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

ORDER MO-1464

Appeal MA-010073-1

City of Toronto

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NATURE OF THE APPEAL:

The appellant, a lawyer acting on behalf of a named client, a former employee with the City of Toronto (the City), wrote to the City seeking access under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the client's time sheets for the months of March and April, 1994. The appellant indicated that his client was seeking to recover "Workplace Safety & Insurance Board Benefits", and that he intended to use the records at an upcoming "appeal hearing".

The City responded by denying access to the responsive record on the basis of sections 52(3)1 and 3 of the *Act*.

The appellant appealed the City's decision to this office.

Since mediation was not successful, the matter was streamed to the adjudication stage. I sent a Notice of Inquiry setting out the issues in the appeal initially to the City, which provided representations in response. I then sent the Notice of Inquiry, together with the non-confidential portions of the City's representations, to the appellant, who provided representations in response.

RECORD:

The record at issue in this appeal is a two-page document entitled "1994 Employee's Attendance Record".

DISCUSSION:

APPLICATION OF THE ACT

Introduction

Section 52(3) is record-specific and fact-specific. If section 52(3) applies to the record, and none of the exceptions found in section 52(4) applies, then the record is outside the scope of the *Act*.

The City claims that both sections 52(3)1 and (3) apply to the record. I will first consider the application of section 52(3)1.

Section 52(3)1

General

Sections 52(3)1 and 52(4) read:

> (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.

In order for a record to fall within the scope of section 52(3)1, the institution must establish that:

> 1. the record was collected, prepared, maintained or used by the institution 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 institution.

The City explains that the appellant was hired in 1991 by the former City of Toronto to work in the Parks and Recreation Department, then later that year began working in the (then) Public Works and Environment Department. The City states that since that time,

the appellant has had nine work-related accidents, six of which led to the appellant making claims for benefits to the Workers' Compensation Board (WCB)/Workplace Safety and Insurance Board (WSIB). In December 1994, the WCB issued a decision on the appellant's claims, which the WCB then modified in 1995 following an investigation. Although the appellant objected to this latter decision, the WCB reaffirmed it in June 1996. The appellant then appealed the decision of the WCB (now the WSIB) to the Workplace Safety and Insurance Appeals Tribunal (WSIAT). The City advises that WSIAT heard the appeal on February 23, 2001, but has not yet made a decision.

The City further states:

> . . . [T]he employee has not been back to work since April 12, 1994, despite numerous attempts by the City to assist him . . .
>
> In addition, although the City has made several attempts including writing a detailed letter to the employee . . ., the City has not been successful in recovering the monies the employee owes with respect to the WCB advance . . .
>
> . . . [T]he City has collected, prepared, maintained and used the records with respect to the employee, specifically his attendance, medical assessments, WCB/WSIB insurance claims and WSIAT appeal etc.
>
> The City submits, therefore, that the first requirement has been met.
>
> . . . [T]he current proceedings before the WSIAT are proceedings before a tribunal and … these proceedings relate to the employment of the employee, specifically his entitlement for WCB/WSIB benefits arising from a work related injury.
>
> The WSIAT has a statutory mandate to hear any disputes between the City and the employee related to his claims for WCB/WSIB benefits, workplace accommodation etc. and to render decisions which will affect the City's legal rights or obligations with respect to these matters . . .
>
> In summary, the City submits that there are current and anticipated proceedings which have a continuing potential impact for employment issues that are directly related to the records in this appeal. Therefore, the three-part test of section 52(3)1 has been met.
>
> The City has considered the circumstances in section 52(4) and submits that none exists. It is, therefore, the City's view that section . . . 52(3)1 [applies] and the records at issue fall outside the scope of the *Act*.

The appellant submits:

> As noted in the representations made by the City, the records requested were indeed relevant to proceedings before WSIAT. In fact, prior to the WSIAT hearing, a request was made to the City for production of these records . . . The City refused to produce the documents requested.
>
> While the subject documents may have been, in fact, collected, prepared, maintained or used by the City the subject documents were not collected, prepared, maintained or used by the City in relation to proceedings or anticipated proceedings before a Court, Tribunal, or other entity. These documents were prepared well before there was any issue relating to the proceedings before a Court or Tribunal. Furthermore, the fact is that the City refused to [produce] such documents, with respect to the WSIAT hearing, and refused [the appellant] production for the same as part of such hearing.
>
> Accordingly, . . . all of the requirements necessary to withhold these documents in accordance with section 52(3)1 are not met.
>
> Furthermore, . . . it is the right of an employee to obtain the production of his employer's records relating to time worked for the purpose of verifying payments due on account of salary, earnings, etc.

In my view, the City has established that the record was collected, maintained or used in relation to proceedings before WSIAT, which have not yet been completed. In his submissions, the appellant confirms the relevance of the record to the issues before WSIAT. In addition, WSIAT clearly is a tribunal with a mandate to adjudicate issues related to the employment of individuals, in particular workplace safety and insurance benefits. While it may be the case that the City did not produce the record to the appellant in the context of the WSIAT hearing, that fact does not negate the application of section 52(3)1, it is sufficient that the City collected, maintained or used the record in relation to the hearing.

The appellant appears to suggest that for section 52(3)1 to apply, the record must have been "prepared" for the proceedings in question. This is clearly not the case, since the wording of the section indicates that it is sufficient for the record to have been collected, maintained or used for that purpose, regardless of the reason for which it was originally prepared.

Based on the above, I find that section 52(3)1 applies. Since none of the exceptions in section 52(4) applies, the record falls outside the scope of the *Act*. Accordingly, it is not necessary for me to make a finding on the application of section 52(3)3.

ORDER:

I uphold the City's decision that the *Act* does not apply to the records

Original signed by: August 31, 2001
David Goodis
Senior Adjudicator