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

ORDER M-861

Appeal M_9600239

Municipality of Clarington

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The Municipality of Clarington (the Municipality) received a five part request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to:

1. The contents of the requester's personnel file.

2. All documents pertaining to a specified job competition in which the requester was involved.

3. Letters written in support of the requester's candidacy.

4. Written reasons why the requester was not awarded the position sought.

5. Copies of any complaints received about the requester by the Municipality.

The requester is a former temporary employee of the Municipality and was an unsuccessful candidate in a job competition held in August 1995. The requester's temporary employment with the Municipality began on June 22, 1992 and ended on December 8, 1995.

The Municipality responded by denying access to all of the records which it identified as responsive to the request, claiming the application of section 12 of the Act (solicitor-client privilege). The requester, now the appellant, appealed the Municipality's decision and claimed that additional records beyond those identified by the Municipality should exist.

During the mediation of the appeal, the Municipality provided the appellant with a number of records relating to items 2 and 3 of the request and advised that no records responsive to items 4 and 5 exist. The Municipality also prepared and forwarded to the appellant a further decision letter in which it claimed the application of section 14 of the Act to records containing the personal information of the other candidates in the job competition.

The undisclosed responsive records in this appeal may be categorized as follows:

1. Group A - records relating to a proceeding initiated by the appellant before the Ontario Labour Relations Board (the OLRB) which is now complete.

2. Group B - records relating to the August 1995 job competition in which the appellant was an unsuccessful candidate.

3. Group C - records relating to a proceeding initiated by the appellant before the Ontario Human Rights Commission (the OHRC) which remains on-going.

4. Group D - the contents of the appellant's personnel file.

The Appeals Officer identified the possible application of section 52(3) of the Act to these records. If this section applies, and none of the exceptions found in section 52(4) are present, section 52(3) has the effect of excluding records from the scope of the Act and thereby, removing them from the Commissioner's jurisdiction.

This office sent a Notice of Inquiry to the Municipality and the appellant soliciting their views on the jurisdictional issue in section 52(3), the application of sections 12, 14, 38(a) and (b), as well as the question of the adequacy of the Municipality's search. Representations were received only from the Municipality.

PRELIMINARY ISSUE:

PAYMENT OF THE REQUEST FEE

The Municipality submits that, under section 17(1)(c) of the Act, a requester is required to pay the fee prescribed by the regulations at the time of making the request. Section 5(2) of Regulation 823 prescribes that a fee of $5.00 is to be charged for the purposes of section 17(1)(c). The Municipality argues that because it "believes that [the appellant] has not paid the prescribed fees for either his request for access to personal information or for the appeal" the appellant's request and appeal have no legal standing before the Commissioner.

The appellant has paid the required appeal fee. With respect to the request fee, in my view it was the responsibility of the Municipality to collect it. If the Municipality failed to collect the request fee due to it at the time the request was received (and I have no evidence before me to determine this question), I find that the Municipality should not be able to rely upon its own failure to collect the fee in order to preclude the processing of the appeal. Accordingly, I will proceed to address the substantive issues which are before me in this matter.

DISCUSSION:

REASONABLENESS OF SEARCH

The Municipality provided me with an affidavit sworn by its Clerk in which she describes in detail the nature and extent of the searches which she undertook for records responsive to the appellant's request. Searches were conducted in the personnel and grievance files of the Municipality's Chief Administrative Officer. In addition, records relating to the job competition were obtained by the Clerk from the Municipality's Property Manager.

Where a requester provides sufficient details about the records which he is seeking and the institution (in this case 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.

As noted above, the appellant did not make any submissions in response to the Notice of Inquiry.

In my view, the steps taken by the Municipality to locate records responsive to the appellant's request were reasonable in the circumstances.

JURISDICTION

The first issue in this appeal is whether the records fall within the scope of sections 52(3) and (4) of the Act. These provisions 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 section 52(4) are present, then the record is excluded from the scope of the Act and not subject to the Commissioner's jurisdiction. As a result, if I find that I do not have jurisdiction to deal with the records, it will not be possible for me to deal with the substantive exemptions claimed by the Municipality.

The Municipality submits that the records are excluded from the scope of the Act by virtue of paragraphs 1, 2 and 3 of section 52(3). It argues that:

> The documents contained in the personnel file of the appellant and the records relating to the job competition have been collected, prepared, maintained or used by various members of the management staff of the Municipality and by counsel retained to act on behalf of the Municipality in the complaint processes launched by the appellant. Further, these documents will be used as evidence in the complaint process before the Ontario Human Rights Tribunal. These complaints made by the appellant were in relation to his employment with the Municipality. Accordingly, the Municipality submits that such records are excluded from the scope of the Act.

