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

ORDER MO-1342

Appeal MA-000074-1

City of Toronto

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NATURE OF THE APPEAL:

The City of Toronto (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a copy of the requester's Employee Health Services file from June 1, 1997 to the date of the request.

The City denied access to all responsive records, claiming that they fell outside the jurisdiction of the, pursuant to section 52(3). The requester, now the appellant, appealed the City's decision.

The City advised the appellant that, notwithstanding their position that the *Act* did not apply to the records, all records addressed to or prepared by her would be disclosed.

Mediation of the appeal was not successful. I first sent a Notice of Inquiry to the City, and received representations. I then sent the Notice to the appellant, together with the non-confidential portion of the City's representations. The appellant also submitted representations.

RECORDS:

The records not otherwise provided to the appellant which remain at issue in this appeal, consist of visit forms, return to work schedules, doctor's notes, physiotherapy continuation forms, medical assessments and diagnoses, correspondence and memoranda.

DISCUSSION:

JURISDICTION

Sections 52(3) and (4) read, in part, 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.
> ...
>
> 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 a record to fall under the scope of paragraph 3 of section 52(3), the City must establish that:

1. the records were 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 provided a detailed outline of the appellant's employment with the City, which began in 1985. The principal focus of this outline is the appellant's medical/injury, attendance and Workers' Compensation Board (WCB) (now Workers' Safety and Insurance Board (WSIB)) history. The City identifies a number of injuries and WCB claims made by the appellant throughout the employment period. The City also

summarizes the actions taken as a result of an injury sustained by the appellant in 1997, and reviews the records in relation to that injury. This injury is the subject of a WSIB claim. The City submits that the records were all collected, prepared, maintained or used by the City's Occupational Health, Safety and Rehabilitation Services department and the City's consulting physiotherapist and other staff, with respect to the employee's medical condition, WCB/WSIB claims and appropriate workplace accommodation.

The City also states:

> City staff held a number of meetings and discussions to discuss the employee's injuries and recurrences, and special schedules. The medical assessments and evaluations, physiotherapy continuation sheets, return to work information forms etc. were prepared and used by the City for these meetings and discussions. Letters and memoranda were exchanged between staff and the WCB/WSIB.

I am satisfied that there have been on-going issues between the appellant and the City for a number of years which relate to injuries and WCB/WSIB claims, and that the requested records were collected, prepared, maintained and used in relation to meetings, consultations, discussions and communications about the appellant in this context. Therefore, I find that the first two requirements of section 52(3)3 have been met.

Requirement 3

Section 52(3)3, requires that the meetings, consultations, discussions or communications must be "about labour relations or employment-related matters".

The City submits:

> It is clear that medical assessments and evaluations of the employee's injuries and her subsequent ability to perform her duties are employment-related matters. Similarly, the City's efforts to find suitable accommodation and correspondence in this regard, as well as discussions relating to modified work schedules are also employment-related matters. (Please see Order MO-1267). Matters before the WSIB also relate to the employment of an individual.

The appellant, through her representative, states:

> It is submitted that the medical appointments that [the appellant] attended are not meetings, consultations, discussions or communications about "labour relations or employment related matters." It is submitted firstly, that they are medical appointments. It is submitted additionally, that their concern is [the appellant's] health and well-being, and this is not primarily an "employment related matter."

The appellant's position that the primary purpose of the medical records is the health of the appellant may be accurate; however, the fact remains that the records relate to her as an employee, are in a file maintained by her employer, and are used by the City for the purpose of determining employment-related matters. Any medical issues involving the appellant are inexorably entwined with employment-related issues in the context of these records. I am satisfied that the records have been prepared and used by the City in the context of finding suitable workplace accommodation and modifying work schedules and, as such, are about employment-related matters.

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

An "interest" is more than mere curiosity or concern. An "interest" 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 City's legal rights or obligations (see Orders M-1147 and P-1242). Furthermore, 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 the requisite interest. [See Orders P-1618, P-1627 and PO-1658, all of which applied this reasoning and were the subject of judicial review by the Divisional Court and were upheld in Ontario (Solicitor General and Minister of Correctional Services) v. Ontario (Information and Privacy Commissioner) [2000] O.J. No. 1974 (Div. Ct.), leave to appeal granted (June 29, 2000), Docs. M25698, M25699, M25700 (C.A.)].

The City addresses this issue as follows:

> In the present case, the employee has had a very complex history of work-related injuries, recurrences and subsequent WCB/WSIB claims and appeals. Most recently, she has appealed the WSIB's decision of August 6, 1998 denying her benefits after August 25, 1997. The City has also appealed the decision, objecting to the entitlement of benefits for the period of August 18 to 25, 1997. The matter is presently before the Appeals Branchof the WSIB but a hearing before an Adjudicator has yet to be scheduled.
> ...
>
> As previously stated, the City is participating in current and anticipated proceedings relating to the employee before the WSIB and possibly further proceedings before the Workplace Safety and Insurance Appeals Tribunal (WSIAT). Both the WSIB and WSIAT are tribunals that have a statutory mandate to adjudicate disputes between the City and the employee relating to her claims for benefits, any workplace accommodation etc. and to render decisions which will affect the City's legal rights or obligations with respect to these matters.

I accept the City's position. I am satisfied that the records relate to an injury and the resulting employment-related issues which are currently in dispute. Accordingly, I find that the City has established a current legal interest in the records.

All three requirements of section 52(3)3 have been established, and I find that none of the exceptions provided by section 52(4) apply in the circumstances of this appeal.

Therefore, I find that the records fall outside the jurisdiction of the *Act*.

ORDER:

I uphold the decision of the City.

Original signed by: September 26, 2000
Tom Mitchinson
Assistant Commissioner