

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4622

Appeal MA23-00226

Windsor Police Services Board

January 31, 2025

Summary: A media requester sought access to certain dates related to a police official's interaction with a subordinate while off-duty. The police denied access to the responsive information, relying on the exclusion in section 52(3) of the *Municipal Freedom of Information and Protection of Privacy Act* that excludes labour relations and employment records from the application of the *Act*.

In this order, the adjudicator finds that the record that contains the responsive information is excluded from the application of the *Act* as it concerns the police's management of their own workforce. The adjudicator, therefore, upholds the police's decision and dismisses the appeal.

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

OVERVIEW:

[1] A media requester sought access to certain dates related to a police official's interaction with their subordinate while this official was off duty. Specifically, he made a request to the Windsor Police Services Board (WPS or the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for answers to the following four questions:

1. The date the official disclosed to the Chief of Police (the Chief) about being pulled over for speeding.

2. The date the Chief involved the WPS Professional Standard Branch (PSB) to investigate.
3. The date the investigation concluded.
4. The date Chief involved the Windsor Police Services Board.¹

[2] The police issued a decision denying access to any responsive records in full. Access was withheld based on the exclusion in section 52(2.1) (ongoing prosecution) of the *Act*.

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

[4] During mediation, the police issued a supplementary decision letter, in which they advised that they were denying access to any responsive records in full under the exclusion in section 52(3) (labour relations or employment records). The police also advised that, as the charges against the official had been resolved in court, they were no longer relying on section 52(2.1) of the *Act* to deny access to the record. As a result of the police's supplementary decision letter, the only issue on appeal is whether section 52(3) applies to the records.

[5] The parties were unable to resolve the issue under appeal through the process of mediation. Accordingly, the file was moved to the adjudication stage where an adjudicator may conduct an inquiry.

[6] I decided to conduct an inquiry and sought and received representations from the police and the appellant.

[7] The police then provided the appellant with a second supplementary decision letter advising that the investigation sent to the Ontario Civilian Police Commission (the OCPC) involving the official had been concluded. They further advised that despite the conclusion of the investigation they continued to rely on the section 52(3) exclusion to deny access to the record.

[8] In this order, I find that the record that contains the responsive information is excluded from the application of the *Act* pursuant to section 52(3). I uphold the police's decision not to disclose it and dismiss the appeal.

RECORD:

[9] The record at issue is a two-page memorandum (memo) from the Chief to the

¹ There was a fifth question set out in the request, but that information is not at issue in this order as it is publicly available information.

Windsor Police Services Board (PSB), which contains an informational timeline of the sequence of events that resulted in the eventual issuing of a summons to appear in court to the official. Attached to this memo is a copy of the report completed by the PSB detailing the investigation into the incident.

[10] In this order, I will refer to the memo and attached report as “the record”.²

DISCUSSION:

[11] The sole issue in this appeal is whether the section 52(3) exclusion for records relating to labour relations or employment matters applies to the record. 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.³

[12] The purpose of this exclusion is to protect some confidential aspects of labour relations and employment-related matters.⁴

[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.⁵

[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.⁶

[16] 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.⁷

[17] The police rely on paragraphs 1 and 3 of sections 52(3), which read:

² The IPC has consistently taken the position that the application of section 52(3) is record-specific and fact-specific. As such, when determining whether the exclusion applies, I must examine the record as a whole rather than looking at individual pages, paragraphs, sentences or words. This “whole record” method of analysis has also been described as the “record by record approach.” See for example Orders MO-3927, M-352, MO-3798-I, MO-3927, MO-3947, MO-4071, PO-3642, PO-3893-I and PO-4564.

³ Order PO-2639.

⁴ *Ontario (Ministry of Community and Social Services) v. John Doe*, 2015 ONCA 107 (CanLII).

⁵ *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.

⁶ *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).”

⁷ *Ministry of Correctional Services*, cited above.

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

Section 52(3)3: labour relations or employment-related matters in which the institution has an interest

[18] 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.

Representations of the police

[19] The police indicate that while off-duty, the police official identified in the request was pulled over by a police officer for a traffic offence, after which they were let go with no further action. The police state that the information in the record was gathered after the official notified their superior, the Chief, about being stopped for this traffic violation.

[20] The police state that the Chief issued a request to the PSB to conduct an internal investigation into the traffic stop. They submit that this investigation was conducted and, as a result, a charge was laid against the official under the *Highway Traffic Act* (the *HTA*). They advise that this *HTA* charge was resolved in court.

[21] The police state that they also asked for an external OCPC investigation into the actions of a superior officer (the official) and a subordinate police officer involved in the incident to determine if these actions met the threshold of misconduct under the *Community Safety and Policing Act* (the *CSPA*, previously the *Ontario Police Services Act*). The police state that the *CSPA* provides the Chief with the legislative authority to convene a tribunal over actions of police officers regardless of whether on duty or not. They advise that the OCPC investigation has been completed.

[22] The police state that the actions of both police officers (the official and the subordinate) are directly linked to the employment of these officers.