Section 52(3)1

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?

I have reviewed the records at issue and find that those which comprise Groups A and C were collected, prepared, maintained or used on behalf of the Municipality by its counsel in responding to the OLRB and OHRC complaints filed by the appellant. The first requirement of section 52(3)1 has, accordingly, been met in relation to these records.

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

In Order P-1223, former Assistant Commissioner Mitchinson provided an interpretation for each of the component parts of section 65(6)1, which is the equivalent provision to section 52(3)1 in the provincial Act. He found that in order to qualify under this section, records must relate to proceedings before a court, tribunal or other entity. Assistant Commissioner Mitchinson then held that:

> 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 the matters at issue would constitute "proceedings" for the purposes of section 65(6)1.

In Order M-815, he also made the following statement with respect to the meaning of the word "tribunal" which appears in section 52(3)1:

> A number of tribunals have been established by statute as part of the administrative justice system in Ontario. The Ontario Labour Relations Board, the Workers' Compensation Board and the Environmental Assessment Board are some of the more well-known examples, but there are dozens of other bodies performing similar functions outside the regular court system. What distinguishes these bodies as "tribunals" is that they have a statutory mandate to adjudicate and resolve conflicts between parties and render decisions which affect legal rights or obligations. In my view, this is the appropriate definition for the term "tribunal" as it appears in section 52(3)1.

Finally, in Order M-815 Assistant Commissioner Mitchinson commented on the meaning of the expression "in relation to" which is contained in the section. He referred to another decision involving the interpretation of the equivalent provision in the provincial Act as follows:

> I recognize that the context of the phrase "in relation to" in section 92 of the Constitution Act, 1867 and in section 65(6) of the Act is different. However, in my view, the case law does provide a clear indication that in order to be "in relation to" something, the activity or object in question must do more than merely "affect" that thing; there must be a substantial connection between the activity and the thing to which it is supposed to be "in relation".
> ...
>
> Following the approach taken in the constitutional cases, the connection must be fairly substantial. In the context of section 65(6), I am of the view that if the preparation (or collection, maintenance, or use) of a record was for the purpose of, as a result of, or substantially connected to an activity listed in sections 65(6)1, 2, or 3, it would be "in relation to" that activity.

I find that the records which comprise Groups A and C were collected, prepared and used on behalf of the Municipality for the purpose of or were substantially connected to proceedings before the OLRB and OHRC which had been instituted by the appellant. I further find that these are "tribunals" within the meaning of section 52(3)1 which have the power by law to adjudicate a dispute or complaint between parties. Accordingly, the second component of section 52(3)1 has been satisfied.

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

Section 52(3)1 uses the phrase "relating to labour relations **or** to the employment of a person by the institution" (emphasis added). In Order P-1223, former Assistant Commissioner Mitchinson stated that:

> ... [I]n my view, the legislature must have intended the terms "labour relations" and "employment" to have separate and distinct meanings and application. My view is supported by the presumption of consistent expression in statutory interpretation, one of whose tenets is that "it is possible to infer an intended difference in meaning from the use of different words or a different form of expression" (Driedger on the Construction of Statutes, 3rd ed., p.164).

I find that the proceedings reflected in the records in Groups A and C do not relate to the collective relationship between an employer and its employees. They do not, therefore, fall within the definition of "labour relations" adopted in Order P-1223 by Assistant Commissioner Mitchinson when defining the meaning of this phrase for the purposes of section 65(6)1, the equivalent provision in the provincial Act to section 52(3)1.

In my view, the proceedings about which the records are concerned do, however, relate to the employment of the appellant. The appellant's employment by the Municipality gave rise to the proceedings before both the OLRB and the OHRC. I find, accordingly, that the third part of section 52(3)1 has been established.

In summary, I find that the records which comprise Groups A and C were collected, prepared and used on behalf of the Municipality in relation to proceedings before two tribunals and that these proceedings relate to the "employment of a person". All of the requirements of section 52(3)1 have been established by the Municipality. None of the exceptions contained in section 52(4) are present in the circumstances of this appeal. I find that the records contained in Groups A and C fall within the parameters of section 52(3)1 and are therefore excluded from the scope of the Act.

Section 52(3)2

In order for a record to fall within the scope of paragraph 2 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 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 will take place between the institution and a person, bargaining agent or party to a proceeding or anticipated proceeding.

