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

ORDER M-878

Appeal M_9600277

Regional Municipality of Peel

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NATURE OF THE APPEAL:

The Regional Municipality of Peel (the Municipality) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to records relating to an investigation undertaken by a senior staff member of the Municipality in relation to a complaint of harassment made against the requester. The Municipality located records which were responsive to the request and denied access to them in their entirety, claiming that because of the application of section 52(3)1 and 3 of the Act, the records were outside the ambit of the Act.

The requester (now the appellant) appealed this decision. A Notice of Inquiry was provided to the appellant and the Municipality by this office. Representations were received from the Municipality only.

DISCUSSION:

JURISDICTION

The sole issue to be determined in this appeal is whether the records which are responsive to the appellant's request fall within the scope of sections 52(3) and (4) of the Act. These sections state:

> (3) 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:
>
> 1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
>
> 2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.
>
> 3. Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.
>
> (4) This Act applies to the following records:
>
> 1. An agreement between an institution and a trade union.

2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.

3. An agreement between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees.

4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment.

The interpretation of sections 52(3) and (4) is a preliminary issue which goes to the Commissioner's jurisdiction to continue an inquiry.

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

Section 52(3)1

In Order P-1223, former Assistant Commissioner Tom Mitchinson delineated a test which must be met in order to establish that a record falls within the scope of paragraph 1 of section 65(6), which is the equivalent provision in the Freedom of Information and Protection of Privacy Act (the provincial Act) to section 52(3). I adopt the test set forth by the former Assistant Commissioner for the purposes of this appeal. The Municipality must establish that:

1. the record was collected, prepared, maintained or used by the Municipality or on its behalf; **and**

2. this collection, preparation, maintenance or usage was in relation to proceedings or anticipated proceedings before a court, tribunal or other entity; **and**

3. these proceedings or anticipated proceedings relate to labour relations or to the employment of a person by the Municipality.

The Municipality has provided documentation to establish that the appellant filed a grievance under the collective agreement (the collective agreement) between CUPE Local 3733 and the Municipality. The appellant was, and continues to be, a member of the bargaining unit. The Municipality submits that the grievance process which has been commenced on behalf of the appellant constitutes a "proceeding" before a tribunal or other entity and that these proceedings relate to labour relations or the employment of the appellant by the Municipality.

1. Was the record collected, prepared, maintained or used by the Municipality or on its behalf?

It is clear from the face of the record that it was prepared by an employee of the Municipality on its behalf. This person was appointed under the provisions of the Municipality's Workplace Harassment Policy to act as an investigator and to report her findings to senior staff of the Municipality. Therefore, I find that the record was prepared by the Municipality.

2. Was this preparation in relation to proceedings or anticipated proceedings before a court, tribunal or other entity?

The grievance filed by the appellant resulted from the findings of the Municipality's Human Resources investigation into complaints made about harassing conduct by the appellant. The investigation and the preparation of the responsive records was completed when the grievance was filed. The Municipality relies on the findings made by Assistant Commissioner Mitchinson in Order P-1223. However, the grievance proceedings and the Workplace Discrimination and Harassment Policy (WDHP) investigation which was the subject of the requested records in that case were being undertaken contemporaneously. For this reason, it was found that there existed a "substantial connection" between preparation of the records and the grievance proceeding.

I find that there does not exist the requisite "substantial connection" between the preparation of the records by the investigator and the grievance proceedings which began some time later. The preparation was not, accordingly, "in relation to" the grievance proceedings.

Because the Municipality has failed to establish a substantial connection between the preparation of the records and the grievance proceeding initiated after the investigation was completed, it has failed to satisfy the second part of the section 52(3)1 test. The records are not, therefore, outside the scope of the Act under section 52(3)1.

Section 52(3)3

In Order P-1242, Assistant Commissioner Mitchinson held that in order for a record to fall within the scope of paragraph 3 of section 65(6), which is the equivalent provision in the provincial Act to section 52(3)3, the Municipality must establish that:

1. the record was collected, prepared, maintained or used by the Municipality 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 Municipality has an interest.

