

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-4621

Appeal MA21-00369

Toronto Police Services Board

January 29, 2025

**Summary:** The appellant asked the police to investigate a police officer under the *Criminal Code*. According to the police, they investigated the officer and dismissed the appellant's allegations. The appellant then asked the police, under the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)*, for records created during the investigation. The police claimed that these records were excluded from *MFIPPA* under section 52(3) (employment or labour relations).

In this order, the adjudicator finds that the police have not established that the records are excluded under section 52(3) of *MFIPPA*. He orders the police to issue an access decision in response to the request without relying on section 52(3) of *MFIPPA*.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 52(3); *Police Services Act*, R.S.O. 1990, c. P.15, sections 90 and 95; *Community Safety and Policing Act, 2019*, S.O. 2019, c. 1, Sched. 1, sections 163 and 170.

**Orders Considered:** Orders MO-2328, MO-4529, and MO-3163.

### OVERVIEW:

[1] The Toronto Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)* for:

...copies of all documentation related to the file and its enclosures which the Executive Director identifies as [specified file numbers], a purported

report of an investigation into a Complaint and information filed personally with the Chief of the Toronto Police Service, containing allegations of conduct contrary to the *Criminal Code of Canada* by a now-former member of the institution, although at the time of the alleged offenses, serving on warranted duty (Badge [specified badge number]) under the *Police Services Act* and assigned to various Divisions and Units. This request will include copies of my personal correspondence with and within the TPS and TPSB regarding the file consistent with that attached by [named person] to his letter of notice. The request will also include access to memorandum book entries, notes and any electronic entries made or viewed by the assigned investigating Officer and/or other Officers, including the Chief of Police (who is cc'd in the letter from the Executive Director) as well as all records of the digital data about me stored on, retrieved and reviewed from the Toronto Police database or servers, including that information entered about me by #[specified badge number] alleged to have been reviewed by the investigators, as well as all current CPIC entries, and all occurrence reports entered about me by their designated and assigned individual file numbers.

[2] The requester did not receive a final access decision from the police, and he filed a deemed refusal appeal with the Information and Privacy Commissioner of Ontario (IPC). Eventually, the police issued a final access decision denying access to the responsive records under sections 52(3)2 and 3 of *MFIPPA* and section 95 of the *Police Services Act*<sup>1</sup> (*PSA*). The letter stated:

Please be advised that, upon review of your request, the records you are seeking access to meet the criteria for exclusion under the Labour Relations Act, and therefore no longer fall under the jurisdiction of [*MFIPPA*]. Consequently, the Access and Privacy Section does not have the authority to release institutional documents of this nature.

...

[...] please note, section 95 of the *Police Services Act* states:

Every person engaged in the administration of this Part shall preserve secrecy with respect to all information obtained in the course of his or her duties under this Part and shall not communicate such information to any other person except,

(a) As may be required in connection with the administration of this act and the regulation;

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<sup>1</sup> R.S.O. 1990, c. P.15. While in effect at the time of the request and the decision letter, the *PSA* was repealed on April 1, 2024, and replaced by the *Community Safety and Policing Act, 2019*, S.O. 2019, c. 1, Sched. 1.

- (b) To his or her counsel;
- (c) As may be required for law enforcement purposes; or
- (d) With the consent of the person, if any, to whom the information relates.

[3] The requester (now the appellant) appealed the decision of the police to the IPC. During mediation, the appellant advised the mediator that the offences outlined in sections 48(1)(c.1), (d), and (e) of *MFIPPA* apply to the appeal because, he said, the police wilfully obstructed access to the records. He also raised the adequacy of the decision letter as an issue in the appeal, and he stated that an index of records should have been provided to him.

[4] No further mediation was possible, and the appeal was transferred to the adjudication stage of the appeals process. I conducted an inquiry where I sought and received representations from the police and the appellant. Representations were shared in accordance with the IPC's *Code of Procedure*.

[5] For the reasons that follow, I find that the records are not excluded under section 52(3) of *MFIPPA* and I order the police to issue an access decision without relying on the exclusion.

