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

# ORDER M-896

## Appeal M_9600211

## City of Niagara Falls

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## BACKGROUND:

The City of Niagara Falls (the City) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to the accident/incident report and all statements and other reports related to a certain incident which occurred on January 16, 1996 between the requester and a named individual (the affected person). Both the requester and the affected person are employees of the City. The records requested relate to an incident between two employees which resulted in allegations of assault by the affected person against the requester. Assault charges were laid against the requester and subsequently withdrawn. Civil litigation proceedings between the requester and the affected person are ongoing.

The City denied access to the records on the basis that they contain personal information which was compiled and is identifiable as part of an investigation into a possible violation of law (section 14(3)(b)). The requester accepted the City's explanation and did not appeal that decision.

## NATURE OF THE APPEAL:

Two months later, the requester submitted another request seeking access to the same information, "now that the police and City investigations have been dropped". The City notified the affected person pursuant to the provisions of section 21 of the Act. The affected person consented to the release of some of the records and objected to the disclosure of eight records. Consequently, the City issued its decision to the requester, advising that access would be granted to some of the records. The City went on to say that it was also prepared to grant access to the remaining eight records, notwithstanding the objections of the affected person. The affected person (now the appellant) appealed the City's decision to grant access to the eight records.

The records at issue relate to the appellant's application for compensation to the Workers' Compensation Board (the WCB), letters to and from the City to the Shop Steward and a letter from a Crown Attorney to the appellant.

This office provided a Notice of Inquiry to the appellant, the requester and the City. Representations were received from the requester and the City. In his representations, the requester raised the application of the public interest override (section 16). In a supplementary Notice of Inquiry, the parties were asked to comment on the possible application of sections 16 and 38(b) of the Act. Section 38(b) was raised because some of the records appeared to contain the personal information of the requester and the appellant. No representations were received in response to the second notice.

As I was of the view that section 52(3) might be relevant in the circumstances of this appeal, a second supplementary Notice of Inquiry was sent to the parties, inviting them to make submissions on the possible application of this section. No representations were received.

## PRELIMINARY ISSUE:

### APPLICATION OF THE ACT

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

> (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.

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 section 52(4) are present, then the record is excluded from the scope of the Act and not subject to the Commissioner's jurisdiction.

As I have indicated previously, none of the parties to this appeal have submitted representations on this issue. I will therefore make my determination on the application of the Act, based on my independent review of the records.

The records at issue consist of the WCB Employer's Report of Injury, WCB Treatment Memorandum, WCB Employer's Return to Work Report, WCB Employer's Subsequent Statement, a letter from the WCB to the City and letters to and from the Shop Steward and the City regarding a grievance filed by the appellant. Also at issue is a letter from a Crown Attorney to the appellant.

In order for a record to fall within the scope of section 52(3)1, I must find that:

1. the record was collected, prepared, maintained or used by the City 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 City.

(Order M-815)

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

Having reviewed the records, I find that all of the records were collected, prepared, maintained or used by the City. The first requirement of section 52(3)1 has been met for all the records.

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

The second part of section 52(3)1 requires that the records were collected, prepared, maintained or used in relation to proceedings or anticipated proceedings before a court, tribunal or other entity.

In Order M-815, former Assistant Commissioner Tom Mitchinson reviewed the concept of "court, tribunal or other entity" and commented as follows:

> A number of tribunals have been established by statute as part of the administrative justice system in Ontario. The Ontario Labour Relations Board, the **Worker's Compensation Board** and the Environmental Assessment Board are some of the more well-known examples...What distinguishes these bodies as "tribunals" is that they have a statutory mandate to adjudicate and resolve conflicts between parties and render decisions which affect legal rights or

> obligations. In my view, this is the appropriate definition for the term "tribunal" as it appears in section 52(3)1.
>
> As far as "other entity" is concerned, it is important to note that the term is included in the list along with "court" and "tribunal", and also as part of the phrase "proceedings or anticipated proceedings before a court, tribunal or other entity". As such, I believe that an "other entity" for the purposes of section 52(3)1 must be a body or person that could preside over "proceedings" and it should be viewed as distinct from, but in the same class as a court or tribunal. Thus, to qualify as an "other entity", the body or person must have the authority to conduct "proceedings", and the power, by law, binding agreement or mutual consent, to decide matters at issue. (Emphasis added).

