



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

ORDER M-1052

Appeal M-9700231

Municipality of Metropolitan Toronto



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NATURE OF THE APPEAL:

The Municipality of Metropolitan Toronto (the Municipality) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to all records in the requester's employee file, including any records maintained by his supervisors which would be considered in his performance appraisal.

The Municipality granted partial access to the majority of the records in his employee file. Access was denied to pages 19 and 20 pursuant to sections 14(1) and 38(b) (invasion of privacy) of the Act. The Municipality also denied access to some records in his employee file and to all supervisory records maintained by his supervisors under section 52(3) (jurisdiction) of the Act. The requester appealed the decision to deny access.

The appellant is an employee of the Municipality who was recently demoted from a supervisory position. Negotiations and communication between the Municipality and the appellant remain ongoing with respect to the appellant's re-instatement to the supervisory position.

During mediation, the Municipality granted access to some of the records which it had previously withheld. The appellant also indicated that he did not wish to pursue access to pages 19 and 20 and therefore, these pages are no longer at issue.

A total of 334 pages remain at issue. These consist of pages 41, 42, 43, 68, 69, 70, 84, 85, 86, 87, 91, 92 and 96 from the appellant's employee file and all the supervisory notes from four supervisors. In reviewing the pages from the appellant's personnel file, I note that some of these are copies of inter-office memoranda or reports addressed to the appellant which have been copied to the supervisors and which contain their handwritten or typed comments or notes.

This office provided a Notice of Inquiry to the appellant and the Municipality. Representations were received from both parties.

DISCUSSION:

JURISDICTION

The sole issue in this appeal is whether the records fall within the scope of section 52(3) of the Act. If so, they would be excluded from the scope of the Act unless they are records described in section 52(4). Section 52(4) lists exceptions to the exclusion established in section 52(3).

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

The Municipality relies on sections 52(3)3 of the Act to exclude the records in this appeal. In order for the records to fall within the scope of section 52(3)3, 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 meetings, consultations, discussions or communications; and
3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the Municipality has an interest.

Requirements 1 and 2

The Municipality submits that the records were collected, prepared, maintained or used by the Municipality in relation to meetings, consultations, discussions or communications. The Municipality explains that it has the overall responsibility to manage the operations and undertakings of the municipality, including personnel matters. It also has certain rights and obligations pursuant to the Employment Standards Act, the Human Rights Code and the Collective Agreement with Local 79.

The Municipality states that during the time that the appellant was performing in the capacity of a supervisor, specific incidents involving the appellant and his supervisory duties were brought to management's attention. The Municipality investigated the complaints and the appellant's direct supervisors began to systematically record, hold meetings, and communicate with other management on issues relating to the appellant's performance. Meetings were held directly with the appellant to discuss these performance issues and recorded. This was done in keeping with the Municipality's practice for investigations into employment-related or labour-related matters where there is a reasonable prospect of proceeding to arbitration.

These records were placed in the appellant's departmental employee file and in separate supervisory files and constitute the records at issue in this appeal. Based on my review of the records, I am satisfied that the records were collected, prepared, maintained or used by the Municipality in relation to meetings, consultations, discussions or communications and Requirements 1 and 2 have been met.

Requirement 3

The Municipality submits that the records were collected and maintained in anticipation that a grievance might be filed resulting in eventual arbitration. The Municipality relies on Order M-830 in which Assistant Commissioner Tom Mitchinson found that a collective agreement imposes binding legal obligations on an institution. The Municipality submits that during the period of review and investigation into the appellant's supervisory performance, there existed a reasonable expectation of proceedings arising from the Municipality's obligations as an employer under the Employment Standards Act and the Collective Agreement with Local 79. I have reviewed the records and I am satisfied that the Municipality has an interest in these matters and Requirement 3 has been met.

Since all three requirements have been met, I find that section 52(3) applies to the records. None of the exceptions in section 52(4) are present and I find that the records are excluded from the scope of the Act.

ORDER:

I uphold the Municipality's decision.

Original signed by: _____
Mumtaz Jiwan
Inquiry Officer

_____ December 22, 1997