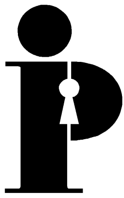

ORDER MO-1401

Appeal MA_000155_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*). The requester sought access to all his personal information in the custody of the City, including his employment file, his personnel file, his workers' compensation file and an investigation file. The City responded by denying access to all the records, citing sections 52(3)1 and 3 of the *Act*.

The requester has appealed this decision.

During mediation, the requester, now the appellant, agreed that his personnel file should be removed from the records at issue as this file had been disclosed to him pursuant to a prior request under the *Act*. The appeal was not otherwise resolved at mediation and has now been referred for adjudication.

RECORDS:

The City has divided the records still at issue, which consist of approximately 1900 pages, into different folders, as described below:

Green Folder	172 pages - Workers Compensation Records, Record of Employee's Injuries, Internal memos from 1994-1999
Yellow Folder	67 pages - Absenteeism Control Forms, Doctors' notes, Internal Memos
Brown Folder	129 pages - Workers Compensation Board records, return to work forms, report of occupational injury and illness from 1994-1999
Yellow Folder	31 pages - accidents, report of injuries or illness from 1998-1999
Blue Folder	29 pages - incident reports, correspondence and directives, application for records and correction from 1994 - 1999
Green Folder	200 pages (approx) - WSIB/WCB report of injury and/or illness (employer/supervisor), physicians' reports, return to work forms from 1998-2000
Green Folder	300 pages (approx) - memos, notes on debriefing team, WCAT decisions, letters, WCB records from 1992 - 1999
Green Folder	400 pages (approx) - WCB file, report on injury, decisions, physician's reports from 1994-1997
Green Folder	100 pages (approx) - internal memos, correspondence, IPC investigations, letters, draft correspondence, cross-examination notes
Red Folder	200 pages (approx) - progress reports, memoranda, correspondence, WCAT records and correspondence from 1992 - 1994
Brown folder	200 pages (approx) - WCB records, memos, correspondence from 1985 - 1993
Green Folder	Directives re: settlement

I sent a Notice of Inquiry initially to the City. After reviewing the representations provided by the City, I sent the Notice of Inquiry to the appellant, together with the non-confidential portions

of the City's representations. The appellant submitted representations. I decided to provide the City with an opportunity to reply to some issues raised by the appellant in his representations, and sent the City a Supplementary Notice of Inquiry, together with the appellant's representations in their entirety. The City provided me with reply representations in response.

DISCUSSION

APPLICATION OF THE ACT

Introduction

The sole issue referred for adjudication is jurisdictional. The City has claimed that the records sought by the appellant are outside the jurisdiction of the *Act* on the basis that they come within the exception in section 52(3) for employment or labour relations-related documents. If section 52(3) applies to the records, and the exceptions found in section 52(4) do not apply, section 52(3) has the effect of excluding the records from the scope of the *Act*.

Section 52(3) is record_specific and fact_specific. The test is whether the section applies to a specific record in the circumstances of a particular appeal. If the section does apply to a record and none of the exceptions listed in section 52(4) is present, then the section 4(1) right of access does not apply to that record. In this case, it was not submitted that section 52(4) is relevant and I am satisfied that it does not apply.

Section 52(3) only applies in the employment or labour relations context. Therefore, section 52(3) will not apply unless the City establishes that the requested records were collected, maintained, prepared or used in an employment or labour relations context. In this case, the City has relied on paragraphs 1 and 3 of section 52(3) in denying the appellant access to the records.

Section 52(3), paragraphs 1 and 3 provide 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.

Background and Positions of the Parties

The appellant has been employed by the City's Ambulance Services Division (Ambulance Services) since 1983 and is currently a Paramedic. It is acknowledged by both the appellant and

the City that there have been a number of legal disputes during the course of the appellant's employment. Notably, the appellant has had a long history of Workers' Compensation Board/Workers'Safety Insurance Board (WCB/WSIB) claims while an employee with Ambulance Services. As well, the appellant made a previous access to information request for many of the records at issue in the present application. That request was the subject of an order of this Office, dated February 18, 1999: Order MO-1189. The factual circumstances which gave rise to the previous request, and which form the background for this request are outlined in Order MO-1189 in the following discussion of the City's submissions:

