Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER M-832

Appeals M_9600133, M-9600152 and M-9600156

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NATURE OF THE APPEAL:

The appellant made a two part request to the Municipality of Metropolitan Toronto (the Municipality) under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to copies of various records relating to her. The appellant is an employee of the Municipality. She sought access to her Human Resources file, Area Office file, her Corporate Medical file and any other files which may have been created by the Municipality's doctor and/or ergonomist. She also asked for copies of all supervisory notes relating to her, created by a number of named individuals.

Shortly after submitting the first request the appellant made another request for copies of notes and/or files relating to her created by three individuals who had not been named in her first request.

With respect to the first request, the Municipality denied access to all supervisory notes, as well as some of the ergonomic information, claiming that, pursuant to section 52(3), the Act does not apply to these records. The Municipality also informed the appellant that no supervisory notes exist in relation to one of the named individuals. The Municipality granted partial access to the other records and denied access to the remaining information under the following sections of the Act:

- advice to government - section 7(1)
- invasion of privacy - section 14(1)
- discretion to deny requester's own personal information - sections 38(a) and (b)

With respect to the second request, the Municipality located responsive records relating to the first named individual and denied access in full, claiming that, pursuant to section 52(3), the Act does not apply to these records. The Municipality also advised the requester that no records exist with regard to the second and third named individuals.

The appellant appealed the Municipality's decisions.

During mediation, the Municipality issued a supplementary decision letter and withdrew its section 7(1) claim and released some of the working notes of the Assistant Ergonomist. The Municipality informed the appellant that the remainder of the Assistant Ergonomist's notes remain exempt subject to section 52(3) of the Act. The Municipality also disclosed six pages of computer generated notes created by the second named individual in the second request. In the Municipality's view, those notes were not responsive to the request.

The appellant agreed not to pursue access to the information being withheld pursuant to sections 14 and 38(b). However, she took the position that the Municipality's doctor and/or nurse should have notes which relate to her and that additional records should exist in relation to the second and third individuals named in her second request.

The records which remain at issue in these appeals are all the supervisory notes relating to the appellant, as well as some of the notes created by the Assistant Ergonomist. The Municipality has claimed that all of these records are excluded from the scope of the Act by virtue of section 52(3).

Section 52(3) raises the issue of the Commissioner's jurisdiction to hear an appeal. This office sent a Notice of Inquiry to the appellant and the Municipality seeking representations on the issues of jurisdiction and reasonable search. The Municipality and the appellant submitted representations.

DISCUSSION:

REASONABLENESS OF SEARCH

Where a requester provides sufficient details about the records which she is seeking and the Municipality indicates that further records do not exist, it is my responsibility to ensure that the Municipality has made a reasonable search to identify any records which are responsive to the request. The Act does not require the Municipality to prove with absolute certainty that further records do not exist. However, in my view, in order to properly discharge its obligations under the Act, the Municipality must provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate records responsive to the request.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records may, in fact, exist.

With respect to the possible existence of additional medical information, the Municipality has provided me with a letter from the Manager, Health Services of the Compensation, Labour Relations, Health & Safety Division of Corporate and Human Resources. This letter confirms that medical information is stored in a confidential file maintained by the Corporate Health Services Unit. Only one medical file is maintained for each employee and reports or records from consulting physicians are also placed in that file. According to the Municipality this file was produced for the purpose of responding to the appellant's request. Even though the Municipality was convinced that it had completed an adequate search for the records, when the appellant indicated that she believed additional records should exist, a second search was completed. The search did not reveal any additional records.

With respect to the possible existence of additional supervisory notes, the Municipality states that it also conducted a second search in this area upon learning of the appellant's belief that additional records should exist. This search did not reveal any additional responsive records, however, 6 pages of computer generated administrative notes which were considered to be non_responsive were located and disclosed to the appellant. The Municipality has explained the steps which it undertook to satisfy itself that its search was adequate.

Having reviewed the information submitted to me, I am satisfied that the Municipality's search for records responsive to the appellant's requests was reasonable.

APPLICATION OF THE ACT

Sections 52(3) and (4) of the Act read:

> (3) Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> 1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
>
> 2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.
>
> 3. Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.
>
> (4) 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.

The interpretation of sections 52(3) and (4) is a preliminary issue which goes to the Commissioner's jurisdiction to continue an inquiry.

Section 52(3) is record-specific and fact-specific. If this section applies to a specific record, in the circumstances of a particular appeal, and none of the exceptions listed in 52(4) are present, then the record is excluded from the scope of the Act and not subject to the Commissioner's jurisdiction.

In her representations, the appellant states that she has, in the past, been granted access to her personnel files. At that time, in the appellant's opinion, some of the material which was in her file was highly subjective, factually inaccurate or inappropriate for inclusion in a personnel record. She states that she has brought her concerns to management's attention both informally and formally through the grievance process. She states that access to the information in her file is the only way she can continue to monitor the appropriateness and accuracy of the information placed in her file. In short, the appellant's argument centres around her belief that she should be entitled to review personal information about her retained in the Municipality's personnel files.

