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

ORDER MO-1587

Appeal MA-000351-1

City of Hamilton

(Formerly City of Hamilton and Region of Hamilton-Wentworth)

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NATURE OF THE APPEAL:

The City of Hamilton, which now includes the former Region of Hamilton-Wentworth, (the City) received a four-part request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to the proposed transfer of management of two health care facilities from the City to two other organizations. The City located records responsive to the request and denied access to them, claiming that they fall outside the ambit of the *Act* due to the operation of section 52(3)3 of the *Act*.

The requester, now the appellant, appealed the City's decision. During the mediation stage of the appeal, the City agreed to disclose information responsive to parts one and two of the request and advised the appellant that records responsive to part four of the request do not exist. The appellant was satisfied with this information and advised that she wished to continue with her appeal of the City's decision to deny access to those records responsive to part three of the request.

As further mediation was not possible, the appeal was moved into the Adjudication stage. I decided to seek the representations of the City, initially. The City made submissions to me, the non-confidential portions of which were shared with the appellant, along with a Notice of Inquiry. The appellant also made submissions, which were also shared with the City. Additional reply representations were then submitted by the City.

In November 2001, I advised the parties that, as a result of the decision of the Ontario Court of Appeal in *Ontario (Solicitor General) v. Ontario (Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), I would be placing this appeal on hold pending the outcome of an application for leave to appeal the Court of Appeal's decision to the Supreme Court of Canada.

On June 13, 2002, the Supreme Court of Canada dismissed the Commissioner's application for leave to appeal, thereby upholding the Court of Appeal's decision on the correct interpretation to be placed on section 52(3) of the *Act*.

On August 20, 2002, following the unsuccessful mediation of the appeal, I provided a Supplementary Notice of Inquiry to the parties, providing them with copies of both the *Solicitor General* case and Order MO-1560-R in which Assistant Commissioner Tom Mitchinson applied the provisions of section 52(3) in accordance with the Court of Appeal's decision for the first time. I received submissions from both parties, who indicate that they wish to rely on both their supplemental representations and their original submissions to me in 2001.

RECORDS:

The records at issue in this appeal consist of eight pages of notes taken at several meetings involving the City and certain organizations concerning the proposed transfer of management of two health care facilities.

DISCUSSION:

APPLICATION OF THE ACT

Introduction

As indicated above, the City relies on section 52(3)3 to deny access to the records at issue. 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 falls outside the scope of the *Act*.

Section 52(3)3

General

Section 52(3)3 of the *Act* states:

> Subject to subsection (4), this *Act* does not apply to records collected, maintained or used by or on behalf of an institution in relation to any of the following:
>
> > Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

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

The appellant submits that the records at issue pre-date the creation of the current City of Hamilton and were prepared and used by the former Region of Hamilton-Wentworth, and not the existing City of Hamilton. In response to this argument, the City points out that section 5(2) of the *City of Hamilton Act, 1999* provides that "The city stands in the place of the old municipalities for all purposes." It goes on to submit that:

> . . . the responsibility of the former Region for the operation of the homes for the aged has simply been transferred to the 'new' City of Hamilton as a result of the recent amalgamation. The City is now charged with the legislated duty which formerly attached to the Region. . .

I accept the City's argument that, as the successor to the former Region of Hamilton Wentworth, it in effect stands in the shoes of the now-defunct entity and assumes all of the duties and responsibilities formerly managed by the Region, including the operation of the homes for the aged which are the subject matter of these records.

In Order P-1223, Assistant Commissioner Tom Mitchinson commented as follows regarding the interpretation of the phrase "in relation to" in section 65(6) of the provincial *Act*, which is the equivalent provision to section 52(3) of the *Act*:

> In the context of section 65(6), I am of the view that if the preparation (or collection, maintenance, or use) of a record was for the purpose of, as a result of, or substantially connected to an activity listed in sections 65(6) 1, 2 or 3, it would be 'in relation to' that activity.

I agree with this interpretation, and find that the records were "prepared, maintained and used" by the City and that this preparation, maintenance and use was in relation to meetings, communications, discussions and consultations between the City and possible operators of the facilities. As a result, I find that requirements one and two of the test for section 52(3)3 have been satisfied.

Requirement Three

In Order PO-2057, Adjudicator Laurel Cropley considered the application of section 65(6) of the provincial *Act* to records whose subject matter is similar in nature to those under consideration in the present appeal. She found that:

> The record relates to a review conducted by the Ministry to examine workload and workforce issues. I find that issues of this nature are clearly employment-related.
>
> The term "labour relations" appears in section 17(1) of the *Act*. In that context, Adjudicator Holly Big Canoe discussed the term "labour relations information" in Order P-653 as follows:
>
> > In my view, the term "labour relations information" refers to information concerning the collective relationship between an employer and its employees. The information contained in the records was compiled in the course of the negotiation of pay equity plans which, when implemented, would affect the collective relationship between the employer and its employees.

> Previous orders have concluded that Adjudicator Big Canoe's interpretation of the term is equally applicable in the context of section 65(6)3 (see, for example, Order MO-1264). I agree, and find that "labour relations" for the purpose of this section is properly defined as the collective relationship between an employer and its employees. Because a collective agreement governs the relationship between the Ministry and its employees at the Probation office, I find that this record also relates to labour relations matters.
>
> It is apparent from the submissions of both parties that the Ministry initiated the Joint Review in response to workload and other human resources concerns raised by employees of the Probation office. I accept that the Ministry, as an employer, has an interest in addressing and resolving these issues as part of the overall management of its workforce.
>
> Accordingly, based on the representations of both parties and my review of the record, I find that the Ministry has provided sufficient evidence to establish that the record was collected, prepared, maintained and used for meetings, consultations, discussions and communications in relation to labour relations and employment-related matters in which the Ministry has an interest.

