoids an absurd result where, for example, certain information maintained by an institution in connection with their organizational mandate would be removed from the scope of the *Act* because it happened to be reviewed in connection with an investigation into an employee's conduct, whereas other information of the same nature would remain subject to the *Act*.¹⁴

[35] I find that the appellant's request was for documentation relating to an internal police investigation and hearing, rather than a request for operational records created in connection with the police's core mandate. This interpretation is based on the appellant's wording of the request, as well as the appellant's representations, which discuss her position and experience as it relates to the internal investigation and hearing. I have also reviewed the records and am satisfied that where operational records do appear, they exist as copies that were collected, prepared, maintained, or used for a different purpose than the purpose for which they were originally created. Therefore, I find that this appeal is distinguishable from the cases that considered operational records referenced above.

[36] Based on the information before me, I accept that the collection, preparation, maintenance, and use of the responsive records was in relation to tribunal proceedings about *Police Services Act* charges. More specifically, I am satisfied that the collection, preparation, maintenance, and use of the records by the PSU in their investigation and subsequent recommendation to the Chief of Police, as well as the collection, preparation, maintenance, and use of the records by the police in the laying and adjudicating of charges before a tribunal can accurately be described as being "in relation to" proceedings before a tribunal.

[37] As a result, I find that part 2 of the test under section 52(3)1 has been met as the records were collected, prepared, maintained and used by the police in relation to tribunal proceedings under the *Police Services Act*.

Part 3: proceedings related to labour relations or employment

[38] The police submit that the tribunal proceedings clearly relate to labour relations or the employment of the named police officer by the police, as the named officer faced the possibility of penalties, charges under the *Police Services Act*, or dismissal. The appellant disputes this, arguing that the named officer has faced no real professional consequences for his actions as a result of these proceedings.

[39] Previous orders of this office have found that disciplinary hearings under the *Police Services Act* relate to "the employment of a person by the institution" for the purposes of section 52(3)1.¹⁵ In Order M-835, former Assistant Commissioner Tom Mitchinson found that the penalties which may be imposed after a finding of misconduct in a

¹⁴ Order M-927.

¹⁵ See Orders MO-4287, MO-4029, MO-3503, MO-2428, M-835.

disciplinary hearing under the *Police Services Act* "can only reasonably be characterized as employment-related actions". I agree with this reasoning and adopt it for the purposes of this appeal.

[40] As a result, I find that part 3 of the test under section 52(3)1 has been met. I am satisfied that the collection, preparation, maintenance, and use of the records by the police was in relation to proceedings concerning the named officer's employment, given the potential for disciplinary action against the named officer. I am not convinced that the appellant's view (that the named officer has not faced adequate consequences) has any bearing on my finding that the proceedings themselves were related to the named officer's employment by the police.

[41] In summary, I am satisfied that all three parts of the test under section 52(3)1 of the *Act* have been met. I also find that the exceptions set out in section 52(4) do not apply in the present case.

[42] In making my decision, I have considered the entirety of the appellant's representations, including the appellant's assertion that the records relate to a hearing that would have been open to the public, were it not for COVID-19 restrictions, as well as the appellant's assertion that the information she requested has been disclosed to the media.

[43] My jurisdiction in the context of this appeal is limited to reviewing whether the responsive records are excluded or exempt from disclosure by the access provisions of the *Act*. I am not able to conclude whether information has been disclosed to other parties, and if so, to what extent that information overlaps with the records at issue in this appeal. Even if I were able to do so, this would not be relevant to my determination of whether the records at issue in this appeal are excluded from the application of the *Act*.

[44] Nevertheless, I note that my decision here does not prevent the police from disclosing records to the appellant outside of the *Act*, especially if disciplinary hearings are intended to be public proceedings and a matter of public record.

[45] In addition, while I acknowledge that the appellant has expressed concerns about the police's conduct toward her and her spouse, I do not have the jurisdiction to address the appellant's concerns about police conduct.

[46] In conclusion, I uphold the police's decision that the responsive records are excluded from the application of the *Act* pursuant to section 52(3)1.

ORDER:

I uphold the police's decision and dismiss the appeal.

Original signed by: _____

Anda Wang
Adjudicator

June 6, 2024 _____