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

ORDER MO-1348

Appeal MA-990301-1

City of Toronto

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NATURE OF THE APPEAL:

The appellant made a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the City of Toronto (the City). The request was for access to all copies of records described as "personal, plant and departmental"; specifically, those records:

- held by a shift control officer at the Humber Treatment Plant, the Acting Senior Engineer at the Humber Treatment Plant, the Plant Manager/Engineer at the Humber Treatment Plant, and any and all other individuals working at the Humber Treatment Plant that have any documents with any reference to the appellant;

- held anywhere at the Humber Treatment Plant with reference to the appellant;

- held in all departments of the City of Toronto and the former Metropolitan Toronto with reference to the appellant;

- held by the Human Resources Department and Employee Relations Department and any and all individuals in those departments that have information with reference to the appellant;

- held by the Employee Health Services and Rehabilitation Division and an Occupational Health Nurse with reference to the appellant;

- held by the Employee Relations Department and another named individual with reference to the appellant.

The City located and identified the following groups of records as responsive to the request:

1. WCB file - 236 pages
2. Docket file from Human Resources Department - 167 pages
3. Docket file from Humber Treatment Plant - 118 pages
4. Notes from the Shift Control Officer - 26 pages
5. File from Labour Relations - 6 pages
6. Notes from the acting Senior Engineer - 9 pages
7. Employee Health Services file maintained by the Occupational Health Nurse - 51 pages.

The City also informed the appellant that the other supervisors and individuals named in the request have advised that they do not have any records responsive to the request, therefore access could not be granted because the records do not exist.

The City claimed that all of the records were excluded from the purview of the *Act* under sections 52(3)1 and 3. The City stated that despite the application of sections 52(3)1 and 3, it was prepared to disclose the following records:

1. From the WCB file - Pages 9, 25, 26, 36-38, 63, 64, 67, 68, 95, 113, 125, 126, 129, 148, 151, 154, 155, 167, 182, 185, 194, 195 and 210.

2. From the Docket file from Human Resources - Pages 2 (page 20 is a duplicate), 3 (duplicate pages 21, 26, 37 and 38), 4 (duplicate pages 23, 27 and 38 [it appears this is a typographical error - page 38 cannot be a duplicate of both pages 3 and 4]), 5 and 6 (duplicates 24, 25, 28, 29, 39, 40), 19, 20, 24, 59, 62, 83, 85-87, 91, 96, 97, 100, 101, 103, 111, 117-122, 126, 131 (duplicate 132), 134-136, 138-148, 157, 159, 161-167.

3. From the Employee Health Services file - Pages 7, 22, 25, 32, 35, 38, 43, 46 and 47.

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

During the mediation of the appeal, the appellant indicated he is no longer pursuing access to his WCB file. This office then provided a Notice of Inquiry to the City seeking its representations on the application of sections 52(3)1 and 3 to the records and requesting that it address the reasonableness of search issue.

The City made submissions and advised that, as a result of further searches which it conducted, a number of additional records were located. These records consist of:

- attendance records similar to those already located in the appellant's Corporate Human Resources files were found in the office of the Shift Control Officer and the Administration office at the facility where the appellant was employed;

- the former Senior Engineer at the facility located a further 14 records, seven of which have already been identified in the other records located by the City. The remaining seven records consist of a diary entry relating to the appellant and six records relating to a grievance filed by the appellant and several other employees.

- a further search of the office of the Occupational Health Nurse revealed an additional file pertaining to the appellant which contained 82 records. Forty-nine of those records are duplicates of other documents already identified. Records 1-4 and 56-74 of this group were created following the date of the appellant's request. The City granted access in full to Record 9 from this group of records and denied access to the remaining documents, including the duplicates.

- a Human Resources Consultant conducted a further search of the former City of Toronto's record holdings and located an additional 13 records which are duplicates of documents identified earlier.

- an additional 99 records were also located in the City's Finance Department,
- many of which are also duplicated elsewhere in the records. The City agreed to disclose Records 15, 18, 81-83, 86, 87, 89, 90 and 98-99 to the appellant as they represent documents which were sent to or received from the appellant.

The City indicated that access to all of the undisclosed records was denied as they fall outside the scope of the *Act* under sections 52(3)1 and 3.

This office then provided the appellant with a Notice of Inquiry, along with the non-confidential portions of the City's representations. After some delay, the appellant advised that, due to his poor health, he would not be submitting representations.

DISCUSSION:

JURISDICTION

Sections 52(3) and (4) of the *Act* provides, 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.

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.

I will first address the application of section 52(3)3 to the records at issue.

Section 52(3)3

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

1. the record 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]

Parts One and Two of the Test

The City submits that the records remaining at issue were collected, prepared, maintained or used by it during the course of the appellant's employment. The City indicates that the appellant currently is the grievor in two current grievance proceedings, one of which is at the arbitration stage and the other at Step 3

of the grievance procedure in place under the terms of the collective agreement between the City and CUPE Local 416. In addition, the appellant has made a number of claims for benefits before the Workers' Compensation Board (the WCB) and its successor, the Workplace Safely and Insurance Board (WSIB). The appellant was unsuccessful in his claim before the WSIB and has indicated to the City his intention to appeal that ruling to the Workplace Safety and Insurance Appeals Tribunal (WSIAT).

The City argues that all of these matters remain ongoing and that the records relate to the City's decision making processes over the years with respect to the appellant's employment. The City submits that it intends to rely on the information contained in the records as evidence at grievance arbitrations and the anticipated appeal before the WSIAT. Further, the City suggests that its collection, maintenance, preparation and use of the records was in relation to various meetings, consultations, discussions or communications about the appellant, his grievances, his WSIB claim, his attendance and other employment-related issues concerning the appellant.