## **RECORDS:**

[6] 201 pages of documentation, which the police have claimed are excluded from *MFIPPA* in their entirety, are at issue in the appeal.

## **ISSUES:**

- A. Did the police provide an adequate decision letter?
- B. Did the police violate *MFIPPA* in their interactions with the appellant?
- C. Does the section 52(3) exclusion for records relating to labour relations or employment matters apply to the records?

## **DISCUSSION:**

### **Issue A: Did the police issue an adequate decision letter and were any exemptions raised late during the appeal?**

[7] Section 22 of *MFIPPA* imposes certain requirements for the form of notice provided to requesters. Where an institution has identified records responsive to a request, as

appears to be the case here, the relevant section is 22(1)(b). It states:

Notice of refusal to give access to a record or part under section 19 shall set out,

- (b) where there is such a record,
  - (i) the specific provision of this Act under which access is refused,
  - (ii) the reason the provision applies to the record,
  - (iii) the name and position of the person responsible for making the decision, and
  - (iv) that the person who made the request may appeal to the Commissioner for a review of the decision

[8] Section 22(3.1) also provides guidance on what should be included in a decision letter:

If a request for access covers more than one record, the statement in a notice under this section of a reason mentioned in subclause (1) (b) (ii) or clause (3) (b) may refer to a summary of the categories of the records requested if it provides sufficient detail to identify them.

### ***Representations***

[9] The appellant submits that the police failed to provide an adequate decision letter because they did not provide an index of records to him with the decision. The appellant also takes issue with the police claiming the application of section 52(3) and section 95 of the *PSA* 35 days after the decision letter was issued following the deemed refusal appeal.<sup>2</sup>

[10] The police submit that their decision letter complied with the requirements of section 22(1)(b), and maintain that they are not required to provide an index of records with every decision that is issued.

### ***Analysis and finding***

[11] The appellant provided lengthy arguments in support of his position that an index of records should be provided as a best practice and in order to ensure a fair proceeding. While I agree with the appellant's submission that the *IPC* generally encourages institutions to provide an index of records to parties, he has not addressed the fact that there is no requirement in *MFIPPA* for institutions to do so.

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<sup>2</sup> The appellant references section 12.03 of the *Code of Procedure*.

[12] Neither *MFIPPA*, nor the IPC's *Code of Procedure* mandate that an institution provide an index of records to either a requester as part of an access decision, or an appellant as part of the IPC appeal process.<sup>3</sup> This is particularly true when dealing with an exclusion claim, where at issue is if the IPC even has jurisdiction to consider the matter.

[13] With respect to the appellant's claim that the police improperly claimed the application of section 52(3) outside of the 35-day window for doing so, it is clear from the *Code* that the 35-day time period only applies to discretionary exemptions, rather than exclusions. For the police's claim regarding section 95 of the *PSA*, based on the police's representations, discussed below, I find that this was a part of their section 52(3) claim, rather than an exemption as set out in *MFIPPA*. While I address the appropriateness of this claim later, I find that the 35-day time period for discretionary exemptions in section 12.03 of the *Code* is not relevant to the appeal.

**Issue B: Did the police violate *MFIPPA* in their interactions with the appellant?**

[14] The appellant claimed that the police violated sections 48(1)(c.1), (d), and (e) of *MFIPPA* because of how they treated the appellant at the request stage and in the stages that followed. These sections state that:

No person shall,

(c.1) alter, conceal or destroy a record, or cause any other person to do so, with the intention of denying a right under this Act to access the record or the information contained in the record

(d) wilfully obstruct the Commissioner in the performance of his or her functions under this Act

(e) wilfully make a false statement to mislead or attempt to mislead the Commissioner in the performance of his or her functions under this Act

***Representations, analysis, and finding***

[15] The police deny violating these sections. The appellant states that it is the primary role of the IPC to seek the consent of the Attorney General to commence a prosecution when section 48 offences are recognized. In support of his position that the above sections have been violated, he generally takes issue with how the police responded to his access request, and how they responded to the IPC. In reply, the police state that the appellant's accusations regarding their conduct during and prior to the appeal are unfounded, and an attempt to obfuscate the facts surrounding this request and appeal. They maintain that they were not required to provide an index of records, and submit

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<sup>3</sup> Sections 5.04 and 11.01 of the *Code* specify that the IPC can order that an index be provided to the IPC, but this does not require that an index be provided to the appellant or any other party.

that they did not unilaterally redefine or limit his request.

