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

ORDER M-1034

Appeals M-9700202, M-9700203 and M-9700204

Municipality of Metropolitan Toronto

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 APPEALS:

The appellant made a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) to the Municipality of Metropolitan Toronto (the Municipality). The request was for access to records relating to the Municipality's employment of the appellant. Specifically, she sought access to:

(1) time sheets (1994, 1995, 1996 and 1997);
(2) Castleview department file number 1201 and all other Castleview files containing information about the requester (i.e. head nurse's file);
(3) corporate/human resources file number 1201;
(4) attendance records (1994, 1995, 1996 and 1997);
(5) payroll file number 1301;
(6) all documents related to October 24, 1995 grievance (step 2);
(7) all documents related to worker's compensation claims (1991, 1994 and 1995); and
(8) all documents related to pay equity retroactive (1993).

The appellant also specified that she wished to examine the originals of the records.

The Municipality divided the request into three separate requests and gave the requester three decision letters: one from Metro Community Services, one from Metro Corporate and Human Resources, and one from Metro Finance. Access to certain records from all three department files relating to the Workers' Compensation Board ("WCB") claims and the grievance were denied in full pursuant to section 52(3) of the Act, as they were outside the scope of the Act. Portions of other records from the Community Services Department and Corporate and Human Resources Department were severed pursuant to the following exemptions:

- invasion of privacy - sections 14 and 38(b)

During the mediation of all three appeals, the Municipality and the appellant discussed the viewing of the originals of records that were being disclosed to the appellant. This matter was not resolved and therefore will be at issue in the appeals.

RECORDS:

The records at issue in this appeal consist of the appellant's personnel department file, grievance file, supervisory notes, corporate employment file, Worker's Compensation Board file, Pay Equity files, payroll file, attendance sheets and time sheets.

DISCUSSION:

APPLICATION OF THE ACT

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.

Section 52(3)1

The Municipality claims that section 52(3)1 applies to the appellant's grievance file, supervisory notes, department file, WCB file and time and attendance sheets. In order for a record to fall within the scope of section 52(3)1, the Municipality 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 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 institution.

The Municipality submits that all of these records were collected, prepared and maintained by the Municipality to document its decision-making process in response to the appellant's ongoing WCB claims and Step 3 grievance and/or are records with evidentiary value that the Municipality is relying on with respect to these matters. Based on my review of the records and the representations, it is clear that they were prepared, maintained and used by officials within the Municipality, and the first requirement has been met.

The appellant's 1994 WCB claim is currently pending before the Workers' Compensation Appeal Tribunal. In Order M-815, Assistant Commissioner Tom Mitchinson reviewed the definition for the purposes of section 52(3)1 of "court, tribunal or other entity" and found that the Workers' Compensation Board is a tribunal established by statute as part of the administrative justice system in Ontario.

In this same order, the Assistant Commissioner determined that 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

agreement, the power to decide grievances. Therefore, such a process can be properly characterized as a proceeding for the purposes of section 52(3)(1). The Municipality submits that there is reasonable prospect that the appellant's grievance will proceed to a hearing before an arbitrator.

I agree with the determinations made by Assistant Commissioner Mitchinson, and find that the records relating to the WCB and the grievance instituted by the appellant in this appeal were collected, prepared, maintained or used by or on behalf of the Municipality in relation to proceedings or anticipated proceedings before a tribunal and/or other entity. Accordingly, I am satisfied that the second requirement of section 52(3)1 has also been met.

In Order M-896, Inquiry Officer Mumtaz Jiwan determined that the records related to a WCB claim and grievance, and therefore proceedings or anticipated proceedings resulting from the claim and grievance related to labour relations for the purpose of section 52(3)1. I agree, and find that the records relating to the appellant's WCB claims and her grievance meet all the requirements of section 52(3)1 of the Act.

Section 52(3)2

The Municipality submits that section 52(3)2 applies to the appellant's Job Evaluation, Pay Equity Audits and Pay Equity History File. 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 institution 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.

[Order M-861]

Having reviewed the records and the representations, I am satisfied that each of the records was either prepared, maintained or used by the Municipality, and the first requirement has been met.

The Municipality submits that the pay equity records represent information on which pay equity negotiations, resulting in the December 1992 Pay Equity Plan between Local 79 and the Municipality, were based. These same records will also be relied on by the Municipality in its current review of union requested positions, which includes the appellant's previously held position, under the present pay equity

maintenance agreement. Based on the information provided, I am satisfied that these records were collected, prepared and maintained by the Municipality for its use in negotiating the pay equity maintenance agreement and determining appropriate classifications.

In Order P-653, I discussed the term "labour relations information" in the Act and stated:

> 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 negotiations of pay equity plans which, when implemented, would effect the collective relationship between the employer and its employees.

In Order M-815, Assistant Commissioner Tom Mitchinson found that my interpretation of this term is equally applicable in the context of section 52(3). In the circumstances of this appeal, I am satisfied that the negotiations relate to labour relations, and the second requirement has been met.

