



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

ORDER MO-1355

Appeal MA-000108-1

City of Toronto



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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*). The request was for access to “all records in my corporate file and all management and supervisory notes pertaining to the period January 1997 to present.” The appellant specifically requested notes maintained by three individuals, identified as the Area Manager, Local Social Services Manager and Supervisor Direct Programs.

The City located records responsive to the appellant’s request and granted access, in full, to his Corporate Personnel file for the specified period. Partial access was granted to the typewritten notes of the Area Manager, with the exception of a one-page typed letter, under sections 14(1) and 38(b) of the *Act*. The City denied access to the handwritten supervisory notes of the Area Manager, the Local Social Services Manager and the Supervisor Direct Programs in their entirety, claiming that these records fall outside the ambit of the *Act*, pursuant to section 52(3)3 of the *Act*.

During the mediation of the appeal, the appellant indicated that he was not seeking access to the typewritten letter of the Area Manager. Accordingly, this record is no longer at issue in this appeal.

I decided to seek and have received the representations of the City, initially. I then shared the non-confidential portions of the City’s representations with the appellant. The appellant also made submissions which were shared in their entirety with the City. The City was then given the opportunity to make further representations by way of reply to the issues raised by the appellant in his submissions. The City provided further representations on those issues.

The records at issue in this appeal consist of the handwritten notes contained in the supervisory files of the Area Manager, the Local Social Services Manager and the Supervisor Direct Programs.

DISCUSSION:

JURISDICTION

As noted above, the City claims that the records at issue fall outside the ambit of the *Act* due to the operation of section 52(3)3.

If section 52(3) applies to the records, and none of the exceptions found in section 52(4) applies, section 52(3) has the effect of excluding records from the scope of the *Act*.

Section 52(3)3 has no application outside the employment or labour relations context. Therefore, unless the institution establishes that the matters for which the records are being maintained arise in an employment or labour relations context, the records do not relate to "labour relations or to the employment of a person by the institution", and section 52(3)3 does not apply.

[Orders P-1545, P-1563, P-1564 and PO-1772]

Section 52(3)3

General

In order to fall within 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.

Requirements One and Two of the Section 52(3)3 Test

The City submits that the records at issue were collected, prepared, maintained or used by its management in relation to meetings, consultations, discussions and communications about the appellant,

specifically his conflicts with various staff members, his medical condition and workplace accommodation as well as his grievances and his complaints to the Ontario Human Rights Commission (the OHRC).

The appellant's submissions do not directly address the application of parts one and two of the test to the records in dispute.

I have reviewed the records and find that they were prepared, maintained and used by City management staff in relation to meetings, consultations, discussions or communications regarding the appellant's complaints arising from his employment by the City. I am, accordingly, satisfied that the first two requirements of section 52(3)3 have been satisfied.

Requirement Three of the Section 52(3)3 Test

The City has provided me with extensive background information describing the appellant's employment history along with his involvement in complaints before the OHRC and the initiation of various grievances under the terms of the collective agreements which govern his employment relationship with the City. The appellant strenuously objected to the inclusion of this information in this inquiry on the basis that it was not relevant to the issues before me. Currently, the appellant has a grievance outstanding involving a complaint

of discrimination on the basis of his medical condition in the calculation of his sick days and an OHRC complaint of discrimination on the basis of his medical condition in a job competition, which was filed in May of this year.

The City submits that the subject matter of the records relates to labour relations and/or employment related matters arising from the appellant's employment with it. The records contain information which describe the City's reaction to the appellant's grievances, workplace accommodation requests, conflicts with other staff and human rights complaints between April and September 1999 in the case of two managers and in January 1997 in the case of the other. In my view, all of these records relate to labour relations or employment related matters within the meaning of section 52(3)3. I must now determine whether the City has the requisite "interest" in these records.

It has been established in many previous orders that an "interest" for the purposes of section 52(3)3 is more than mere curiosity or concern. An "interest" must be a legal interest in the sense that the matter must have the capacity to affect the City's legal right or obligations (Orders M-1147, P-1242 and MO-1344).

A number of orders 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" being engaged (see, for example, Orders P-1575, P-1586, M-1128, M-1161, PO-1718, PO-1782, PO-1797 and PO-1814). Specifically, this line of orders has held that an institution must establish an interest, in the sense that the matter 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 the requisite interest. As referred to earlier, Orders P-1618, P-1627 and PO-1658, all of which applied this reasoning, were the subject of judicial review by the Divisional Court and were upheld in *Ontario (Attorney General) v. Ontario (Assistant 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 appellant's complaint before the OHRC involves a claim that he is being discriminated against on the basis of his medical condition and that he was denied a promotion following a job competition. The appellant's current grievance against the City claims that he is being discriminated against in the manner in which his sick days are calculated, based on his medical condition. The City argues that:

. . . these records provide information as to how the City has managed the employment of the appellant. More specifically, they document various incidents/conflicts involving the appellant with other staff and management, some leading to grievances being filed. As stated above, together with other documents, they will provide the historical background and evidence supporting the City's position on the issue of discrimination that is before the Commission.

The City goes on to refer to Order MO-1189 in which Adjudicator Laurel Cropley held that records which do not directly relate to the subject matter of a "proceeding" under section 52(3)1 may still be excluded from the ambit of the *Act*.

In its original submission, the City submits that:

. . . although the records are not directly related to the specific complaint before the Human Rights Commission, they are, nevertheless, crucial and relevant to the present and any future proceedings before the Human Rights Commission, as well as any future grievances filed by the appellant.

The appellant argues that records relating to conflicts which he may have had with other co-workers or management are not relevant to any matters in dispute between the City and himself at the present time. However, I note that both the grievance filed in May 1999 and the appellant's May 2000 complaint to the OHRC allege discrimination against the appellant on the basis of his handicap in the manner in which his sick days are calculated and in a job competition situation. In my view, the subject matter of the records at issue in this appeal, particularly as they relate to conflicts between the appellant and his co-workers and managers, speak directly to the issue of discrimination which is the basis for both the OHRC complaint and the remaining grievance filed by the appellant under the procedures outlined in the applicable collective agreement.

In my view, the subject matter of these records has the capacity to affect the City's legal rights or obligations as contemplated by section 52(3)3. The City's legal interest in each of these matters remains current as these proceedings continue to be ongoing. While the OHRC complaint was filed after the date when the appellant made his request for records under the *Act*, I cannot ignore the fact that the complaint was made and that the City's interest in the subject matter of the records was thereby, and remains, engaged.

As all three requirements of section 52(3)3 have been met, I conclude that all of the records at issue in this appeal fall within the ambit of that section and are, therefore, outside the scope of the *Act*. In addition, I find that none of the exceptions provided by section 52(4) apply in the circumstances of this appeal.

ORDER:

I uphold the City's decision to deny access to the requested records.

Original Signed By: _____ October 26, 2000
Donald Hale

Adjudicator