Requirement 1

Group D records are the documents located in the appellant's personnel file which were compiled between 1992 and 1995. Some of these consist of various correspondence documenting the discussions and disputes which arose between the appellant, the union representing employees of the Municipality and the Municipality's administration and elected officials during the course of his employment with the Municipality. The only other documents contained in the Group D records are the appellant's resume and a number of attachments to it provided by the appellant, which I will address in my discussion of section 52(3)3.

I find that the other records which comprise Group D (the correspondence between the appellant, the Municipality and the union) were collected, prepared, maintained and used by the Municipality within the meaning of section 52(3).

Requirements 2 and 3

These records relate primarily to the arrangements made between the union, the appellant and the Municipality regarding the terms and conditions of his employment between 1992 and 1995. I find that this collection, preparation, maintenance and usage of these records was in relation to the negotiation of the periodic renewals of the appellant's status as a temporary employee of the Municipality. They relate, therefore, to the employment of the appellant by the Municipality.

Further, I find that these negotiations were entered into between the appellant, the bargaining agent for the Municipality's employees and the Municipality itself.

The correspondence records categorized in Group D relate to the negotiation of the terms and conditions of the appellant's employment with the Municipality. They are, accordingly, outside the scope of the Act as they clearly fall within the parameters of section 52(3)2.

Section 52(3)3

In Order P-1242, Assistant Commissioner Mitchinson held that in order for a record to fall within the scope of paragraph 3 of section 65(6), which is the equivalent provision to section 52(3)3 found in the provincial Act, the Municipality must establish that:

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

2. this collection, preparation, maintenance or usage 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 City has an interest.

Requirements 1 and 2

Group B refers to records which relate to the job competition in which the appellant was an unsuccessful candidate. Group D records not addressed in my discussion of section 52(3)2 above consist of the appellant's resume and supporting materials.

In my view, it is clear that job competition records are either collected, prepared, maintained or used by the Municipality, and in many cases, all four. Therefore, Requirement 1 has been established for the records in Group B. The appellant's resume and supporting documents contained in Group D were also maintained and used by the Municipality.

I find that in the context of a job recruitment process, both at the point of initial hire and in later job competitions:

- an employment interview is a "meeting"; and
- deliberations about the results of a competition among the interview panel members are "meetings, discussions or communications", and sometimes all three.

Moreover, the records generated with respect to these activities would be either for the purpose of, as a result of, or substantially connected to these meetings, discussions or communications, and therefore properly characterized as being "in relation to" them (Order P_1242). Therefore, Requirement 2 has also been established with respect to the documents which comprise Group B and the resume materials in Group D.

Requirement 3

The Municipality submits that the meetings, consultations, discussions and communications are about employment-related matters. I am satisfied that the appellant was or was soon to be an employee of the Municipality at the time when all of the records which comprise Groups B and D were created. It is self-evident that a job competition is an employment-related matter. I must now determine whether the Municipality has an interest in these matters.

In Order M-830, Assistant Commissioner Mitchinson found that a job competition process involves certain legal obligations which an employer must meet under the Ontario Human Rights Code. These involve a duty not to discriminate in selecting an employee in a job competition. He went on to find that job competitions are matters in which an institution "has an interest". Assistant Commissioner Mitchinson defined the term "has an interest" as follows:

> Taken together, these [previously discussed] authorities support the position that an "interest" is more than mere curiosity or concern. An "interest" must be a legal interest in the sense that the matter in which the Ministry has an interest must have the capacity to affect the Ministry's legal rights or obligations.

I concur with this conclusion and find that in the present circumstances, the Municipality has an interest in the job competition involving the appellant. Requirement 3 has, accordingly, been established for those records which comprise Groups B and the resume records in Group D.

In summary, I find that the records which are included in Group B and the resume records in Group D were collected, prepared, maintained and/or used by the Municipality, in relation to meetings, discussions and consultations about employment-related matters in which it has an interest. All of the requirements of section 52(3)3 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)3, and therefore, are excluded from the scope of the Act.

Because of the manner in which I have decided the jurisdictional question under sections 52(3) and (4), it is not necessary for me to consider the application of sections 12, 14 and 38(a) and (b) and I am, in fact, precluded from doing so.

COSTS

The Municipality submits that, pursuant to section 45(1) of the Act, the appellant is required to pay the fees prescribed in section 6.1 of Regulation 823 for access to his personal information. As the remaining undisclosed records which are responsive to his request do not fall within the scope of the Act, the appellant is not entitled to obtain access to them under the Act. The fees prescribed by section 45(1) do not, therefore, apply.

ORDER:

I uphold the Municipality's decision not to disclose the records.

Original signed by: November 19, 1996
Donald Hale
Inquiry Officer