



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

ORDER M-1014

Appeal M-9700129

City of Scarborough



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NATURE OF THE APPEAL:

The City of Scarborough (the City) received a request from a union under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to records relating to a forensic auditor's report completed on the City's Works and Environment Department in 1996. The union specifically sought information in relation to incidents that may have been investigated at fleet operations during 1995 or 1996.

The City denied access to the report based on section 14 (invasion of privacy) of the Act. The requester (now the appellant) appealed this decision to the Commissioner's office.

This office sent a Notice of Inquiry to the City, the appellant and three affected parties. Because of the nature of the information contained in the record, section 10 (third party information) and section 52(3) (employment related records) were included in the Notice of Inquiry. If the records fall under section 52(3) of the Act, they would be excluded from the scope of the Act unless they are records described in section 52(4).

Representations were received from all of the parties.

DISCUSSION:

JURISDICTION

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

These sections state:

- (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.

[IPC Order M-1014/October 2, 1997]

- (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.

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.

The record at issue is a report entitled "Confidential Review, City of Scarborough Garage Operation", February 12, 1996.

The union does not make specific representations on section 52 of the Act. It states that the auditor was brought in to investigate allegations made by a number of parties including the union. According to the union, two of its members were displaced from their workplace, one after many years of service. It states that having been involved in meetings with management, the Commissioner of the Department and outside parties as well as being present at all grievance hearings, it should be permitted to at least review the report to determine if the facts and details pertaining to its members are correct.

Although the union does not specifically say so, it appears to believe that it should be given access to the record because it relates to matters in which its members have a personal interest and may include their personal information.

Assistant Commissioner Tom Mitchinson addressed a similar issue in two orders decided under section 65(6) of the Freedom of Information and Protection of Privacy Act, the provincial equivalent of section 52(3) (Orders P-1242 and P-1260). 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.

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) of the Freedom of Information and Protection of Privacy Act, which is the provincial equivalent to section 52(3)3 of the Act, an institution must establish that:

1. the record was collected, prepared, maintained or used by the institution 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 institution has an interest.

Requirements 1 and 2

In its representations, the City states the report was prepared on behalf of the City and maintained and used by the City. It is clear on the face of the record that the City engaged in an investigation of the allegations against its staff which involved meetings and discussions. The City states that in addition to the meetings and discussions conducted during the course of the investigation, it also conducted meetings and discussion with the individuals and the union before and after the investigation. The report was the method of communicating the result of the investigation to the City.

In Order P-1223, Assistant Commissioner Mitchinson stated 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 52(3)1, 2, or 3]”, it would be “in relation to” that activity.

Having reviewed the City’s representations and the report, I am satisfied that the preparation, maintenance or use of the report was “in relation to” meetings, discussions and communications. Accordingly, I find that Requirements 1 and 2 have been met.

Requirement 3

In order to satisfy the third requirement, the City must establish that the meetings, discussions and communications are about labour relations or employment-related matters in which it has an interest.

Because the investigation relates to the actions of unionized and non-unionized staff, I am satisfied that the meetings, discussions and communications were about employment-related and labour relations matters, namely, whether or not City staff carried out their responsibilities in an appropriate manner.

The remaining component which must be established is whether this matter can be characterized as one “in which the institution has an interest”.

In Order P-1242, Assistant Commissioner Mitchinson considered the meaning of this phrase in section 65(6)3, the provincial equivalent of section 52(3)3. He stated:

[A]n “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.

The City submits that its legal “interest” in the matter of whether or not City staff carried out their responsibilities in an appropriate manner arises from general common law principles regarding employer/employee relations. The City states it has an obligation to ensure that all of its operations are carried out in accordance with City policies and procedures and all other applicable laws. In addition, the City states that it “has an interest” in the investigation and report because any allegations involving union employees could result in grievance proceedings and any allegations involving non-union personnel could result in court proceedings. Therefore, I find that the City has established that the meetings, discussions and communications are about labour relations or employment-related matters in which it has an interest.

Accordingly, all of the requirements of section 52(3)3 of the Act have been established by the City. Since none of the exceptions contained in section 52(4) are present in the circumstances of this appeal, I find that the record falls within the parameters of section 52(3)3. Therefore, it is excluded from the scope of the Act.

ORDER:

I dismiss the appeal.

Original signed by: _____
Marianne Miller
Inquiry Officer

_____ October 2, 1997