The Municipality maintains that the pay equity records at issue in this appeal were collected, prepared and maintained for the Municipality's use in negotiating the 1992 Pay Equity Plan, that these negotiations took place between the Municipality and a bargaining agent and that the reasoning applied by Assistant Commissioner Tom Mitchinson in Order P-1255 is equally applicable to section 52(3)2. I agree, and find that the third requirement has also been met.

In summary, I have found that the appellant's grievance file, supervisory notes, department file, WCB file, time and attendance sheets and Job Evaluation, and the Pay Equity Audits and Pay Equity History File are all excluded from the scope of the Act by section 52(3).

INVASION OF PRIVACY

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual. I have reviewed the records or parts of records to which section 38(b) has been applied, and I am satisfied that they contain the personal information of the appellant and other identifiable individuals.

Section 36(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 38 provides a number of exceptions to this general right of access.

Under section 38(b) of the Act, where a record contains the personal information of both the appellant and other individuals and the Municipality determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the Municipality has the discretion to deny the requester access to that information.

Sections 14(2) and (3) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 14(2) provides some criteria for the head to consider in making this determination. Section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 14(2).

The Municipality submits that section 14(3)(c) applies to the personal information contained in the records. This section states:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> > relates to eligibility for social service or welfare benefits or to the determination of benefit levels.

The Municipality submits that its Homes for the Aged Division is mandated to provide-long term care to adults requiring such services who are found to be eligible through a combination of functional and financial assessments. Residents are also eligible for subsidized residency. Having reviewed the records, I find that they do not contain sufficient detail about the situation of any particular resident to attract the application of this presumption.

With respect to the application of the factors listed in section 14(2), the appellant submits that section 14(2)(d) is relevant, and the Municipality indicates that section 14(2)(h) is a relevant consideration. These sections read:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> > (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
> >
> > (h) the personal information has been supplied by the individual to whom the information relates in confidence.

The Municipality submits that the records contained in the Community Services file consist of complaint letters made by residents of the Homes for the Aged at which the appellant was employed. The Municipality submits:

> These complaint letters about the conduct of the appellant were implicitly provided in confidence to the Home's management staff. The residents of Homes for the Aged are

> dependent on Nursing Attendants whose responsibility is to provide the residents with daily personal care. Placing a complaint against a Nursing Attendant is a sensitive matter which would naturally place the resident in a vulnerable position. Denial of access to these letters is consistent with management's longstanding policy to protect the confidence of residents making complaints against staff and/or other residents. Recognizing the requester's right to be advised of concerns about her raised by residents, management staff discussed the nature of the complaints with her, however, did not reveal the identity of the complainants.

Section 38(b) authorizes the head to refuse to disclose an individual's personal information to the individual if the disclosure would constitute an unjustified invasion of another individual's personal privacy. I am satisfied that the Municipality considered section 14(2)(d), as the appellant was made aware of residents' complaints and she was provided with sufficient detail to permit her to exercise any available rights under the collective agreement. The Municipality submits that it concluded that the appellant's rights are not affected by withholding the names of residents.

Having reviewed the records and the representations, I find that disclosure of the severed information would constitute an unjustified invasion of the personal privacy of individuals other than the appellant. Accordingly, I uphold the Municipality's application of section 38(b).

METHOD OF ACCESS

Section 23 of the Act states:

> (1) Subject to subsection (2), a person who is given access to a record or a part of a record under this Act shall be given a copy of the record or part unless it would not be reasonably practicable to reproduce it by reason of its length or nature, in which case the person shall be given an opportunity to examine the record or part.
>
> (2) If a person requests the opportunity to examine a record or part and it is reasonably practicable to give the person that opportunity, the head shall allow the person to examine the record or part.
>
> (3) A person who examines a record or a part and wishes to have portions of it copied shall be given a copy of those portions unless it would not be reasonably practicable to reproduce them by reason of their length or nature.

The appellant specified in her request that she preferred to examine the original records. The Municipality submits that, through an oversight, the notification letters from the Corporate and Human Resources and Finance Departments did not contain reference to the fact that the appellant was entitled

to exercise her option to view the records. The Municipality submits that it will ensure that this right of access will be included in future access decision letters where applicable.

In the Community Services Department notification letter, the appellant was provided with the option to view the records. The appellant was provided with a contact number, which she called. At this time she raised the issue of viewing records from the other two departments. It was suggested that it would be more practicable to view all of the records together in the Corporate Access and Privacy Office. Since that time, the Municipality and the appellant have unfortunately been unable to confirm a time.

It appears from the representations I have received that the appellant may have misunderstood what exactly would be made available to her should she choose to view the records. The only information which can be made available is the information which is accessible under the Act. The appellant would not, by choosing this method of access, be able to view anything which she had not already been provided with in the original response to her request. The information which I have found to be excluded from the scope of the Act or exempt will not be available for the appellant to view.

As the Municipality has corrected the oversight by offering the appellant the opportunity to arrange to view the records available to her under the Act, I find that it has complied with section 23(2). Should the appellant wish to view the originals, she should contact the Municipality's Corporate Access and Privacy Office and make the necessary arrangements. The appellant, of course, may choose to exercise this right at any time.

ORDER:

I uphold the Municipality's decision.

Original signed by: November 17, 1997
Holly Big Canoe
Inquiry Officer