[16] While I appreciate that the appellant is dissatisfied with how the police responded to his access request and the contents of their representations in this appeal, the appeal before me relates to how the police responded to the access request, and there is nothing to suggest that they did not act in good faith throughout the process. Even if I have found, as I discuss in Issue C, that the police were incorrect in claiming section 52(3), it does not follow that the police acted in bad faith.

[17] There is no evidence to suggest that the police or any other person altered, concealed, or destroyed a record, obstructed the Commissioner (wilfully or otherwise), or made a false statement to the Commissioner or any of her delegated staff. As such, I do not need to make a finding that the IPC is the appropriate forum to consider if these sections have been violated or if the IPC has a duty to seek the consent of the Attorney General.

**Issue C: Does the section 52(3) exclusion for records relating to labour relations or employment matters apply to the records?**

[18] The police claimed section 52(3) of *MFIPPA* for the entirety of the records at issue. Section 52(3) of *MFIPPA* 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 *MFIPPA*, although the institution may choose to disclose it outside of *MFIPPA*'s access scheme.<sup>4</sup>

[19] The purpose of this exclusion is to protect some confidential aspects of labour relations and employment-related matters.<sup>5</sup>

[20] Section 52(3) states:

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

1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.

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<sup>4</sup> Order PO-2639.

<sup>5</sup> *Ontario (Ministry of Community and Social Services) v. John Doe*, 2015 ONCA 107 (CanLII).

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

[21] 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 *MFIPPA*. Additionally, 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.<sup>6</sup>

[22] The type of records excluded from *MFIPPA* 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.<sup>7</sup> 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.<sup>8</sup>

[23] For the collection, preparation, maintenance or use of a record to be "in relation to" one of the subjects mentioned in this section, there must be "some connection" between them.<sup>9</sup> The "some connection" standard must, however, involve a connection relevant to the scheme and purpose of *MFIPPA*, understood in their proper context.

[24] The police claimed that the records are excluded under section 52(3)2 and 52(3)3.

[25] For section 52(3)2 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 negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution; and
3. these negotiations or anticipated negotiations took place or were to take place between the institution and a person, bargaining agent or party to a proceeding or anticipated proceeding.<sup>10</sup>

[26] Similarly, for section 52(3)3 to apply, it must be established that:

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<sup>6</sup> *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.

<sup>7</sup> *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)."

<sup>8</sup> *Ministry of Correctional Services*, cited above.

<sup>9</sup> Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

<sup>10</sup> Orders M-861 and PO-1648.

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.

## ***Representations***

### *Police representations*

[27] The police claimed both sections 52(3)2 and 52(3)3, but provided only general representations in support of the exclusion applying. They submit that the appellant submitted a formal complaint to the police regarding the conduct of a police officer. They state that an investigation was conducted by the police's Professional Standards – Conduct Investigations Section (PRS). The police explain that the PRS investigates allegations of misconduct against police members, with the authority to conduct investigations on current and former members of the police.

[28] They state that the records at issue relate to this complaint, and were collected, prepared, maintained, and used by the PRS while investigating the complaint filed by the appellant, which they ultimately found to be unsubstantiated. The police referenced Order MO-2328, where the contents of a Professional Standards Bureau public complaint file related to a complaint made under the *PSA* were found to be excluded from *MFIPPA*.

[29] The police also note that although a portion of the records at issue may have originally been operational records created for criminal investigations flowing from the appellant's complaints, the appellant is specifically requesting an internal conduct investigation file, and as such the records were collected, prepared, maintained, and used for a different purpose than they were originally created. They reference Order MO-4529 as an example of when the exclusion was found to apply in similar circumstances.