1. Were the records collected, prepared, maintained or used by the Municipality or on its behalf?

In my discussion of the application of section 52(3)1 above, I found that the records were prepared on behalf of the Municipality by one of its employees.

2. Was the preparation in relation to meetings, consultations, discussions or communications?

The Municipality states that the records were used in relation to discussions and communications between the investigator and the parties to the complaint, as well as senior staff members of the Municipality.

In the context of a workplace harassment complaint investigation, it is clear that records are collected, prepared and/or used in the context of meetings, consultations, discussions and/or communications. The question is whether this collection, preparation or usage was **in relation to** these activities.

In Orders P-1223 and P-1242, former Assistant Commissioner Mitchinson stated:

> 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. (emphasis added)

In my view, records were prepared for the purpose of or as a result of meetings related to the harassment complaint, or were used for the purpose of communicating the results of the investigation to the Municipality's senior staff.

Accordingly, I find that the answer to Question 2, posed above, is "yes".

3. Are these meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest?

Section 65(6)3 of the provincial Act uses the phrase "about labour relations **or** employment-related matters". As stated by former Assistant Commissioner Mitchinson in Order P-1223, these terms should be interpreted as having separate and distinct meanings and application. I will first consider whether the harassment investigation is properly characterized as an "employment-related matter" and, if so, whether it is a matter "in which the Ministry has an interest".

"employment-related matter"

The Municipality's Workplace Harassment Policy was implemented to address discrimination and harassment by or against individuals in the Municipality's employ. In my view, the Workplace Harassment Policy is, by definition, designed to address an employment-related concern, and I find that any investigation which takes place under the terms of the program is

properly characterized as an "employment-related matter" for the purposes of section 52(3)3 of the Act.

"in which the Municipality has an interest"

In Order P-1242, after reviewing the pertinent legal authorities, former Assistant Commissioner Mitchinson defined the term "has an interest" as follows:

> Taken together, these authorities support the position that an "interest" is more than mere curiosity or concern. An "interest" must be a legal interest in the sense that the matter in which the Ministry has an interest must have the capacity to affect the Ministry's legal rights or obligations.

The Ontario Human Rights Code (the Code) contains several provisions which are relevant to the issue of whether the Municipality "has an interest" in a workplace harassment investigation within the meaning of section 52(3)3 of the Act. In Order P-1242 former Assistant Commissioner Mitchinson found that a Workplace Discrimination and Harassment Policy investigation undertaken by a provincial institution could properly be characterized as an employment-related matter in which the institution has an interest because of the obligations placed on employers under the Code. He stated that:

> As indicated by a number of board of inquiry cases under the Code, where an employer is aware of a harassment situation and does not take adequate steps to remedy or prevent it, if the harassment allegation is sustained, the employer has "indirectly" breached Part I of the Code within the meaning of section 9, and may be found liable under section 41(1) of the Code.

He then went on to refer to several reported cases where an employer's liability in relation to allegations of discrimination or harassment against employees was discussed. He concluded that:

> ... if the Ministry fails to act on a harassment complaint, it risks potential liability under section 41(1) of the Code, while an effective WDHP investigation may reduce or preclude such liability. In my view, therefore, the WDHP investigation has the potential to affect the Ministry's legal rights and/or obligations, and for this reason I find that the WDHP investigation is properly characterized as matter "in which the institution has an interest".

I agree with the conclusion reached in this order and adopt it for the purposes of this appeal. I find that the Municipality could have been potentially liable under section 41(1) of the Code if it had not acted in response to the harassment complaint by initiating an investigation under its Workplace Harassment Policy.

In summary, I find that the records at issue in this appeal were prepared on behalf of the Municipality, in relation to meetings, discussions and consultations about employment-related matters in which the Municipality has an interest. All of the requirements of section 52(3)3 of the Act have thereby been established by the Municipality. None of the exceptions contained in

section 52(4) are present in the circumstances of this appeal, and I find that the records are, therefore, excluded from the scope of the Act.

ORDER:

I uphold the Municipality's decision.

Original signed by: December 17, 1996
Donald Hale
Inquiry Officer