Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3359

Appeal MA15-99

City of Ottawa

September 26, 2016

Summary: The appellant sought access to his employee and health records from his employer, the city. The city decided to grant the appellant partial access to the records, relying on the exclusion in section 52(3)3 (employment or labour relations) to deny access to certain portions. The appellant filed an appeal of the city's decision. The records are excluded from the scope of the *Municipal Freedom of Information and Protection of Privacy Act* under section 52(3)3 in their entirety and the appeal is dismissed.

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

Orders and Investigation Reports Considered: Orders MO-1342, P-1618, P-1627 and PO-1658.

Cases Considered: *Ontario (Solicitor General) v Mitchinson*, 2001 CanLII 8582 (ON CA).

BACKGROUND:

[1] The appellant submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the City of Ottawa (the city) for access to his employee and health records. The city located 439 pages of records that were responsive to the appellant's request and issued a decision granting the appellant partial access. In its decision letter, the city stated that it withheld portions of the responsive records in accordance with the mandatory exemption in section 14(1)

(invasion of privacy) and the exclusion in section 52(3) (employment or labour relations) of the *Act.*

[2] The appellant appealed the city's decision to the Office of the Information and Privacy Commissioner.

[3] During the mediation stage of the appeal, the appellant confirmed that he is not interested in pursuing access to the information withheld under the mandatory invasion of privacy exemption in section 14(1). Accordingly, section 14(1) and the information withheld under it are no longer at issue in this appeal. Also during mediation, the city specified that it relies on paragraph 3 of the exclusion in section 52(3) of the *Act.*

[4] A mediated resolution of the appeal was not possible and the appeal was transferred to the adjudication stage of the appeal process for a written inquiry under the *Act.* During my inquiry, I sought and received representations from the city and shared these with the appellant, who also provided representations.

[5] In this order, I find that the records are excluded from the scope of the *Act* under section 52(3)3 and I dismiss the appeal.

RECORDS:

[6] The records at issue in this appeal are the sixty pages the city withheld in full or in part, which consist of a variety of notes, emails, correspondence and other documents contained in the appellant's personnel file kept by the city.

DISCUSSION:

[7] The sole issue in this appeal is whether the exclusion for employment and labour relations information at section 52(3)3 of the *Act* applies to the records. This section 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:
>
> . . .
>
> 3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

[8] If section 52(3)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*.

[9] For the collection, preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in section 52(3)3, it must be reasonable to conclude that there is "some connection" between them.[1]

[10] 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]

[11] 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]

[12] 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.[4]

[13] 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;
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> 2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and
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> 3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

[14] The phrase "labour relations or employment-related matters" has been found to apply in the context of a job competition[5] and a grievance under a collective agreement.[6] It has been found not to apply in the context of an organizational or operational review.[7]

[15] The phrase "in which the institution has an interest" means more than a "mere

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[1] Order MO-2589; see also *Ministry of the Attorney General and Toronto Star*, 2010 ONSC 991 (Div Ct).
[2] *Ontario (Minister of Health and Long-Term Care) v Ontario (Assistant Information and Privacy Commissioner)*, [2003] OJ No 4123 (CA); see also Order PO-2157.
[3] Order PO-2157.
[4] *Ontario (Ministry of Correctional Services) v Goodis* (2008), 89 OR (3d) 457, [2008] OJ No 289 (Div Ct).
[5] Orders M-830 and PO-2123.
[6] Orders M-832 and PO-1769.
[7] Orders M-941 and P-1369.

curiosity or concern", and refers to matters involving the institution's own workforce.[8]

The city's representations

[16] The city states that the records are part of the appellant's personnel file kept by its human resources department. It submits that it prepared, maintained and used all 439 pages of the records in relation to employment-related and labour relations related matters in which it has an interest. It explains that its staff in the human resources department, including those in the Employee Health and Wellness Unit of the department, and in the department in which the appellant works, collected, prepared, maintained and used the records to address workplace issues relating to the appellant. The city specifies that the records consist of documents relating to a grievance filed by the appellant, electronic notes related to the appellant's return to work following an injury that he sustained, handwritten notes of managerial staff regarding the appellant's employment, and email correspondence among city staff and between city staff and external individuals relating to the appellant's return to work.