[30] The police also referenced section 95 of the *Police Services Act*, which relates to the confidentiality of information obtained in *Police Services Act* investigations. They state that because the records at issue were compiled as part of a *Police Services Act* investigation, the section is relevant to the appeal, but did not provide further information on how it interacts with the section 52(3) exclusion or any exemptions in *MFIPPA*.

[31] The police did not provide any information about the employment status of the police officer who was the subject of the investigation.

### *Appellant representations*

[32] The appellant provided general representations on why section 52(3) does not



apply, focusing on the nature of the investigation that the records at issue relate to. He explains that section 95 of the *PSA* does not contain a confidentiality provision that prevails over *MFIPPA* or its provincial equivalent. He refers to Order MO-3163, where the adjudicator found that section 95 of the *PSA* does not specifically prevail over *MFIPPA*, and states that the police referencing the *PSA* is a vexatious attempt to deny access to the records, which should be referred to the Attorney General under section 48 of *MFIPPA*.<sup>11</sup>

[33] He submits that section 90 of the *PSA* shows that the records at issue cannot be records generated by a conduct or service complaint and compiled as part of an investigation that would be excluded by section 52(3) of *MFIPPA*.<sup>12</sup> He states that section 90 of the *PSA* shows that no further action will be taken against a police officer through the *PSA* complaint process after they resign.

[34] The appellant does not dispute that PRS conducted the investigation but takes issue with the police's submission that the investigation concerned the conduct of an officer at the time. He explains that the officer in question did not work for the Toronto police at the time of the investigation and had not for several years. He rebuts the police's reference to Order MO-2328, stating that the present appeal is distinguishable because Order MO-2328 involved the investigation of active police officers, while the present appeal involves a retired police officer. He makes the same argument for MO-4529, stating that it also involved an investigation into active police officers charged under the *PSA*.

[35] The appellant states that his complaint against the specified officer was not a conduct complaint made under the *PSA*, but rather a criminal complaint made under the *Criminal Code*.<sup>13</sup> He submits that he did not request records of an internal conduct investigation, but instead requested the results of a criminal complaint of an individual who was not employed as a police officer for several years at the time of the complaint.

[36] The appellant also submits that sections 163(1) and 170(1) of the *Community Safety and Policing Act, 2019* are relevant to the appeal:<sup>14</sup>

163 (1) Subject to subsections (2) and (3), if a matter that is or may be the subject of an investigation under this Part is or becomes the subject of an investigation of an offence under a law of Canada, a province or a territory,

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<sup>11</sup> The appellant generally argues that the police should know better than to characterize his complaint as being made under the *PSA*. While, as discussed later, I agree that the police were incorrect in characterizing his complaint in this way, I do not find that he has established that they were acting in bad faith.

<sup>12</sup> The appellant refers to section 52(3) of *MFIPPA* as a discretionary exemption, rather than an exclusion. For clarity, when summarizing his representations I refer to it as an exclusion, as set out in *MFIPPA*.

<sup>13</sup> R.S.C., 1985, c. C-46.

<sup>14</sup> S.O. 2019, c. 1, Sched. 1. The appellant referred to this as the *Comprehensive Police Services Act, 2019* in his representations. However, the title of the legislation the appellant references is the *Community Safety and Policing Act, 2019*, which was put into force by *Bill 68, the Comprehensive Ontario Police Services Act, 2019*.

or the prosecution of such an offence, the Complaints Director may postpone the commencement of the investigation under this Part, or suspend it, for as long as is necessary in the Complaints Director's opinion to avoid interfering with the investigation or prosecution.

170 (1) If a person who is the subject of a complaint or investigation under this Part resigns before a report respecting an investigation into the person's conduct is given to the person's designated authority under clause 166 (4) (c), no further action shall be taken under this Part after the date of resignation.

[37] The appellant referred to a letter he received from a Toronto police inspector, where he was informed of the results of his complaint against the specified officer. The police inspector acknowledges that the officer was not subject to the *PSA*, and as such the investigation was only based on the appellant's criminal allegations. The police inspector then explains that the appellant's allegations are unsubstantiated. The appellant submits that, considering the nature of the complaint he made, and the nature of the investigation conducted by the police, the section 52(3) exclusion does not apply.