The City submits that all of the records at issue satisfy the requirements of Parts One and Two of the test described above. The appellant has not made any submissions on this aspect of the application of section 52(3)3.

The City has outlined the nature of the two outstanding grievances filed by the appellant pursuant to the collective agreement between it and CUPE Local 416. I note that the grievances relate specifically to:

- a disagreement regarding the appellant's entitlement to sick days under Article 15 of the collective agreement following an incident in 1996. The grievance, designated as #M99-03, was not filed until 1998 and is currently at the Arbitration stage.

- an incident involving the appellant and a Shift Control Officer which occurred in April 1999. This grievance, designated as #M99-217, is currently at Step 3 of the grievance process.

The City submits that the appellant has also disputed a decision of the WSIB made in November 1999 to deny him benefits on the basis that he is fully recovered. The City indicates that this matter is presently at the adjudication level but if it is not resolved, it will be forwarded to the WSIB appeals branch (the WSIAT). The appellant has apparently indicated to the City his intention to move this matter forward to the appeals stage, before the WSIAT.

The City also anticipates that the appellant may initiate other processes available to him under his collective agreement or provincial human rights legislation to address what he perceives to be harassment and

intimidation directed at him by managers at his workplace. Letters outlining the nature of these complaints have been exchanged between the City's Human Resources Department staff and the appellant. One of the issues raised by the appellant in his correspondence concerns an alleged threat by a manager that the appellant's level of absenteeism could have a negative impact on his future employment by the City.

Based on my review of the records and the submissions of the City, I find that the records remaining at issue were collected, prepared, maintained or used by the City in relation to various meetings, consultations, discussions or communications relating to the strategies which it intended to pursue in responding to the appellant's grievances, harassment and intimidation complaints and his WSIB claim. I am, therefore, satisfied that Requirements One and Two of the test for section 52(3)3 have been met with respect to these records.

Part Three of the Test

The City submits that records relating to an employee's attendance, job functions, workplace injuries and grievances are "employment-related matters" within the meaning of section 52(3)3. In addition, the City takes the position that previous orders of the Commissioner's office have recognized that where an employee has initiated a grievance pursuant to the collective agreement which governs their relationship with their employer, the records which relate to the subject matter of the grievance is, by its very nature, a labour relations matter as contemplated by section 52(3)3.

I have reviewed the records at issue in this appeal and conclude that they relate to the WSIB/WSIAT proceeding, the grievance proceedings undertaken by the appellant and a number of other aspects of the appellant's employment with the City, including such matters as his attendance and his job functions which form the subject matter of his intimidation and harassment complaints. In my view, 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 the 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.).

I find that the City has clearly established that it has the requisite degree of interest in those records which relate directly to the current grievances filed by the appellant, as well as those relating to his WSIB/WSIAT proceedings. 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.

Other records which were identified as responsive by the City, however, do not relate to either the grievances or the WSIB/WSIAT matter. Rather, the City argues that the subject matter of these records, addressing the issues raised by the appellant in his harassment and intimidation complaints, also have the capacity to affect the City's legal interests or obligations. While the appellant has not initiated additional grievances or filed a complaint with the Ontario Human Rights Commission (the OHRC) with respect to the alleged harassment and intimidation, he has brought these issues to the attention of the City's Human Resources Department and elicited a detailed response from that Department. I find that in doing so, the appellant has engaged the City's legal interest in these records. The City was required to respond to these complaints and by not doing so, it may have found itself vulnerable to a proceeding before the OHRC or the anti-harassment provisions found in the collective bargaining agreement which governs the appellant's employment relationship with the City. Accordingly, I find that the City has the requisite interest in the subject matter of these records as well.

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. Because of the manner in which I have addressed the application of section 52(3)3 to the records, it is not necessary for me to consider whether they also fall outside the jurisdiction of the *Act* under section 52(3)1.

REASONABLE SEARCH

In appeals involving a claim that further responsive records exist, as is the case in this appeal, the issue to be decided is whether the City conducted a reasonable search for the records, as required by section 17 of the *Act*.

Where a requester provides sufficient detail about the records which he is seeking and the City indicates that further records do not exist, it is my responsibility to ensure that the City has made a reasonable search to identify any records which are responsive to the request. The *Act* does not require the City to prove with absolute certainty that further records do not exist. However, in my view, in order to properly discharge its obligations under the *Act*, the City must provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate records responsive to the request.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in the City's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist.

In the Notice of Inquiry provided to the City, it was asked to provide a written summary of all steps taken in response to the appellant's request. The City provided me with detailed information concerning the nature and extent of the searches undertaken at the time of the original request and again following its receipt of the Notice of Inquiry. The City indicates that the record-keeping systems of each of the departments and individuals referred to by name in the appellant's request were examined and that all records relating to the appellant were copied and compiled as part of the records in this appeal. The City also states that many of the searches which it undertook located duplicate copies of many of the records in the record-holdings of the departments and individuals identified by the appellant.

The representations of the City with respect to the reasonableness of search issue made in response to the Notice of Inquiry were shared, in their entirety, with the appellant. At no time did the appellant provide the Commissioner's office with any indication as to the basis for his belief that additional records beyond those identified by the City in its searches should exist.

On the basis of the information provided to me by the City, I am satisfied that the searches which it undertook for records responsive to the appellant's request were reasonable and I dismiss that part of the appeal.

ORDER:

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

2. I find that the City's search for responsive records was reasonable and I dismiss that part of the appeal.

Original signed by: October 13, 2000
Donald Hale
Adjudicator