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

ORDER MO-2491

Appeal MA09-63

City of Mississauga

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NATURE OF THE APPEAL:

The City of Mississauga (the City) received the following request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information related to an email the requester received from City Corporate Security:

> Item 1
> All records, emails, documents (esp [three named individuals]) pertaining to the investigation (and the result of investigation) into the complaint I filed against Mississauga Corporate Security guard/employee who wrote, "Please leave security [alone] to do their jobs" including what steps were taken (ie I.T. Division) to successfully identify the author of the publicinfo email.
>
> Item 2
> Name/rank of Author of July 2008 publicinfo email "Please leave security alone …"

The City issued a decision letter, advising the requester that there were no records responsive to the first part of the request and that the information responsive to the second part of the request was contained in a letter sent to the relevant employee. The City explained the decision in the following manner:

> While section 1 of the *Act* refers to a right of access to *information*, a request under the *Act* is fundamentally about receiving *records*. In this instance there are no records [responsive to] Item 1 because at the onset of the investigation the individual verbally identified themselves and the issue was dealt with at a meeting. Therefore, our decision for Item 1 of the request is that there are no responsive records [emphasis in original].
>
> Regarding Item 2 of your request, a letter was issued to the employee at the conclusion of the investigation process. However, under section 52(3) of the *Act*, most employment-related records are excluded from the *Act*. Our decision for Item 2 is that the letter is excluded from the *Act* as per subsection 52(3).

The requester, now the appellant, appealed the City's decision to this office and a mediator was appointed to try to resolve the issues. During mediation, the appellant clarified that she is seeking access only to the name, rank and badge number of the guard/employee that sent her the "publicinfo" email response. The appellant accepted the City's position that no records responsive to Item 1 of her request exist, and is not appealing that part of the City's decision. However, the appellant advised that she wished to pursue access to a copy of the letter the City identified as responsive to Item 2 of her request.

As a mediated resolution of this appeal was not possible, it was transferred to the adjudication stage of the process, where it was assigned to me to conduct an inquiry.

I sent a Notice of Inquiry outlining the facts and issues to the City, initially, seeking representations, which I received. I then sent a modified Notice of Inquiry to the appellant, along with a complete copy of the City's representations, and received representations in return.

RECORDS:

The sole record at issue is a two-page letter.

DISCUSSION:

LABOUR RELATIONS AND EMPLOYMENT RECORDS

The City takes the position that the *Act* does not apply to the record because it falls within the exclusion in section 52(3)3, which states:

> 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:
>
> > Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

The interpretation of sections 52(3) and (4) is a preliminary issue which goes to the jurisdiction of the Commissioner, or her delegate, to continue an inquiry into the issue of whether or not a record is subject to any of the exemptions contained in the *Act*. If the requested record falls within the scope of section 52(3), it would be excluded from the scope of the *Act*, unless it is found to fall within the ambit of one of the exceptions in section 52(4).

Section 52(3) is record-specific and fact-specific. If it applies to a specific record, in the circumstances of a particular appeal, and none of the exceptions listed in section 52(4) are present, then the record is excluded from the scope of the *Act* and not subject to the Commissioner's jurisdiction.

The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship [Order PO-2157].

If section 52(3) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date [*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].

The type of records excluded from the *Act* by section 52(3) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct

from matters related to employees' actions [*Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.)].

Representations

According to the City, the record falls outside the scope of the *Act* pursuant to section 52(3)3 because:

> The letter, which was prepared, maintained and used in relation to meetings, consultations, discussions or communications carried out as per Corporate Policy No. 01-03-08, *Code of Conduct and Complaint Procedure for Security Staff* [enclosed], is about employment-related matters since it relates to the behaviour of an employee while performing their employment duties and the consequences of the investigation into the conduct of the employee while performing their employment duties.
>
> The City … has an interest in the employment-related matters to which the record relates because of the obligation to monitor security staff conduct while performing their employment duties and the record forms part of the City's Human Resources employment file. A copy of Corporate Policy No. 01-03-07, *Standard of Behaviour,* which is referenced in Corporate Policy No. 01-03-08, is enclosed for your reference.

The appellant's representations on the possible application of section 52(3)3 to the record do not address the first part of the test for exclusion. Respecting the second part of the test for exclusion, the appellant concedes that "meeting, consultations, discussions or communications" occurred regarding to the subject of her complaint.

However, the appellant argues that the subject matter of her complaint is not an "employment-related matter." The appellant refers to *Goodis* [cited above] in support of the argument that her complaint relates to the employee's actions, "and possibly inactions" and not to an "employment-related matter in which the institution has an interest," as required by section 52(3)3.

The appellant also submits that the City should apply the principle of severance to the records since it is obliged, under section 4(2) of the *Act*, to disclose as much of a responsive record as can reasonably be severed without disclosing exempt information. According to the appellant,

> … [T]he minimum information I seek, namely the name/rank of the Author of the July 2008 Public.Info email … is easily severed without disclosing any protected information, therefore section 4(2) supersedes the protection of section 52(3) [emphasis in original].

