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

ORDER M-815

Appeal M_9600098

City of Toronto

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NATURE OF THE APPEAL:

The appellant made a request to the City of Toronto (the City) under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to all personal information about him held by the City. The appellant, an employee of the City, had been accused of workplace improprieties. Following an investigation, the appellant was dismissed. He grieved the dismissal, and this grievance is currently in process.

The City located 611 pages of responsive records in the following three locations:

- the appellant's personnel file
- the file of the Director of the division which employed the appellant
- the investigation file

The records include letters, minutes, correspondence, notes, memoranda, records of inspection and other supporting documentation.

The City granted access in whole or in part to 172 pages, and denied access to the remaining 439 pages on the basis of one or more of the following exemptions:

- advice to government - section 7(1)
- law enforcement - sections 8(1)(a) and (b), 8(2)(a) and (c)
- third party information - section 10
- economic interests of the institution - sections 11(c), (d), (e) and (f)
- solicitor-client privilege - section 12
- invasion of privacy - section 14(1)
- discretion to deny requester's own personal information - section 38(a) and (b)

The appellant appealed the City's decision.

During mediation, the City disclosed additional pages to the appellant, and the appellant advised the Appeals Officer that he did not require any of the pages to which only partial access was granted, or to pages containing personal information of other individuals.

The City also issued a second decision letter, claiming additional exemptions under sections 8(1)(d) and (f) and 11(g) of the Act; and a third letter, claiming that all of the records fall within the parameters of paragraphs 1, 2 and 3 of section 52(3) of the Act, and therefore outside the scope of the Act.

Because 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 City seeking representations on the jurisdictional issue only. Only the City submitted representations.

Shortly after submitting its representations, the City informed this office that two pages of records had been removed from the appellant's personnel file, pursuant to a request made by the

appellant under the collective agreement between the City and the appellant's union. In the City's view, this action removed these pages from the scope of the appeal. I cannot consider this issue unless I have jurisdiction to hear the appeal, so I have decided to treat these two pages as within the scope of the appeal for the purpose of determining my jurisdiction.

DISCUSSION:

The only 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 52(4) are present, then the record is excluded from the scope of the Act and not subject to the Commissioner's jurisdiction.

In its representations, the City states that all the information contained in the records relates to steps taken by the City to investigate allegations of possible improper and illegal conduct on the part of a number of employees of the City, including the appellant. As a result of these investigations, the appellant's employment was terminated. He later filed a grievance under the collective agreement between the City and Local 79 of the Canadian Union of Public Employees (CUPE).

The matter proceeded through the grievance procedure set out in the collective agreement, and was referred to labour arbitration by the union representing the appellant. The arbitration hearing began in early 1996, but was adjourned and is to continue in October. According to the City, all of the records are being used in the labour arbitration.

In its decision letter, the City claimed that paragraphs 1, 2 and 3 of section 52(3) all apply to exclude the records from the Act. I will first consider section 52(3)1.

Section 52(3) of the municipal Act is identical in wording to section 65(6) of the Freedom of Information and Protection of Privacy Act (the provincial Act). I considered the interpretation of section 65(6)1 in Order P-1223, and the reasoning in that order is equally applicable in relation to 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 City 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 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 City.

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

In its representations, the City submits that:

> All of the records in each of these three files have been collected, prepared, maintained or used in relation to the [appellant's] grievance arbitration, by management in the [appellant's former] Department, by staff of the [City's] Office of Labour Relations, by counsel retained by the City to represent the City in this grievance arbitration process, and the police in their investigation.

Having reviewed the records, I agree with the City's position. I find that they were all collected, prepared, maintained and/or used by the City 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?

I will first discuss some of the terms identified in this requirement, and then determine whether the records at issue in this appeal fit within these interpretations.

