

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER MO-3354

Appeal MA15-21

City of Greater Sudbury

September 13, 2016

Summary: The City of Greater Sudbury (the city) received a request under the *Act* for records relating to the salary and benefits of a named employee as well any grievances or claims filed against that employee. The city granted partial access to the records, denying access to any records related to grievances or claims on the basis that they fall outside of the scope of the *Act* by virtue of the application of the exclusion at section 52(3). The requester appealed the decision. In this order, I uphold the city's decision that section 52(3) of the *Act* applies to the records at issue and dismiss the appeal.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 52(3).

OVERVIEW:

[1] The City of Greater Sudbury (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information:

[A]ll documents pertaining to [named individual's] salary and benefits package, as well as any grievances and/or claims that may have been filed against [named individual], to [their] union or any other public governing body. This request includes all relevant documents. This would include emails, faxes and all other written [or] typed documents, records and/or reports.

[2] The city notified the individual named in the request (the employee) pursuant to

section 21 of the *Act* and subsequently provided the requester with partial access to the responsive records which were contained in the employee's human resources file. Portions of the records were withheld pursuant to the mandatory personal privacy exemption at section 14(1) of the *Act*. Additionally, in its access decision, the city stated that any records responsive to the portion of the request addressing "any grievances and/or claims that may have been filed against [the employee], to [their] union or any other public governing body," are excluded from the scope of the *Act* pursuant to the application of exclusion for labour relations or employment-related information at section 52(3) of the *Act*.

[3] The requester, now the appellant, appealed the city's decision.

[4] During mediation, the appellant advised that she sought access to the records relating to grievances or claims filed against the employee that the city denied access to pursuant to the exclusion at section 52(3) of the *Act*. She confirmed that she is not pursuing access to the portions of records that were withheld pursuant to section 14(1) of the *Act*.

[5] The city advised that it continues to claim that any existing records relating to grievances or claims filed against the employee are excluded from the scope of the *Act* pursuant to section 52(3). The city advised that should the exclusion be found not to apply and the records are found to fall under the *Act*, in the alternative, it claims that the records are exempt from disclosure pursuant to sections 7(1) (advice or recommendations) and 14(1).

[6] As a mediated resolution could not be reached, the file was transferred to the adjudication stage of the appeal process for an adjudicator to conduct an inquiry. I sought and received representations from the city on the possible application of the exclusion for labour relations and employment-related information at section 52(3), initially, reserving the right to seek representations on its alternative claim, that the exemptions at sections 7(1) and 14(1) apply should I find that the records fall within the scope of the *Act*. The city provided me with representations on section 52(3). The appellant chose not to submit representations.

[7] In this order, I find that the exclusion related to labour relations and employment-related information at section 52(3) applies to all records responding to the portion of the request seeking access to records relating to grievances or claims filed against the employee and they are excluded from the scope of the *Act*. As a result, I have no jurisdiction with respect to their disclosure. Accordingly, I dismiss the appeal.

RECORDS:

[8] The records that remain at issue are those that address any grievances or claims filed against the employee, contained in the employee's human resources file.

DISCUSSION:

Does the exclusion for labour relations and employment-related information at section 52(3) of the *Act* apply to the records at issue?

[9] In this appeal, I must determine whether the exclusion for labour relations and employment-related information at section 52(3) of the *Act* applies to the records at issue. The city submits that paragraph 3 of section 52(3) applies in the circumstances of this appeal. That section and paragraph state:

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.

[10] If section 52(3) applies to the records, and none of the exceptions found in section 52(4) applies, the records are excluded from the scope of the *Act*.

[11] For the collection, preparation, maintenance or use of a record to be “in relation to” the subjects mentioned in paragraph 1, 2 or 3 of this section, it must be reasonable to conclude that there is “some connection” between them.¹

[12] The term “labour relations” refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships. The meaning of “labour relations” is not restricted to employer-employee relationships.²

[13] The term “employment of a person” refers to the relationship between an employer and an employee. 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.³

[14] 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.⁴

[15] 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

¹ Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.) (*Toronto Star*).

² *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.); see also Order PO-2157.

³ Order PO-2157.

⁴ *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.

conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees' actions.⁵

Section 52(3)3: matters in which the institution has an interest

[16] For section 52(2)3 to apply, the institution 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.

Part 1: collected, prepared, maintained or used

[17] The city submits that the information contained in the records at issue form part of an employee's human resources file and were "collected, maintained and used" by the city, as the employer. It submits that the records at issue were collected for the purpose of investigations into employment-related matters and that the collection of such records is part of the city's responsibility. The city also submits that the records were maintained in accordance with the city's policies and procedures and used in the course of investigations into employment-related matters.

