



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER MO-1723

Appeal MA-030058-1

City of Hamilton



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NATURE OF THE APPEAL:

The City of Hamilton (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) from an individual employed by the City. The request identified that the requester had met with the Director of a particular City Department (the director) concerning an allegation that had been made against the requester. The requester asked for the name of the person who brought the accusation, and also requested that certain information be removed from the requester's files.

The City responded to the request by identifying that the director had been contacted, and then stated as follows:

...[the director] indicated that no records were created by him or his staff regarding the verbal comments that were made to him respecting this matter. He has also indicated that any notes he may have made during the meeting between the two of you regarding the incident were destroyed as he considered the matter closed.

In response to your request, [the director] has created a record – an e-mail message containing the name of the staff member who brought the comments made regarding you to his attention. However, the name of this individual is considered to be personal information under the *Act*, and is thus exempt from release pursuant to section 14 of the *Act*.

The requester (now the appellant) appealed the City's decision.

During the mediation stage of the appeal, it was confirmed that the only issue remaining in this appeal is access to the e-mail message referred to in the City's decision.

Mediation did not resolve this matter, and this appeal was transferred to the inquiry stage of the process. I sent a Notice of Inquiry to the City and the identified affected party, initially, and received representations in response. The affected party took the position that the information was personal information. The City took the position that section 38(b) (invasion of privacy) applies to the information. Furthermore, the City stated that section 52(3)3 applies to the record, such that the record is not covered by the *Act*.

I then sent the Notice of Inquiry, along with the non-confidential portions of the City's representations, to the appellant. I included the possible application of section 52(3)3 as an issue, and invited the appellant to address the issues.

The appellant did not provide representations to this office.

RECORDS:

The record remaining at issue is an e-mail from the director, summarizing the actions taken by the director in response to the allegation made against the appellant.

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 falls outside the scope of the *Act*.

The City asserts that section 52(3)3 applies to the record such that it is excluded from the scope of the *Act*.

Section 52(3)3

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 these three requirements:

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.

Representations

In support of its position that the record is excluded from the scope of the *Act*, the City states:

The record in question was created by [the director]. The information on the record was collected as a result of an examination into the capacity of the appellant to perform [the appellant's] job function and was used to initiate a

discussion with the appellant regarding the concerns. The record itself denotes a communication of these matters between [the director] and the affected party. The employment related matter revolves around the concerns raised initially by the anonymous staff member, and the nature of the concerns directly relates to the ability of a City employee to perform his or her job functions. ... [The] information speaks to an employee's capacity to perform job functions, and thus is an employment-related matter in which the City has an interest.

Analysis

Part One of the Test Under Section 52(3)3

The City submits that it collected, prepared, maintained or used the records in relation to meetings, consultations, discussions or communications about the appellant.

The record at issue contains information regarding an allegation concerning the appellant (who was a City employee) and subsequent actions taken by the director. The record was prepared by the director in response to requests about information relating to the allegation against the appellant.

I find that the record at issue was collected, prepared and used by the City, and that the first part of the test under section 52(3)3 has been satisfied.

Part Two of the Test Under Section 52(3)3

The record consists of an e-mail communication sent by the director, relating to the allegation against the appellant. Furthermore, the City states that "the record itself denotes a communication of these matters between [the director] and the affected party".

I accept that the record was collected, prepared or used by the City in relation to discussions or communications, specifically, communications about the actions taken in response to the allegation made against the appellant. As a result, the second part of the section 52(3)3 test has been met.

Part Three of the Test Under Section 52(3)3

The City submits that the communications relate to an employment-related matter in which the City has an interest. The City states:

... The employment related matter revolves around the concerns raised initially by the anonymous staff member, and the nature of the concerns directly relates to the ability of a City employee to perform his or her job functions. ... [The] information speaks to an employee's capacity to perform job functions, and thus is an employment-related matter in which the City has an interest.

I am satisfied that the appellant was an employee of the City at the time the records were collected or prepared, and that the allegation and the actions taken in relation to the allegation are about an employment-related matter concerning the appellant.

I also agree with the City's position that it had an interest in this employment-related matter involving its employee, and that this interest was more than a mere curiosity or concern. [See *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507].

Therefore, the third part of the section 52(3)3 test has been met.

I have found that all three parts of the section 52(3)3 test have been met. As a result, I conclude that the record is excluded from the scope of the *Act* by virtue of section 52(3)3. In addition, I find that none of the exceptions in section 52(4) apply in the circumstances.

Having found that section 52(3)3 applies, it is not necessary for me to determine whether the exemptions relied on by the City apply.

ORDER:

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

Original signed by: _____
Frank DeVries
Adjudicator

December 8, 2003