[38] The appellant also asserts that the police claiming that the section 52(3) exclusion applies is the result of them improperly characterizing his request and also not conducting a reasonable search. However, he did not provide evidence of this, aside from his arguments that the section 52(3) exclusion does not apply to the records.

#### *Police reply representations*

[39] In response to the appellant's representations, the police reiterated that the appellant's representations show that he is seeking access to the complaint file that is excluded from the scope of *MFIPPA* by section 52(3).

#### ***Analysis and finding***

[40] For the following reasons, I find that the police have not established that the section 52(3) exclusion applies to the records at issue. The police's arguments rely on their assertion that the investigation was conducted under the *PSA* and is therefore related to an employment or labour relations matter in which the police have an interest or some form of labour-relations or employment related negotiations. I agree with their submission that, as outlined in Orders MO-2328 and MO-4529, among others, that records related to investigations conducted under the *PSA* are generally excluded from *MFIPPA* under section 52(3). I also agree with the appellant's submission that, as the adjudicator found in Order MO-3163, that section 95 of the *PSA* does not prevail over *MFIPPA*.

[41] However, in order for the polices' reasoning to apply, it must first be established that the investigation the records are related to was conducted under the *PSA*, or at least otherwise be related to employment or labour relations matters as outlined in sections

52(3)2 and 3. Here, while the police generally assert that this is the case, the appellant has provided evidence showing that he specifically requested that the investigation be conducted under the *Criminal Code*, and he provided correspondence from the police showing that the investigation was indeed conducted under the *Criminal Code*, rather than the *PSA*. Furthermore, as noted in the language of his access request, he specifically sought access to records related to the *Criminal Code* investigation, rather than any investigation conducted under the *PSA*. I also note that, based on the evidence before me, the officer in question was retired at the time of the complaint, and as such was not subject to the *PSA*.

[42] Based on the information before me, the responsive records, and the request, I find that the responsive records would, on their face, be records related to a *Criminal Code* investigation. While this does not necessarily mean that responsive records could not also be related to the employment of the specified officer, in this case the police have not provided any evidence to show that the records fit within the section 52(3) exclusion, let alone that each specific record does. For instance, the police have not addressed or explained the employment status of the officer, how the outcome of the investigation that was conducted is something that the police have an interest in, or how many of the records identified as responsive even tangentially relate to the employment of a police officer.

[43] While the *PSA* applying is not necessarily a requirement for the 52(3) exclusion to apply, the police have not satisfied either of the section 52(3)2 or 3 tests outlined above. For section 52(3)2, the police have not explained how the collection, preparation, maintenance or use of the records was in relation to employment or labour relations negotiations or anticipated negotiations. Based on the information provided by the appellant, which the police did not dispute, the officer in question was retired at the time of the investigation, and it is therefore not clear how the investigation could impact their employment or relationship with the police, or otherwise affect labour relations.

[44] Similarly, for section 52(3)3, the police have not established how the records relate to meetings, consultations, discussions or communications that are about labour relations or employment-related matters in which they have an interest. While they may have such an interest in the outcome of a *PSA* investigation, the police have not established that this is the case for a *Criminal Code* investigation of a retired officer. Accordingly, I find that the police have not established that the investigation, even if it was conducted by PRS, would produce records excluded from *MFIPPA* under section 52(3) due to being related to a *PSA* investigation or otherwise.

[45] It does not necessarily follow that the appellant is entitled to access to the records under *MFIPPA*, as it is possible that they may be exempt from disclosure, even if not excluded under section 52(3). However, considering the above, I find that the records are subject to *MFIPPA* and I will order the police to issue an access decision for the responsive records.

**ORDER:**

1. I order the police to issue an access decision to the appellant without relying on the section 52(3) exclusion, treating the date of this order as the date of the request for procedural purposes.
2. In order to ensure compliance with Order provision 1, I reserve the right to require the police to provide me with a copy of the access decision.

Original Signed by: \_\_\_\_\_

Chris Anzenberger  
Adjudicator

January 29, 2025 \_\_\_\_\_