In the present appeal, the subject matter of the records relates to the future operation of two homes for the aged owned by the City. Among the items canvassed in the records are issues surrounding the question of union representation of the employees at these facilities and other matters relating directly to the status of the current employees, unionized or otherwise. I find that the subject matter of the records is employment-related for the purposes of section 52(3)3. In addition, adopting the findings of Adjudicator Cropley, I find that because the records relate to issues involving the collective relationship between an employer (the City) and its unionized employees who are governed by the terms of a collective agreement, the records relate to labour relations matters within the meaning of section 52(3)3.

The majority of the submissions of the City and the appellant, both initially and following the issuance of the Court of Appeal's decision referred to above, concern the interpretation of the term "has an interest" in section 52(3)3. The Court of Appeal made certain findings with respect to the interpretation placed on that language by the Commissioner's office. In *Ontario (Solicitor General)*, above, the Court of Appeal stated the following with respect to the words "in which the institution has an interest" in the provincial equivalent of section 52(3)3:

> In arriving at the conclusion that the words "in which the institution has an interest" in s. 65(6) 3 must be referring to "a legal interest" in the sense of having the capacity to affect an institution's "legal rights or obligations", the Assistant Privacy Commissioner stated that various authorities support the proposition that an interest must refer to more than mere curiosity or concern. I have no difficulty with the latter proposition. It does not however lead to the inevitable conclusion that "interest" means "legal interest" as defined by the Assistant Privacy Commissioner.

> As already noted, section 65 of the *Act* contains a miscellaneous list of records to which the *Act* does not apply. Subsection 6 deals exclusively with labour relations and employment related matters. Subsection 7 provides certain exceptions to the exclusions set out in subsection 6. Examined in the general context of subsection 6, the words "in which the institution has an interest" appear on their face to relate simply to matters involving the institution's own workforce. Sub clause 1 deals with records relating to "proceedings or anticipated proceedings relating to labour relations or to the employment of a person **by the institution**" [emphasis added]. Sub clause 2 deals with records relating to "negotiations or anticipated negotiations relating to labour relations or to the employment of a person **by the institution**" [emphasis added]. Sub clause 3 deals with records relating to a miscellaneous category of events "about labour-relations or employment related matters in which the institution has an interest". Having regard to the purpose for which the section was enacted, and the wording of the subsection as a whole, the words "in which the institution has an interest" in sub clause 3 operate simply to restrict the categories of excluded records to those records relating to the institutions' own workforce where the focus has shifted from "employment of a person" to "employment-related matters". To import the word "legal" into the sub clause when it does not appear, introduces a concept there is no indication the legislature intended.

Applying a "correctness" standard of review to the interpretation of the provincial equivalent of section 52(3)3, the Court of Appeal thus determined that this office's interpretation of the words "in which the institution has an interest" to mean a "legal interest" was incorrect.

Similarly, the Court of Appeal determined that this office's interpretation of the "time sensitive" element of the provincial equivalent of section 52(3)3 was incorrect. In *Ontario (Solicitor General)*, above, the Court of Appeal stated the following with respect to the "time sensitive" element under the provincial equivalent of section 52(3)1:

> In my view, the time sensitive element of subsection 6 is contained in its preamble. The *Act* 'does not apply' to particular records if the criteria set out in any of subclauses 1 to 3 are present when the relevant action described in the preamble takes place, *i.e.* when the records are collected, prepared, maintained or used. Once effectively excluded from the operation of the *Act*, the records remain excluded. The subsection makes no provision for the *Act* to become applicable at some later point in time in the event the criteria set out in any of subclauses 1 to 3 cease to apply.
>
> . . . . .
>
> In my view, therefore, [Assistant Commissioner Mitchinson] was wrong to limit the scope of the exclusions in the way that he did.

The City submits that it is about to begin negotiations with the bargaining agent for the employees of the homes for the aged and that as recently as May of this year, the subject of a

possible agreement governing the operation of the facilities was addressed by City Council. As a result, it argues that it continues to have an interest in the subject of the records.

The appellant argues that the City's interest in the records may be considered to be a "mere curiosity or concern" and is not sufficient to trigger the operation of section 52(3)3.

Based on my review of the records and the information provided to me by the City and the appellant, I am of the view that the City has the requisite degree of interest in the subject matter of the records to meet the third part of the section 52(3)3 test. The interest of the City went well beyond the "mere curiosity or concern" referred to by the Court of Appeal in its decision in *Ontario (Solicitor General),* as the records directly address potential labour relations issues surrounding the agreements under consideration. Similarly, the passage of time cannot operate to remove the records from the exclusion in section 52(3)3, as described in the decision in *Ontario (Solicitor General).*

As I have found that the records were prepared, maintained and used by the City in relation to meetings, discussions, consultations or communications about labour relations or employment-related matters, the third requirement for section 52(3)3 has been satisfied.

To summarize, all three parts of the test for the application of the exclusion in section 52(3)3 have been met and, as a result, the *Act* does not apply to the records which are responsive to the third part of the appellant's request.

ORDER:

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

Original signed by: November 15, 2002
Donald Hale
Adjudicator