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

# ORDER MO-1267

## Appeal MA-990154-1

## City of Toronto

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## BACKGROUND:

The appellant began her full-time employment with the former City of Toronto at its offices at Toronto City Hall in 1986. Following surgery in 1989, the appellant commenced part-time employment and required a parking space at her location of employment as she was not able to take public transportation. Between 1989 and the time of amalgamation, a number of issues arose between the City and the appellant relating to her ability to work, and accommodations were made for her on an informal basis. It appears that all issues were resolved to the satisfaction of both parties during this time period.

However, following amalgamation, the City was unable to accommodate the appellant on a part-time basis at City Hall and she was relocated to the City's North York location. The appellant did not want to go to the North York location and indicated that she would do so if she was provided with a disabled parking spot close to work. At that time, the City ordered a medical assessment for the appellant by its Occupational Health Physician to determine whether the appellant qualified for disabled parking in accordance with its disabled parking policy. The appellant was then transferred to the North York location.

She subsequently underwent further independent medical examinations in March and April 1999. The results of these examinations indicated that she was able to perform her job on a part-time basis and that she was able to take public transportation to the North York location. The appellant was advised of the results of the examinations but indicated that she did not agree with them and would be seeking further medical assessment herself.

The City transferred the appellant back to its City Hall location temporarily over the summer of 1999 but she was subsequently returned to the North York location in October 1999.

## 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 information in my Employee Health file with Employee Health Services".

The City located the records responsive to the request and denied access to them on the basis that they fall outside the scope of the Act, pursuant to section 52(3)3 of the Act.

The appellant appealed the City's decision to deny access.

During mediation, the City advised the mediator that it is currently involved in "accommodation" issues relating to the transfer of the appellant from one office to another.

I sent a Notice of Inquiry to the appellant and the City. Representations were received from the City only.

## RECORDS:

The records at issue consist of all the documents located in the appellant's employee health file and include the following: a physical demands analysis, physical examination records, medical notes, letters and

memoranda about the appellant's medical condition, a medical referral, the Orthopaedic and Arthritic Hospital's medical evaluation report and insurance documents.

## DISCUSSION:

### JURISDICTION

Sections 52(3) and (4) read as follows:

> (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.

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.

**Section 52(3)3**

In order for the record to fall within the scope of paragraph 3 of section 52(3), the City must establish that:

1. it 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.

[Order P-1242]

**Requirements 1 and 2**

The City states that it held a number of meetings and discussions regarding the appellant's employment, specifically with respect to her medical condition and suitable employment accommodation. It indicates further that the medical assessments and evaluations were prepared and used by the City during these meetings and discussions. Finally, the City submits that the letters and memoranda at issue consist of communications pertaining to this matter.

I am satisfied that all of the records at issue were collected, prepared, maintained and used by the City in relation to meetings, discussions and communications. Therefore, I find that the first two requirements of section 52(3)3 have been met.

**Requirement 3**

The City submits that medical assessments and other activities related to finding suitable accommodation for an employee are "employment-related matters". I agree, and find that the meetings and discussions held by the City relating to the accommodation of the appellant's medical condition and needs pertain to an employment-related matter and the first part of the third requirement has been met.

The only remaining issue is whether this is an employment-related matter in which the City "has an interest".

Previous orders have held that an interest is more than mere curiosity or concern. An "interest" for the purposes of section 52(3)3 must be a legal interest in the sense that the matter in which the City has an interest must have the capacity to affect the legal rights or obligations of the City (Orders P-1242 and M-1147).

Several recent orders of this Office have considered the application of section 52(3)3 (and its provincial equivalent in section 65(6)3) in circumstances where there is no reasonable prospect of the institution's "legal interest" in the matter being engaged (Orders P-1575, P-1586, M-1128, P-1618 and M-1161). The conclusion of this line of orders has essentially been that an institution must establish an interest that has the capacity to affect its legal rights or obligations, and that there must be a reasonable prospect that this interest will be engaged. The passage of time, inactivity by the parties, loss of forum or conclusion of a matter have all been considered in arriving at a determination of whether an institution has a "legal interest" in the records.

The appellant takes the position that she is not able to "grieve" the City's decisions regarding her work placement and that the City, therefore, has no "interest" in the records in the requisite sense.

The City submits that the matter of appropriate employment accommodation for the appellant has been an on-going issue, which has yet to be resolved. The City points out that the appellant indicated in May of 1999 (shortly after filing her access request) that she intends to challenge the medical opinion obtained by the City. The City submits that while she has not yet done so, it believes she will pursue this matter further following the outcome of this appeal.

The City acknowledges that the appellant is not a member of a union and therefore, cannot initiate grievance proceedings, however, it submits that she has other forums available to her. In this regard, the City notes that she may file a complaint under its human rights policy or file a complaint with the Ontario Human Rights Commission under the Human Rights Code (the Code). The City submits that the records at issue are connected and relevant to either human rights complaint process and that they will be used by the City in any of these proceedings.

Previous orders of this Office have found that the provisions of the Code are relevant to an institution's legal obligations (Order P-1258). In the current appeal, I am satisfied that issues pertaining to the City's legal obligations to accommodate the appellant's medical disabilities, if any are ultimately found to exist, create a "legal interest" on the part of the City in the employment-related matter concerning the appellant. Further, should the City be found to have infringed the Code, it could be liable for damages, thus creating an additional "legal interest" in the employment-related matter.

I am also satisfied that the City's legal interest in this employment-related matter is current and on-going. Although the appellant has not yet taken formal steps to challenge the City's decision to relocate her to the North York office and all other attendant decisions in this regard, she has indicated an intention to do so, which clearly coincides with her access request. In my view, the filing of an access request by an appellant is not, in and of itself, sufficient to automatically trigger a "legal interest" on the part of an institution. However, in the circumstances of this appeal, I find that the appellant's request for the records at issue in this appeal was made in furtherance of her objectives in challenging the City's employment decisions as they relate to her. This is a strong indication that the City has a current legal interest in an employment-related matter involving the City and the appellant that has the capacity to affect the City's legal rights or obligations. Based on the above, I find that the third requirement for section 52(3)3 has been established.

I find further that section 52(4) does not apply to the records in the circumstances of this appeal.

As a result, the records fall outside the jurisdiction of the Act.

## ORDER:

I uphold the City's decision.

Original signed by: January 7, 2000
Laurel Cropley
Adjudicator