Assistant Commissioner Tom Mitchinson addressed this issue in Order P-1242 when discussing the provincial equivalent of section 52(3), section 65(6) of the Freedom of Information and Protection of Privacy Act. He stated:

> The wording of section 65(6) does not distinguish records on the basis of whether they contain personal information. In fact, the types of records described in both sections 65(6) and (7) would by their very nature frequently contain personal information.

In other words, if the records at issue in this appeal are found not to fall under the scope of the Act by virtue of section 52(3), the appellant has no right of access to them under the Act, and no right to request correction of them under the Act.

In its representations, the Municipality focuses on paragraphs 1 and 3 of section 52(3) to exclude the records from the Act.

In order for a record to fall within the scope of paragraph 1 of section 52(3) of the Act, the Municipality must establish that:

1. the record was collected, prepared, maintained or used by the Municipality or on its behalf; **and**

2. this collection, preparation, maintenance or usage 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 Municipality.

(Order M-815)

1. Were the records collected, prepared, maintained or used by the Municipality or on its behalf?

In its representations, the Municipality submits that the supervisory notes document meetings and discussions with the appellant, clients of the Municipality and staff responsible for Workers'

Compensation Board processes and that the ergonomist's notes are directly relevant to the Municipality's defence of the appellant's grievance before the Grievance Arbitration Board.

Having reviewed the records, I agree with the Municipality's position. I find that they were all collected, prepared, maintained and/or used by the Municipality or on its behalf, and the first requirement of section 52(3)1 has been established.

2. Was this collection, preparation, maintenance or usage in relation to proceedings or anticipated proceedings before a court, tribunal or other entity?

According to the Municipality, the majority of the records are notes made by the staff responsible for supervising the appellant and for responding to complaints that were received by the Municipality about the appellant. Other notes document the appellant's work-related health concerns and the Municipality's attempt to accommodate these concerns.

In its representations, the Municipality states that the appellant has made a claim for Worker's Compensation and has two outstanding grievances related to accommodation of her medical condition and what she views as harassment regarding her work performance.

The two grievances have moved through the initial steps of the grievance procedure set out in the collective agreement without being resolved. The grievances have been scheduled to be heard by the Grievance Arbitration Board shortly. According to the Municipality, all of the records are evidence which will be relied upon by the Municipality in responding to the grievances filed by the appellant.

The Municipality argues that a Grievance Arbitration Board is a tribunal with the authority to impose a penalty or sanction against the institution in response to the union's application on the appellant's behalf.

In Order M-815, Assistant Commissioner Mitchinson discussed a number of the phrases which are found in section 52(3). Applying these various interpretations, I make the following findings under the second requirement of section 52(3)1:

- The arbitration process under the collective agreement between the Municipality and the union is a dispute or complaint resolution process conducted by a court, tribunal or other entity which has, by law, binding agreement or mutual consent, the power to decide grievances. As such, hearings before an arbitrator or arbitration board are properly characterized as "proceedings".

- An arbitrator has the authority to conduct "proceedings", and the powers to determine matters affecting rights, and is properly characterized as an "other entity" for the purpose of section 52(3)1.

- The records at issue in this appeal were collected, prepared, maintained and/or used for the purpose of investigating the conduct of the appellant with respect to a number of complaints or to determine appropriate action

> with respect to her work-related health concerns. The appellant has filed two grievances: one questioning the Municipality's efforts to accommodate her and the other alleging harassment regarding her work performance. The grievances have not been resolved and have led to the scheduled arbitration. The records will be used in the arbitration hearing. This usage is for the purpose of and/or substantially connected to the arbitration, and therefore properly characterized as being "in relation to" it.

Accordingly, I find that the answer to question 2, posed above, is "yes".

3. Do these anticipated proceedings relate to labour relations or to the employment of a person by the Municipality?

In Order M-815, Assistant Commissioner Mitchinson stated that "labour relations", for the purposes of section 52(3)1, is properly defined as the collective relationship between an employer and its employees.

In the circumstances of this appeal, the Municipality has established that the appellant, who was a member of a union, filed her grievance in accordance with the collective agreement between the Municipality and the union. Therefore, I find that the grievance arbitration is a proceeding relating to labour relations, and the third requirement of section 52(3)1 has been established.

In summary, I find that the records at issue in this appeal will be used by the Municipality in relation to proceedings before an "other entity", the arbitrator, and that these proceedings relate to labour relations. All of the requirements of section 52(3)1 of the Act have thereby been established by the Municipality. None of the exceptions contained in section 52(4) are present in the circumstances of this appeal, and I find that the records fall within the parameters of section 52(3)1 and therefore are excluded from the scope of the Act.

ORDER:

I uphold the Municipality's decision.

Original signed by: September 10, 1996
Holly Big Canoe
Inquiry Officer