"proceedings or anticipated proceedings"

In Order P-1223, I stated:

> The words "proceedings" and "anticipated proceedings" appear in section 65(6)1 in the context of the phrase "proceedings or anticipated proceedings **before a court, tribunal or other entity**". In my view, the words I have highlighted in bold must be considered in defining the words "proceedings" and "anticipated proceedings".

I went on to make the following interpretation of the term "proceedings":

> Given the references to proceedings "before a court, tribunal or other entity, I am of the view 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.

I adopt this interpretation for the purposes of section 52(3)1.

As far as the term "anticipated proceedings", is concerned, in my view, there must be a reasonable prospect of such proceedings at the time of the collection, preparation, maintenance or usage of the record - the proceedings must be more than just a vague or theoretical possibility.

"court, tribunal or other entity"

The words "court, tribunal or other entity" also appear as part of the phrase "proceedings or anticipated proceedings before a court, tribunal or other entity". As with the meaning of

"proceedings" discussed above, the entire phrase must be considered in any attempt to define the meaning of "court", "tribunal" and "other entity" in section 53(2)1.

In my view, the term "court" is widely understood to mean a judicial body presided over by a judge. It is clear that a court is a body which can have "proceedings" before it. In my view, to qualify as a "tribunal" or "other entity" in the context of section 52(3)1, the body or person must similarly be one which can preside over a "proceeding".

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.

As far as "other entity" is concerned, it is important to note that the term is included in the list along with "court" and "tribunal", and also as part of the phrase "proceedings or anticipated proceedings before a court, tribunal or other entity". As such, I believe that an "other entity" for the purposes of section 52(3)1 must be a body or person that could preside over "proceedings", and it should be viewed as distinct from, but in the same class as a court or tribunal. Thus, to qualify as an "other entity", the body or person must have the authority to conduct "proceedings", and the power, by law, binding agreement or mutual consent, to decide the matters at issue.

"in relation to"

As I stated in Order P-1223, the phrase "in relation to" can be interpreted in a number of ways. I pointed out that the phrase has a long history of interpretation by the courts, stemming from its inclusion in section 92 of the Constitution Act, 1867. The preamble of section 92, which specifies powers assigned to the provinces, reads:

> In each Province the Legislature may exclusively make Laws **in relation to** matters coming within the Classes of Subjects next herein-after enumerated, that is to say, ... (emphasis added)

After reviewing a number of cases which discussed the phrase (Gold Seal Ltd. v. Dominion Express Co. and A-G Alberta (1921) 62 S.C.R. 424, 62 D.L.R. 62, 3 W.W.R. 710 (S.C.C.); Re Dunne, [1962] O.R. 595 (Ont. H.C.J.); and R. v. Steinberg's Ltd. (1977), 17 O.R. (2d) 559, 80 D.L.R. (3d) 741), I made the following comments:

> 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 adopt this reasoning for the purposes of this appeal.

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 City and CUPE 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 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 or to determine appropriate disciplinary action. Disciplinary action was subsequently taken, which lead to the grievance and subsequent arbitration. The records were and 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 City?

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, I 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" (Dreidger on the Construction of Statutes, 3rd ed., p.164).

The term "labour relations" also appears in section 10(1) of the municipal Act and its provincial equivalent, section 17(1). In the context of section 17(1), Inquiry Officer Holly Big Canoe discussed the term "labour relations information" in Order P-653, and made the following statements:

> In my view, the term "labour relations information" refers to information concerning the **collective** relationship between an employer and its employees. The information contained in the records was compiled in the course of the negotiation of pay equity plans which, when implemented, would affect the **collective** relationship between the employer and its employees.

Given the particular wording of section 52(3)1, I find that Inquiry Officer Big Canoe's interpretation of the term is equally applicable in the context of paragraph 1. Therefore, I find 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 City has established that the appellant, who was a member of CUPE at the time, filed his grievance in accordance with the collective agreement between the City and CUPE. 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 were and will be used by the City 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 City. 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 City's decision.

Original signed by: August 2, 1996
Tom Mitchinson
Assistant Commissioner