[17] The city continues that its collection, preparation, maintenance and use of the records were directly linked to consultations, discussions and communications about the appellant's workplace issues. For example, meeting requests, emails, notes and other correspondence were created to resolve the appellant's return to work issue and his reintegration. The city states that the main purpose of the records was for it to address the appellant's employment issues, including his return to work, and that these consultations, discussions and communications were directly connected to employment-related matters. It states that it has an interest in these matters as the appellant's employer, including a legal interest in ensuring it adhered to legal requirements and the processes and rulings of the Workplace Safety and Insurance Board (WSIB) regarding the appellant's employment.

[18] Finally, the city states that although the exclusion applies to all of the records, it decided to apply the exclusion to only the sixty pages of the records that contain internal deliberations or consultations regarding the appellant's employment, thereby granting the appellant access to as much of his personal information as possible.

The appellant's representations

[19] In his representations, the appellant describes his post-injury employment issues with the city. He states that when he received his employee records from the city many pages that appeared to be communications between the city and WSIB about him were omitted. He asserts that he has a right and is entitled to access his personal information, which he needs in order to determine his medical capacity to return to work.

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[8] *Ontario (Solicitor General) v Mitchinson*, 2001 CanLII 8582 (ON CA).

[20] The appellant refutes the city's submission that the records qualify for exclusion under section 52(3)3 based on the fact that he has not had the opportunity to review the records. He asks that I confirm whether the requirements of section 52(3)3 have been established in this appeal. The appellant argues that the portions of the records that relate to his reintegration were made in the context of an organizational review concerning his return to work and that, as a result, section 52(3)3 does not apply and the city cannot rely on it. He also argues that the city does not have an interest in the records because it let too much time pass in arranging his ergonomic assessment and was inactive in considering medical evidence and his worsening medical condition. In support of this submission, he cites Order MO-1342 and argues that in order to have an interest "there must be a reasonable prospect that this interest will be engaged" and that the passage of time and inactivity by the institution are considerations as to whether the institution has the requisite interest.[9]

Analysis and finding

[21] From my review of the records at issue, it is clear that they satisfy the requirements for the application of the exclusion in section 52(3)3. The city collected, prepared, maintained or used each one of the records on its own behalf as the appellant's employer. The records form part of the appellant's personnel file and all of them relate to meetings discussions or communications about the appellant's various employment issues with the city, including: the terms and conditions of his employment, the changes to his employment following his injury, his grievance, his WSIB claim, and his return to work. All of the employment issues reflected in the records are employment-related matters specific to the appellant and his work for the city. I am satisfied from the city's representations and from the contents of the records that the city, as the appellant's employer, has an interest in these employment-related matters.

[22] I do not accept the appellant's argument that the records, or a part of them, can be characterized as an organizational review. This argument is not supported by the records themselves or the circumstances of their collection, preparation, maintenance or use.

[23] I also reject the appellant's argument, relying on Order MO-1342, that the city lacks the requisite interest in the records due to the alleged passage of time and inactivity as this is not an accurate statement of how section 52(3)3 is interpreted and applied. Order MO-1342 relied on a ruling of the Divisional Court[10] that upheld the reasoning in Orders P-1618, P-1627 and PO-1658 – which considered the provincial equivalent of section 52(3)[11] – that there must be a reasonable prospect that the

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[9] Order MO-1342 at page 4.
[10] *Ontario (Solicitor General) v Ontario (Assistant Information and Privacy Commissioner)*, [2000] OJ No 1974.
[11] Section 65(6) of the *Freedom of Information and Protection of Privacy Act* (*FIPPA*).

institution's interest will be engaged. The Divisional Court accepted that the passage of time, inactivity by the parties, and loss of forum or conclusion of a matter, were appropriate considerations in determining whether an institution has the requisite interest. However, the Divisional Court was reversed on this issue by the Court of Appeal for Ontario in 2001.[12] In its ruling, which quashed Orders P-1618, P-1627 and PO-1658, the Court of Appeal rejected the reasoning relied on by the appellant and found that introducing a time element into section 65(6) of *FIPPA* when none exists was erroneous. The decision of the Court of Appeal and its reasoning apply to section 52(3)3 of the *Act* and this appeal.

[24] I find that section 52(3)3 applies to exclude the records from the scope of the *Act.* I further find that none of the exceptions to section 52(3) listed under section 52(4) applies to the records.

ORDER:

I dismiss the appeal.

Original Signed by: September 26, 2016
Stella Ball
Adjudicator

[12] *Ontario (Solicitor General) v Mitchinson*, cited at note 8 above.