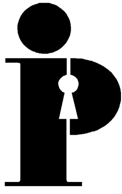

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-1470

Appeal MA-010053-1

City of Toronto

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The appellant is an employee of the City of Toronto (the City). He submitted a request to the City under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a copy of his employment records for the years 1998, 1999 and 2000.

The City granted partial access to the records, claiming the exemptions found in sections 7, 14(1) and 38(b) of the *Act* to deny access to the remainder.

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

During mediation, the City issued a subsequent decision adding the exemption in section 38(a) to the records for which section 7 was claimed. Also during mediation, the appellant indicated that he is not seeking access to the information at the bottom of page 18 of the records. Sections 14(1) and 38(b) had been claimed only for this information. As a result of the narrowing of the portion of page 18 at issue, neither section 14(1) nor 38(b) are at issue.

Further mediation could not be effected and this appeal was moved into inquiry. I decided to seek representations from the City, initially, and sent it a Notice of Inquiry setting out the facts and issues in the appeal. The City submitted representations in response.

In its representations, the City indicates that during their final preparation, it became aware of a grievance that had been filed by the appellant. The City acknowledges that this grievance was settled. It appears that the City is concerned that the appellant will file a further grievance or take some other action should the outcome of this appeal not be to his satisfaction. In these circumstances, the City submits that section 52(3)3 of the *Act* applies to exclude the records at issue from the scope of the *Act*. Although not initially raised, the City requests that the application of this section be considered.

Section 52(3) is a jurisdiction limiting provision of the *Act*, which is intended to remove certain employment and/or labour relations information from the scope of the *Act*. If this section applies to a specific record, in the circumstances of a particular appeal, then the record is excluded from the operation of the *Act*. Although raised very late in the appeals process, because it is jurisdictional and has the potential of removing records from the application of the *Act*, I will consider whether it applies in the circumstances.

I subsequently sought representations from the appellant and attached the non-confidential portions of the City's representations to the Notice of Inquiry that I sent to him. The appellant was asked to review them and to refer to them where appropriate in responding to the issues set out therein. In particular, the appellant was asked to address the issues raised by the City regarding its claim that section 52(3)3 applies in the circumstances as discussed in its representations and as noted above.

The appellant submitted representations in response.

RECORDS:

The records at issue consist of:

- page 18 - the remaining portion of notes made on a telephone sheet dated June 21, 2000;
- page 25 - a print-out of an originating and response e-mail dated July 28 and 31, 2000, respectively;
- page 27 - a facsimile of a memorandum between two co-ordinators of the City's Building Division dated June 22, 2000; and
- page 48 - an undated draft memorandum to the appellant.

DISCUSSION:

APPLICATION OF THE ACT

Introduction

Section 52(3) is record-specific and fact-specific. As I noted above, 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*.

As I indicated above, the City claims that section 52(3)3 applies to the records.

Section 52(3)3

Sections 52(3)3 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:
>
> 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 to fall within the scope of paragraph 3 of section 52(3), an institution must establish that:

1. the records were collected, prepared, maintained or used by the institution 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 institution has an interest.

The City describes the appellant's work history, first with the Municipality of Metropolitan Toronto and, following amalgamation, with the City. The City notes that certain concerns were raised at one point in July 2000 regarding the appellant's performance, and the appellant was informed that the granting of his April salary increment was not being recommended at that time but would be deferred until October. The City indicates that a subsequent notice was given to the appellant in October recommending a salary increment.

The City indicates further that on the same date that the salary increment was recommended, the appellant both filed a grievance on the original denial of the increment, and made a formal request under the *Act* for access to his employment records.

The City notes that the grievance was settled in February, 2001, in part by the payment of a sum of money to the appellant, and in part by the City providing the appellant with access to his personnel file, which included some of the records relating to his access request, but not the records that are at issue in this appeal. The City notes that on or about this date, the appellant filed an appeal of the City's decision to deny access to the records at issue.

The City points out that although the appellant is no longer employed in the position in which concerns were raised, he continues to be an employee of the City.

The City submits that it collected, prepared, maintained or used the records at issue in relation to meetings, including the grievance meeting, consultations, discussions and communications concerning the appellant, specifically in relation to his entitlement to a salary increment based on his ability to meet the requirements for the position he held at that time.

The City submits further that issues about the requirements of an employee's position, his job performance and salary increments are employment-related matters.

The City states further:

> As indicated in the background, the employee was denied an increment in April of 2000 but received one in October. Nevertheless, he filed a grievance on the original denial of the increment. During the meeting to discuss his grievance held on January 31, 2001, the appellant also raised the matter of the City's denial of access to his employment records.
>
> Although the grievance was subsequently settled and access was granted to certain records, the appellant nevertheless filed an appeal of the City's denial of access to the records to the IPC.
>
> The City submits that in such circumstances, it is clear that the appellant remains dissatisfied with the actions of the City … there is no impediment to the appellant filing a formal grievance relating to this matter.

The City takes the position that the appellant may be seeking information contained in the records to support his position on matters not specifically related to the salary increment. The City refers to the contents of the records at issue in support of its position.