> The City notes that all of the current issues arising between it and the appellant stem from an incident in May of 1992, where the appellant attended at the scene of a murder-suicide, in his capacity as an ambulance attendant. Following this incident, the appellant requested assistance from a staff psychologist (the doctor), to help him to deal with the effects of critical stress allegedly arising from attendance at the scene of the murder-suicide.
>
> The City indicates that following the May 1992 incident, the appellant launched a number of administrative proceedings based on his allegation that a breach of confidentiality with respect to his personal information had occurred. These included: grievances against the doctor and his supervisor at the time, under the *Labour Relations Act*; filing a complaint against the doctor with the Ontario Board of Examiners (OBEP); filing a Human Rights complaint; proceedings to obtain documents under the *Act* and a privacy complaint under the *Act*; and a Workers' Compensation claim for compensation related to the May 1992 incident. The City acknowledges that certain of these proceedings have been concluded, however, it submits that they are substantially connected and relevant to current litigation involving the appellant and the City. The City stresses that the records are being and will be relied on in the current legal proceedings.
>
> With respect to the current proceedings between the City and the appellant, the City states that, in 1993, the appellant brought an action against the Department and a number of its staff for damages arising from an alleged breach of confidentiality, which occurred during the course of work related duties. The City indicates that the claim is an insurable one under the OMEX policy held by the former Municipality of Metropolitan Toronto, now the City of Toronto. Further, the City's claim adjuster retained a law firm to defend the action on the City's behalf and a solicitor has been taking instructions from him since that time. The damages the appellant is claiming are limited entirely to an alleged disclosure of confidential information by the doctor and the appellant's supervisor, both of whom are employees of the Department.

The appellant's civil action against the City, referred to above, was outstanding at the time the previous access to information request was adjudicated. On that basis, this Office held that the records at issue fell outside the jurisdiction of the *Act* pursuant to section 52(3)1. These circumstances have now changed. It is undisputed that the parties have settled the civil action and all related proceedings in a settlement agreement entered into in August 1999. Under the terms of the settlement, the City was obligated to remove certain information from the appellant's employment files. The City, through its solicitors, confirmed in correspondence

dated December 17, 1999, that it had complied with the terms of the settlement with respect to the removal of records. This was further confirmed by the Supervisor of Administrative Services in a telephone conversation with the appellant on March 13, 2000.

On February 16, 2000, the appellant made the request for access to his employment files which is the subject of this appeal. Two months later, in correspondence to Ambulance Services dated April 13, 2000, the appellant questioned whether all "inaccurate information" had been removed from his employment files and indicated that if he was not satisfied with the response to his letter, he would "proceed with legal proceedings with costs." The City relies on this stated intention to pursue further legal action in claiming that the records at issue should be found to fall outside the legislation.

As well, the City relies on the fact that the appellant is presently appealing a decision of the Workplace Safety and Insurance Board (WSIB) finding that, in 1999, he had collected workers' compensation benefits, in the amount of $3500, to which he was not entitled. The City states that it will be instituting legal proceedings to collect this sum from the appellant if the decision of the WSIB is ultimately upheld by the Workplace Safety and Insurance Appeal Tribunal (WSIAT).

The appellant denies that there are outstanding legal disputes between himself and the City other than the appeal currently before me. He takes the position that the terms of the settlement agreement prevent him from pursuing further legal action in respect of the matters dealt with therein and that he is now satisfied that the City has complied with its undertaking in the agreement to remove records from his employment files. He disputes the City's reliance on the matter currently before the WSIB, questioning the relevance of that litigation to his request for access to his employment files.

In submissions in this appeal, the appellant states that:

> In summary, there are no outstanding issues relating to the Appellant's employment which has a current legal interest or further interest. All items of settlement have been met and submitted to the Courts (issue of 8 years ago is closed). There are no future proceedings or grievances. All items related to a specific issue 8 years ago.

However, the appellant goes on to ask this Office to consider if the City has in fact complied with terms of the agreement requiring certain records to be expunged from his file. The submissions ask me to review his employment files and then state:

> Then explain how a Government Agency and Employer, which has been found to collect file and release inaccurate information, is allowed to continue to file, collect and release information up to 1900 pages, which is not accessible to the employee in question.
>
> Also, why is the Employer collecting and filing cross-examination notes, directives of settlement and internal correspondence relating to an 8 year old

> filing in my employment files and not file then separately outside my Department's employment file.
>
> There should not be any legal papers or documents relating to the settlement. Those items were expunged from the files.

Application of Section 52(3)1

In order for a record to fall within the scope of paragraph 1 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 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 City**.**

I am satisfied that the records meet the first requirement specified above. All of the information in the files at issue was "collected, prepared, maintained or used" by the City.

Turning to the second and third requirements, I am satisfied first of all that all of the records were "collected, prepared, maintained or used" in relation to the appellant's various proceedings before WSIB, including the current appeal, or in relation to his civil proceeding and the grievances and human rights complaint associated with that action. Further, previous decisions of this Office have held that WSIB and the appeal tribunal, WSIAT (formerly the Workers' Compensation Appeals Tribunal), are tribunals falling under section 52(3)1 of the *Act:* M-815, MO-1342. Finally, it is not disputed that all these proceedings relate to the appellant's employment by the City. The remaining issue with respect to both the second and third requirements is whether, notwithstanding the settlement agreement, there are still **proceedings or anticipated proceedings** in relation to which the withheld records continue to be "collected, prepared, maintained or used."

