



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER M-1054

Appeal M-9700252

Municipality of Metropolitan Toronto



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BACKGROUND:

The appellant was a resident in a home for seniors which is operated by the Municipality of Metropolitan Toronto (the Municipality). The appellant was injured in an incident at the home and alleged that her injuries were caused by the actions of her caregiver, an employee of the Municipality. An investigation was conducted by the Municipality and a report was prepared about the incident. The appellant has commenced a legal proceeding for damages in the Ontario Court of Justice (General Division) against the Municipality, the nursing home and the caregiver.

NATURE OF THE APPEAL:

The appellant made a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to the investigation report, as well as “the names, qualifications and statements of all individuals involved with (the appellant's) care at the time of the incident”.

The Municipality located 15 responsive records, comprising 28 pages. Partial access to several pages of these records was granted. Access to 24 pages of records, in whole or in part, was denied by the Municipality, which claimed that the following exemptions contained in the Act applied to them:

- solicitor-client privilege - section 12
- invasion of privacy - sections 14(1) and 38(b)
- discretion to refuse requester's own information - section 38(a).

The appellant appealed the Municipality's decision to deny access. A Notice of Inquiry was provided to the Municipality, the appellant and to nine individuals whose rights may be affected by the disclosure of the information contained in the records (the affected persons). Because the records were created as a result of an investigation into the conduct of an employee of the Municipality, the Commissioner's office asked the parties to consider whether the information falls outside the scope of the Act because of the operation of section 52(3) of the Act.

Representations were received from the Municipality and two of the affected persons.

DISCUSSION:

JURISDICTION

The records at issue fall outside the scope of the Act if they are subject to sections 52(3)1 and 3. Accordingly, the first issue to be determined is whether the records fall within the ambit of these sections, which 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.
- ...
3. Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

The interpretation of section 52(3) 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 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 a result, if I find that I do not have jurisdiction to deal with the records, it will not be necessary for me to deal with the substantive exemptions claimed by the Municipality.

The Municipality submits that the records fall within the parameters of paragraphs 52(3)1 and 3 of the Act.

Section 52(3)3

In order for a record to fall within the scope of paragraph 3 of section 52(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.

(Order P-1242)

Requirements 1 and 2

The Municipality submits that the records were prepared by its employees in relation to meetings and discussions which took place following the appellant's allegations of abuse against the nursing home caregiver. Specifically, the Municipality states that the records were collected and prepared in the course of its investigations into those allegations. It further indicates that these records are now being "used" by its legal counsel to assist in the preparation of the Municipality's defence to the legal action initiated by the appellant.

I find that the records were collected, prepared and are now being used by the Municipality, as well as counsel on its behalf, in relation to various meetings and discussions which took place in the course of the investigation into the appellant's allegations. Accordingly, the first two requirements of section 52(3)3 have been satisfied.

Requirement 3

The Municipality submits that it "has an interest" in the subject matter of the discussions and that they are about labour relations or an employment-related matter. It argues that under the terms of its collective agreement with the bargaining agent for the employees of the nursing home, it is legally required to manage the facility and to discipline employees who are found to be in breach of their responsibilities. The Municipality further submits that failure on its part to meet these obligations may result in a successful grievance by one of its employees.

In my view, the Municipality has confused the legal obligations which it owes to residents of its nursing homes with the duty of non-discrimination it owes to its employees. Failure to properly investigate allegations made against one of its employees by a resident will not give rise to a grievance by the employee, as alleged by the Municipality in its submissions. I find that the possibility of being involved in the grievance process with one of its employees does not grant to the Municipality an "interest" in these records within the meaning of section 52(3)3. Rather, the Municipality's interest in the subject matter of the records, for the purposes of section 52(3)3, has been triggered by the legal proceeding initiated by the appellant against the Municipality, the nursing home and the caregiver.

I find that the meetings, discussions and communications which took place within the nursing home and the Municipality following the receipt of the appellant's allegations were about an employment-related matter, as contemplated by section 52(3)3. The actions of an employee were being impugned and the Municipality took steps to investigate the veracity of the appellant's claims. The investigation was undertaken by the Municipality because of its employer-employee relationship with the individual about whom the allegations were made. Accordingly, I find that the records are about an employment-related matter within the meaning of section 52(3)3.

Finally, and particularly because the appellant has now commenced a legal action against the Municipality, I find that the Municipality has a legal interest, as opposed to a "mere curiosity" in the employment-related matter which is the subject of the records.

All three requirements of section 52(3)3 of the Act have been established by the Municipality. In addition, none of the exceptions contained in section 52(4) are present in the circumstances of this appeal. I find that the records fall within the ambit of section 52(3)3 and are, therefore, excluded from the scope of the Act.

Because of the manner in which I have decided the jurisdictional issue under section 52(3)3, it is not necessary for me to consider the application of the exemptions claimed by the Municipality.

ORDER:

This appeal is dismissed.

Original signed by: _____
Donald Hale
Inquiry Officer

December 23, 1997