[18] Having reviewed the records for which section 52(2)3 has been claimed, I accept that they were collected, prepared, maintained and used by the city, for the purpose of an investigation into employment-related matters relating to the conduct of the employee to whom they relate. Accordingly, I accept that they meet the first requirement of the section 52(2)3 test.

Part 2: meetings, consultations, discussions or communications

[19] The city submits that the records were collected, maintained and used for the purpose of communications and discussions regarding the employee's job performance and, as previously noted, for the purpose of investigations into employment-related matters involving the employee.

[20] As noted above, the Divisional Court in *Toronto Star*,⁶ instructs that for the collection, preparation, maintenance or use of a record to be considered "in relation to" any of the circumstances in section 52(3), including the meetings, consultations, discussions or communications referred to in paragraph 3, that it must be reasonable to conclude that there is "some connection" between them.

⁵ *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.).

⁶ *Toronto Star*, cited above, note 1.

[21] In my view, it is evident on the face of the records for which section 52(3)3 has been claimed that they were collected, prepared, maintained and used "in relation to meetings, consultations, discussions or communications" by the city staff about employment-related matters involving the employee. I also accept that there is "some connection" between the city's collection, preparation, maintenance or use of these records and meetings, consultations, discussions or communications held by the city relating to the employee. Accordingly, I find that the second requirement of the section 52(3)3 test has been met.

Part 3: labour relations or employment-related matters in which the institution has an interest

[22] The city submits that it employs both union and non-union employees and agrees that the phrase "labour relations" extends to all city employees, encompassing not only issues related to the collective bargaining relationship between itself and its employees, grievance and arbitration but also such issues a work environment, organization structure, polices and procedures, attendance and disciplinary actions." It also submits that "employment-related matters" refers to human resources or staff relations issues arising from the relationship between employer and employees that do not arise out of a collective bargaining relationship.

[23] It submits that the records at issue in this appeal were collected, maintained and used in relation to meetings, consultations, discussions or communications in which the city has an interest. It submits that records relating to staffing or evaluation of employees have previously been found, by this office as relating to matters "in which the institution has an interest."

[24] Under part 3 of the test for the application of section 52(3)3, the records collected, prepared, maintained by the institution are excluded only if the meetings, consultations, discussions or communications are about "labour relations" or "employment-related matters" in which the institution has an interest. As stated above, 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.⁷

[25] The phrase "labour relations or employment-related matters" has been found to apply in the context of, job competitions⁸, an employee's dismissal⁹, a grievance under a collective agreement¹⁰, disciplinary proceedings¹¹, a "voluntary exit program"¹² and a review of "workload and working relationships"¹³.

⁷ *Ontario (Ministry of Correctional Services) v. Goodis*, cited above, note 5.

⁸ Orders M-830 and PO-2123.

⁹ Order MO-1654-I.

¹⁰ Orders M-832 and PO-1769.

¹¹ Order MO-1433-F.

¹² Order M-1074.

¹³ Order PO-2057.

[26] The phrases "in which the institution has an interest" means more than a "mere curiosity or concern," and refers to matter involving the institution's own workforce.

[27] The city submits that the subject matter of the records addresses "employment-related matters." On my review, I accept that they relate to human resources or staff relations issues arising from the relationship between an employer and an employee out of the context of a collective bargaining relationship. Accordingly, I accept that they relate to "employment-related matters."

[28] Additionally, given that the records relate to matters relating to the conduct of and between its employees, in my view, they clearly relate to the city's management of its own workforce. Therefore, I accept that the city has an interest in the matters addressed by these records that amounts to more than a mere curiosity or concern.

[29] Accordingly, I find that the third requirements of the section 52(3)3 test has been met.

Summary

[30] Having closely reviewed the records for which the exclusion at section 52(3)3 has been claimed, I find that they were collected, prepared, maintained or used by the city in relation to meetings, consultations, discussions, and communications related to employment-related matters in which the city has an interest as contemplated by the exclusion at paragraph 3 of section 52(3).

[31] I do not find that any of the exceptions to the exclusion set out in section 52(4) apply. Accordingly, I find that section 52(3)3 applies to the records for which it has been claimed, and those records are excluded from the scope of the *Act*. As a result, I dismiss the appeal.

ORDER:

I uphold the city's decision and dismiss the appeal.

Original signed by: _____
Catherine Corban
Adjudicator

September 13, 2016 _____