In that same order, the former Assistant Commissioner determined that the arbitration process under the collective agreement between the institution and the union is a dispute or complaint resolution process conducted by a court, tribunal or other entity which has, by law, binding agreement or mutual agreement, the power to decide grievances and therefore, such a process can be properly characterized as a "proceeding" for the purposes of section 52(3)1.

I agree with the approach used by former Assistant Commissioner Tom Mitchinson and adopt it for the purposes of this appeal. Based on this interpretation, I find that the records relating to the WCB and the grievance instituted by the appellant, were collected, prepared, maintained or used by or on behalf of the City in relation to proceedings or anticipated proceedings before a tribunal and/or other entity. I find that the letter from the Crown Attorney does not meet the second requirement of section 52(3)1.

**3. Do these anticipated proceedings relate to labour relations or the employment of a person by the City?**

In Order P-653, Inquiry Officer Holly Big Canoe found that "... "labour relations information" refers to information concerning the **collective** relationship between an employer and its employees". I agree with the Inquiry Officer's definition and adopt it for the purposes of this appeal.

In the present case, the records relate to a claim for compensation filed by the appellant with the WCB and a grievance filed by the appellant in accordance with the collective agreement between the City and CUPE. I find that the records relate to the WCB claim and the grievance and therefore, proceedings or anticipated proceedings resulting from the claim and grievance relate to "labour relations" for the purpose of section 52(3)1.

All of the requirements of section 52(3)1 of the Act have been met. None of the exceptions listed in section 52(4) are present in the circumstances of this appeal and I find that the records, with the exception of the letter from the Crown Attorney to the appellant, fall within the parameters of section 52(3)1 and therefore, are excluded from the scope of the Act.

I have previously found that section 52(3)1 did not apply to the letter from the Crown Attorney to the appellant. The letter relates to criminal charges laid against the requester and subsequently

withdrawn. I have considered the application of sections 52(3)2 and 52(3)3 to this record and I find that neither of these sections apply. I will now consider the application of section 38(b) of the Act to this record.

## DISCUSSION:

### INVASION OF PRIVACY

Section 2(1) of the Act defines personal information, in part, as "recorded information about an identifiable individual". I have reviewed the information in the record and find that it contains the personal information of the appellant and the requester.

Section 36(1) of the Act allows the individuals access to their own personal information held by a government institution. However, section 38 sets out exceptions to this right.

Where a record contains the personal information of both the appellant and other individuals, section 38(b) of the Act allows the institution to withhold information from the record if it determines that disclosing that information would constitute an unjustified invasion of another individual's personal privacy. On appeal, I must be satisfied that disclosure **would** constitute an unjustified invasion of another individual's personal privacy.

Sections 14(2), (3) and (4) of the Act provide guidance in determining whether the disclosure of personal information would result in an unjustified invasion of personal privacy. Where one of the presumptions in section 14(3) applies to the personal information contained in a record, the only way such a presumption against disclosure can be overcome is if the personal information falls under section 14(4) or where a finding is made that section 16 of the Act applies to it.

If none of the presumptions in section 14(3) apply, the City must consider the application of the factors listed in section 14(2) of the Act, as well as all other circumstances which are relevant in the circumstances of the case.

The City has made no representations on this issue. As I indicated previously, the appellant has made no representations.

The requester has raised the possible application of the factor in section 14(2)(d) (fair determination of rights) to the disclosure of the record. This factor weighs in favour of disclosure of the record. The requester submits that the information is necessary for him to prepare an adequate defence in the civil suit. The requester states that this is a new expedited procedure that relies upon documentation and affidavit evidence but does not include the usual examination for discovery where some or all of the records might be ordinarily obtained.

I have carefully reviewed the record and I find the factor in section 14(2)(d) is relevant in the circumstances of this case with respect to this record. I have not been provided with any factors which weigh in favour of privacy protection in respect of the letter. The record at issue is a letter addressed to the appellant but relates to criminal charges laid against the requester and subsequently withdrawn. In the circumstances of this appeal, the identity of the appellant is known to the requester.

In weighing the right of the requester to his own information against the right of the appellant to the protection of her privacy, I find that, on balance, disclosure of this record would not constitute an unjustified invasion of privacy. I find, therefore, that section 38(b) of the Act does not apply.

## ORDER:

1. I order the City to disclose the record (being the letter from the Crown Attorney to the appellant) to the requester by sending him a copy by **March 14, 1997** but not before **March 10, 1997**.

2. I reserve the right to require the City to provide me with a copy of the record disclosed to the requester pursuant to Provision 1.

Original signed by: February 7, 1997
Mumtaz Jiwan
Inquiry Officer