Representations of the appellant

[23] The appellant submits that section 52(3) does not apply as there is a public interest in disclosure of the record.

Findings

[24] For section 52(3)3 to apply, all three parts of the test set out above must be met. Based on my review of the record and the parties' representations, I find that section 52(3)3 applies to exclude the record from the scope of the *Act*.

Part 1: collected, prepared, maintained or used

[25] Regarding the three-part test under section 52(3)3, the police state that part 1 of the test has been met as the record was prepared for the PSB regarding an incident involving a member of this service.

[26] The police state that the report attached to the memo was prepared and used to conduct an internal investigation by the PSB at the request of the Chief to determine if any misconduct occurred under the *CSPA*. They state that all involved parties are employees of the police, and the report was maintained and used on behalf of the institution.

[27] The police state that the memo was created to provide the police with the results of their internal PSB review related to the incident involving a superior officer (the official) and his subordinate. They submit it outlines steps taken in the investigation conducted by the PSB into the conduct of all involved parties. The police state that if the PSB had not conducted an investigation the memo would not exist. They state that the record was used by the police to determine if further investigation was required.

[28] After reviewing the representations of the parties and the circumstances of this appeal, I am satisfied that the record, which comprises the memo and the attached report, was prepared, maintained, or used by the police. The memo was prepared by the police while investigating employment-related matters concerning their employees arising from the incident. The report was prepared by an Inspector at the PSB for a Deputy Chief at the WPS and was maintained and used by the police. The memo and attached report were used to provide the police with the results of the internal PSB review related to the incident involving a superior officer (the official) and his subordinate.

[29] Therefore, I find part 1 of the test has been met for the record as it was prepared, maintained and used by the police.

Part 2: meetings, consultations, discussions or communications

[30] 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.⁸

[31] 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.⁹

[32] The police state that the memo and the attached report were submitted to the board during a closed meeting of the PSB where a discussion was held about the incident. As a result, the board made the decision to conduct an external review through the OCPC to ensure all policies and procedures were followed correctly.

[33] I find that part 2 of the test has been met as the police have established that the record was used in their closed meeting discussion about the incident involving two members of their police force.

Part 3: labour relations or employment-related matters in which the institution has an interest

[34] 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.¹⁰

[35] 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.¹¹

[36] The phrase "labour relations or employment-related matters" has been found to apply in the context of:

⁸ Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

⁹ Order MO-3664, *Brockville (City) v. Information and Privacy Commissioner, Ontario*, 2020 ONSC 4413 (Div. Ct.).

¹⁰ *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.

¹¹ Order PO-2157.

- an employee's dismissal;¹²
- a grievance under a collective agreement;¹³
- disciplinary proceedings under the *Police Services Act*;¹⁴

[37] 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

[38] The record is 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).¹⁶

[39] The police state that if the external review by the OCPC had determined evidence existed in relation to a superior officer influencing a subordinate, the official could have been disciplined under the then *PSA*. Further, the OCPC could have laid charges against the other involved officer.

[40] I find that part 3 of the test has been met as the closed meeting in which the memo and attached report were used by the police was about employment-related matters in which the police have an interest. The record is about the police's management of two members of their own workforce. The record was used in response to allegations of their employees' misconduct related to their employment duties which are employment related matters in which the police have an interest.

[41] The police have an interest in this employment-related matter involving their employees, and that this interest was more than a mere curiosity or concern. The police reviewed the circumstances of the incident in order to determine the next steps in dealing with their employees who were involved in the incident. Therefore, I find that the record is about an employment-related matter in which the police have an interest are required by part 3 of the test.

Conclusion

[42] Above I have found that all three parts of the test have been established as the police prepared, maintained and used the record in relation to a meeting about employment-related matters in which the police have an interest. As all three parts of the test under section 52(3) must be met for the exclusion to apply, I find that the record is

¹² Order MO-1654-I.

¹³ Orders M-832 and PO-1769.

¹⁴ Order MO-1433-F.

¹⁵ *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above.

¹⁶ *Ministry of Correctional Services*, cited above.

excluded from the scope of the *Act*.

[43] In making this determination, I have considered whether the record falls within any of the exceptions in section 52(4). If any of these exceptions apply, the record is not excluded from the application of the *Act*.¹⁷ None of the exceptions in section 52(4) have been claimed and I find that none of them apply.

[44] Accordingly, I find that the record is excluded from the scope of the *Act* by reason of section 52(3)3.

[45] As the record is excluded under section 52(3)3, it is not necessary for me to also consider whether it is excluded under section 52(3)1.

[46] I acknowledge that the appellant has raised the application of the public interest override in section 16 of the *Act* as he submits that there is a compelling public interest in the disclosure of the record. However, the public interest override at section 16 can only apply to records that are accessible under the *Act* and for which an institution has claimed exempt under one of the specified exemptions. As I have determined that the record is excluded from the scope of the *Act*, the public interest override in section 16 cannot apply to it.

ORDER:

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

Original Signed by: _____

Diane Smith
Adjudicator

January 31, 2025 _____

¹⁷ Section 52(4) reads:

This Act applies to the following records:

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.
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.