According to the appellant, not having the name of the individual who wrote the email response to her prevents her from filing "a proper complaint" under the City's *Code of Conduct* and *Complaint Procedure for Security Staff* or "determining the appropriateness of having had [the]

Director of Facilities and Properties Management" investigate the incident. The appellant submits that the record cannot be "protected because it was created under a process that was blatantly ignored." The rest of the appellant's representations largely relate to her concerns about the handling of her complaint by the City and its Corporate Security department, including the lack of transparency and the potential for conflict of interest. However, since such matters are beyond the scope of this appeal, they will not be set out in any further detail in this order.

Analysis and Findings

I will preface my findings by noting that this appeal relates only to the decision issued to the appellant by the City under the *Municipal Freedom of Information and Protection of Privacy Act*. It is the *Act* that defines my authority, and I am bound by its provisions in conducting this inquiry. I do not have any jurisdiction over the City's administration of its corporate policies and procedures. More specifically, I have no authority to review issues relating to the City's investigation of, or response to, the appellant's complaint. The sole issue for me to decide in this appeal, therefore, is whether the responsive record is *excluded* from this office's jurisdiction by virtue of the operation of section 52(3) of the *Act*.

For section 52(3)3 to apply, the City must establish that:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;

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.

For the reasons that follow, I find that the record at issue in this appeal is excluded from the *Act* pursuant to section 52(3)3.

Part 1 – collected, prepared, maintained or used

The first requirement is met if the records were collected, prepared, maintained or used by the City or on its behalf. I have considered the City's representations and I have also reviewed the record. I am satisfied that City staff prepared the record in the course of investigating the appellant's complaint, including writing a summary of the circumstances and the action taken to conclude the matter.

Accordingly, I find that the record was collected, prepared, maintained and/or used by the City, thereby meeting the first of the three requirements for the application of section 52(3)3.

Part 2 – in relation to meetings, discussions, communications

For the second requirement to be met, I must be satisfied that the City collected, prepared, maintained or used the record in relation to meetings, discussions, or communications.

The term "in relation to" in section 52(3) means "for the purpose of, as a result of, or substantially connected to" [Order P-1223].

This office has previously held that records collected, prepared, or used by the institution in relation to an internal investigation of an employee were collected, prepared and used by the institution in relation to "communications" about the internal investigation [Orders MO-1186, MO-1523 and PO-2748].

In the circumstances of this appeal and with the benefit of having reviewed the record, I find that it was collected, prepared, maintained or used in relation to meetings, consultations, discussions or communications.

Part 3 – labour relations or employment-related matters in which the City has an interest

Under this final part of the test, the City is required to establish that the meetings, consultations, discussions or communications that took place were about labour relations or employment-related matters in which the City has an interest.

The appellant disputes the City's assertion that the record at issue represents an "employment-related matter in which the institution has an interest," and highlights the following statement from *Goodis* [cited above]: "Employment-related matters are separate and distinct from matters related to employees' actions." As I understand the appellant's argument, she is asserting that the Divisional Court's decision in *Goodis* supports the distinction she seeks to establish between employment-related matters for the purposes of section 52(3) and employee actions, or "inactions," in the specific context of her complaint. I further understand the appellant to be suggesting that this distinction obviates the possibility of meeting the third part of the test for exclusion under section 52(3)3.

Based on the reasons provided in past orders and *Goodis*, however, I do not accept the appellant's argument on this issue.

As noted previously, the term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship [Order PO-2157]. Moreover, in my view, it is important to consider the type of record at issue in this appeal as compared to those at issue in *Goodis*. The records at issue in *Goodis* related to allegations of abuse perpetrated by employees of a government Ministry, that is, conduct that fell outside the scope of the employees' work responsibilities. In the present appeal, the record relates to the investigation of an employee's actions within the scope of that individual's work responsibilities, where the performance of those duties could lead to disciplinary action within an *internal*, human resources context (see

Order PO-2748). In my view, there is ample support in past orders for the exclusion of records related to an institution's investigation into complaints against members of its own workforce because of the potential for disciplinary action against the employee (Orders PO-2658 and PO-2748).

In addition, the Court in *Goodis* affirmed that the type of records excluded from the *Act* by section 65(6) (the provincial equivalent to section 52(3)) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue.

In this appeal, the creation of the record at issue stemmed from the City's investigation into the appellant's complaint alleging improper use of the City's "publicinfo" computer response system. On my review of the record, it clearly summarizes the conclusions reached through the complaint review process, as well as the follow-up action respecting it. In the circumstances, therefore, I am satisfied that the record represents an employment-related matter in which the City has an interest. Accordingly, I find that the third requirement of section 52(3)3 has been established for the record.

All three parts of the test for exclusion from the *Act* in section 52(3)3 have been established, and I find that section 52(3)3 applies to the record. Since none of the exceptions to section 52(3) in section 52(4) are applicable in the circumstances of this appeal, I find that the record is subject to the exclusion in section 52(3)3.

In view of my finding that the record is excluded from the *Act*, and from this office's jurisdiction, the principle of severance found in section 4(2) has no application, and I cannot consider it in the circumstances of this appeal.

ORDER:

I uphold the City's decision that the record is excluded from the scope of the *Act* as a result of the operation of section 52(3)3.

Original signed by: January 7, 2010
Daphne Loukidelis
Adjudicator