Considering first of all the records relating to the current workers' compensation claim, it is clear that these records are being maintained for use in current proceedings before WSIB and the anticipated proceedings before WSIAT and also possibly the Small Claims Court for collection of overpaid benefits. I am satisfied that these records fall outside the jurisdiction of the *Act* pursuant to section 52(3)1.

Turning to the rest of the records, this Office has already held, in Order MO-1189, that this group of files, taken as a whole, was collected and maintained for use by the City "in relation to" the civil action then outstanding before the Ontario Court of Justice (General Division). The question to be decided is whether it is reasonable to anticipate further employment-related

proceedings relating to the settlement of that action. If it is, then these records remain at present outside the scope of the legislation.

The issue of what constitutes "anticipated" proceedings is largely a question of fact which must be considered in the circumstances of a particular case. Proceedings must be more than just a vague or theoretical possibility. To fall within the definition of this term, there must be a reasonable prospect of proceeding in the future: Orders P-1618 and MO-1351.

Previous orders of this Office have given section 52(3) [and its equivalent provision, section 65(6), in the *Freedom of Information and Protection of Privacy Act* (the provincial *Act*)] an interpretation which accords with the wording and accommodates the purposes of both the *Act*s and the amendments which subsequently incorporated sections 52(3)/65(6) within the statute (the Bill 7 amendments). The subject matter of the sections 52(3)/65(6) exclusions - "proceedings or *anticipated* proceedings," "negotiations or *anticipated* negotiations" and "employment-related matters in which the institution *has* an interest" - demonstrates that the legislature intended to protect the confidentiality of records which have the capacity to affect the *current or future conduct* of an institution in the employment and labour relations context. This interpretation protects the confidentiality of past information about concluded proceedings, negotiations or other employment-related matters, provided: (1) the institution can establish that the information contained in the records reasonably relates to current or future anticipated proceedings or negotiations; or (2) that its labour relations or employment interests in the information are otherwise currently engaged, or there is a reasonable prospect that such interests will be engaged in the future. See Orders MO-1344 and MO-1351.

The rationale behind section 52(3)1 (and 65(6)1 of the provincial *Act*) were considered by Assistant Commissioner Tom Mitchinson in Order P-1618 as follows:

> When proceedings are current, anticipated, or in the reasonably proximate past, in my view, there is a reasonable expectation that a premature disclosure of the type of records described in section 65(6)1 could lead to an imbalance in labour relations between the government and its employees. However, when proceedings have been completed, are no longer anticipated, or are not in the reasonably proximate past, disclosure of these same records could not possibly have an impact on any labour relations issues directly related to these records, and different considerations should apply.

Order P-1618 was upheld on judicial review 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.).

In this case, the City has submitted that the appellant's representations indicate that he "continues to be dissatisfied with matters relating to the settlement of his claim and the management of his employment files." I agree. Given the history of litigation between the parties, the continuing employment relationship, the recent threat of further legal proceedings in relation to the settlement and the on-going and anticipated litigation in relation to the appellant's workers' compensation claim, I am satisfied that it is reasonable at this time to anticipate further proceedings in which the records at issue may be relevant to the City's legal interests.

I conclude that section 52(3)1 applies to the records at issue. I will now consider the possible application of section 52(3)(3).

Application of Section 52(3)3

To qualify under section 52(3)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.

Turning to the first requirement above, I have already found that the records were collected, prepared and maintained to be used by the City. Further, I am satisfied, based on the factual circumstances outlined above, that the records were collected, prepared and maintained in relation to meetings, consultations, discussions and communications about the various employment-related disputes between the parties.

The issue to be determined is whether or not the City can be held to have an "interest" in the employment-related disputes which gave rise to these records.

Previous decisions of this Office support the position that an "interest" within the meaning of section 52(3)3 must be 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: Orders M-1147 and P-1242.

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: Orders P_1575, P_1586, M_1128 and M-1161. 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. 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)*, above.

In this case, the parties continue to be in an employment relationship. Less than a year has passed since the appellant questioned, by letter dated April 13, 2000, whether the City had

complied with its obligations under the agreement which attempted to settle various legal disputes then outstanding between the parties. The representations filed by the appellant indicate that he is not satisfied that the City has yet complied with the terms of the settlement. The appellant has launched a further legal proceeding in respect of a workers' compensation claim, currently being adjudicated before the WSIB. The City has already advised the appellant that, if the current decision of WSIB is ultimately upheld by WSIAT, it will commence civil legal proceedings as necessary to collect overpaid compensation benefits. In these circumstances, I am satisfied that the City has established the requisite degree of legal interest in the employment disputes to which the records relate to support a finding that the records continue at present to fall outside the scope of the *Act*.

ORDER:

I uphold the decision of the City.

Original signed by: February 28, 2001
Katherine Laird
Adjudicator