The appellant states that this request was initiated as a "matter of interest" following the lack of progression with informal queries for access. He indicates that the grievance he filed in October 2000 was settled to his satisfaction at the end of January 2001. He notes that he did not file his appeal of the City's access decision until several weeks later. Commenting on the City's representations, the appellant states:

> As noted in the City's submissions, the grievance filed was in relation to the original wrongful denial of an increment. During the January 31, 2001 grievance meeting, the issue of the City's denial of access was not raised but, rather the existence of disciplinary notations contained within the personnel file (attachment 1 & 2). Again, it is these records which were at issue during the grievance meeting and not the records at issue in this appeal.

The appellant states, in clarification of the City's statement regarding his current employment status, that the position he previously held no longer exists. He also points out that this "position" was not, in fact a recognized position but was, rather, an assignment. He submits that because it was not a recognized position, no interviews, examinations or official requirements are specified and therefore, the first two requirements for the application of section 52(3)3 have not been met.

The appellant reiterates that the January 31, 2001 grievance meeting addressed the existence of disciplinary notations in the personnel file and not the City's denial of access to the records at issue in this appeal. He states that his motive for filing this appeal was essentially inquisitive in nature regarding the content of these records.

The appellant states that he is not dissatisfied with the actions of the City and notes that "a rewarding employment experience still continues as further evidenced through acceptance of the terms of agreement as specified in the grievance meeting on January 31, 2001."

The appellant indicates that there are currently no grievances concerning him before the City, nor does he intend to initiate any.

Having reviewed the records at issue and the submissions of the parties, I accept the City's position that the records were collected, prepared, maintained and used by the City in relation to meetings, discussions and/or communications about the appellant, specifically, about his entitlement to a salary increment based on his ability to meet the requirements of the "position" he held at that time, and in respect of the grievance meeting. I also accept that these types of meetings, discussions and/or communications were about employment-related matters concerning the appellant as they relate to the performance of his job and his entitlement to a salary increment which are both fundamental components of the employment relationship. The fact that the position was an assignment rather than a "recognized position" does not alter the character of the relationship between the appellant and the City or the elements of the first two requirements under section 52(3)3.

Attachment 1 to the appellant's representations is a letter written by him to his CUPE representative in which he states: "As discussed with you, I am providing you with a copy of the documents (5 pages) of which I was not aware of being on my file. As discussed in the Step 2 meeting, these documents are to be removed from the corporate file considering the disciplinary tone in which they were written".

Attachment 2 is an e–mail to the appellant which indicates that the documents had been removed from his file. The e-mail continues: "It is not appropriate to include a clause in the minutes of settlement for your grievance that the letters are to be removed. Your grievance relates to the wage increment and not the letters".

In my view, it is apparent that the appellant had more than one issue with the City. Although the grievance initiated in October 2000 only addressed the issue of his salary increment, the discussions at the grievance meeting raised other areas of concern on the appellant's part, specifically, issues relating to disciplinary notations in his personnel file. It is apparent from the follow-up to the January 2001 meeting that these concerns were not insignificant.

In my view, the appellant's persistence in pursuing the records at issue in this appeal are consistent with a continued concern regarding the contents of his personnel file. Although issues relating to the contents of his file were discussed during the previous grievance meeting, they were not the basis for this meeting, and I accept the City's position that there is no impediment to the appellant initiating a further grievance in this regard. Accordingly, I find that the City has established an interest in the employment-related matter to which the records relate.

On this basis, I find that all three requirements for the application of section 52(3)3 have been met.

The appellant submits that section 52(4)1 applies to the records at issue in this appeal, and states:

> Concerning the records at issue in this appeal, Article 30 of the agreement between the Canadian Union of Public Employees and the City of Toronto state,
>
> "Each employee shall have access to his/her personnel file for the purpose of reviewing all evaluations and/or disciplinary notations pertaining to his/her work records with the City (attachment 3).
>
> The records at issue in this appeal are contained in my personnel file. Under the terms of agreement between the City and the Local 79 trade union, full disclosure of these records is warranted.

The appellant indicates that paragraphs 2 and 3 of section 52(4) may also be applicable.

A finding that the exception in section 52(4)1 (and possibly 2 and 3) applies would effectively bring the records within the application of the *Act* regardless of whether they fall within the scope of section 52(3). However, I do not accept the appellant's position in this regard.

Paragraphs 1, 2 and 3 of section 52(4) all refer to "agreements" between an institution and a trade union in the case of paragraph one or one or more employees which either "ends a proceeding" or "results from negotiations" in the case of paragraphs 2 and 3, respectively. These sections relate only to the actual agreements themselves rather than to records that might fall within the scope of the provisions of the agreements. The records at issue are not agreements, and thus do not fall with the application of section 52(4).

Based on the above, I find that section 52(3)3 applies to the records at issue in this appeal. Since none of the exceptions in section 52(4) applies, the records fall outside the scope of the *Act*.

Because of these findings, it is not necessary for me to consider the possible application of the exemptions originally claimed by the City.

ORDER:

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

Original Signed By:
Laurel Cropley
Adjudicator

October 9, 2001