



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

ORDER MO-1189

Appeal MA-980161-1

City of Toronto



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NATURE OF THE APPEAL:

The appellant submitted a request to the City of Toronto (the City) under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The request, as clarified by the appellant, was for access to his Ambulance Department/Area Office Employee file, WCB/Health and Safety file, Human Rights file, Legal file, Privacy Complaint file, Grievance files, Commissioner's Office files, and supervisory notes of three named individuals, for the period from 1993 to the date of his request.

The City's decision indicated that records relating to notes of one of the named individuals and the Commissioner's Office file relating to him do not exist. With respect to the remaining parts of the request, the City denied access to responsive records claiming that they consist of employment records and fall outside the scope of the Act pursuant to sections 52(3)1 and 3 of the Act.

The appellant appealed the City's decision that the records at issue fall outside the scope of the Act. The appellant is not appealing the portion of the decision advising him that certain records do not exist.

During mediation the City decided to provide access to the appellant's personnel file titled "1201 Employee file" as the appellant was entitled to access his personnel file under the terms of his collective agreement in any event. This record is, therefore, not at issue in this appeal.

I sent a Notice of Inquiry to the appellant and the City. Representations were received from both parties.

RECORDS:

The records at issue are contained in the following files:

- Incident Report, Complaint, Internal Review file- 20 pages
- WCB District Office file - 114 pages
- Appellant's Employee file - 53 pages
- Grievance files (2) - 18 and 34 pages respectively
- WCB Ambulance Headquarter file - approx. 500 pages
- Human Rights file - 63 pages
- Notebooks/Logbooks - 15 pages
- BE's file - 34 pages
- Privacy Complaint file - 200-300 pages
- JW's file and WCB 1994 file - approx. 250 pages

DISCUSSION:

JURISDICTION

The sole issue to be determined in this appeal is whether the requested information falls within the scope of sections 52(3) and section 52(4) 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, in part:

- (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.

- (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.

Background

The City describes the background to this request in considerable detail and outlines the various

proceedings in which the appellant has been involved. In this regard, the City indicates that the appellant is a full time employee of the City's Ambulance Services Department (the Department). The City notes that all of the current issues arising between it and the appellant stem from an incident in May of 1992, where the appellant attended at the scene of a murder-suicide, in his capacity as an ambulance attendant. Following this incident, the appellant requested assistance from a staff psychologist (the doctor), to help him to deal with the effects of critical stress allegedly arising from attendance at the scene of the murder-suicide.

The City indicates that following the May 1992 incident, the appellant launched a number of administrative proceedings based on his allegation that a breach of confidentiality with respect to his personal information had occurred. These included: grievances against the doctor and his supervisor at the time, under the Labour Relations Act; filing a complaint against the doctor with the Ontario Board of Examiners (OBEP); filing a Human Rights complaint; proceedings to obtain documents under the Act and a privacy complaint under the Act; and a Workers' Compensation claim for compensation related to the May 1992 incident. The City acknowledges that certain of these proceedings have been concluded, however, it submits that they are substantially connected and relevant to current litigation involving the appellant and the City. The City stresses that the records are being and will be relied on in the current legal proceedings.

With respect to the current proceedings between the City and the appellant, the City states that, in 1993, the appellant brought an action against the Department and a number of its staff for damages arising from an alleged breach of confidentiality, which occurred during the course of work related duties. The City indicates that the claim is an insurable one under the OMEX policy held by the former Municipality of Metropolitan Toronto, now the City of Toronto. Further, the City's claim adjuster retained a law firm to defend the action on the City's behalf and a solicitor has been taking instructions from him since that time. The damages the appellant is claiming are limited entirely to an alleged disclosure of confidential information by the doctor and the appellant's supervisor, both of whom are employees of the Department.

The City indicates that in February 1995, an amended Statement of Defence was filed by the solicitor which disputes many of the facts claimed by the appellant.

The City states that it has been advised by the solicitor that the 1993 action brought by the appellant against the Department has not at this time been settled and that a motion for summary judgement was to be heard on January 22, 1999, in the Ontario Court of Justice (General Division) with respect to this matter. The City provided a letter confirming this.

The appellant alleges that the City improperly collects personal information, does not properly maintain and update its files which contain the personal information of its employees, and improperly discloses this information to third parties. The appellant argues that, because of this, files pertaining to individual employees should be available to them so that information can be validated and corrected.

Section 52(3)1

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]

Requirement 1

The City submits that all of the information contained in the files identified above was either collected, prepared, maintained or used in the course of the Department's efforts to respond to the appellant's complaints and concerns arising out of the May 1992 incident. The City states further that in any complaint resolution process involving employment-related or labour relations matters, it relies on documentary evidence in the way of correspondence and/or memos created and compiled by staff in their day-to-day interactions and meetings. The City indicates that these records are an integral and essential part of the matters presently subject to litigation and will be used by the solicitor in this regard.

In reviewing the records, I note that many of them relate to matters other than the May 1992 incident. For example, there are a number of records pertaining to other attendance related issues concerning the appellant and other WCB claims made by him during the course of his employment with the City. That being said, however, I am satisfied that all of the records were collected, prepared, maintained and used by the City or on its behalf (by the solicitor). Therefore, I find that the first requirement has been established.

Requirements 2 and 3

The City indicates that the solicitor has advised it that he intends to rely on these files collectively for his defence of the action brought by the appellant, and that they form part of his brief. The City submits that although certain of the appellant's administrative actions have concluded, the subject matter of these files is substantially connected and relevant to issues related to the May 1992 incident, which is now the subject matter of the litigation which is currently taking place in the Ontario Court of Justice (General Division).

I am satisfied that the 1993 litigation between the appellant and the City is properly characterized as a "proceeding before a court", and that this proceeding relates to issues arising from the employment of the appellant by the City. I find that the records were collected and maintained and will be used by the City in the defence of the action brought against the City by the appellant. This usage is for the purpose of and/or substantially connected to the litigation, and is thus "in relation to" it (Order M-815).

In Order P-1618, Assistant Commissioner Tom Mitchinson considered whether the provision in section 65(6)1, which is the equivalent section in the provincial Act to section 52(3)1, is "time sensitive". He found that:

... in order for section 65(6)1 to apply to these records in the context of the present appeal, it must be established that the proceedings or anticipated proceedings referred to are current or are in the reasonably proximate past so as to have some continuing potential impact for any ongoing labour relations issues which may be directly related to the records.

The City reiterates that this 1993 claim is currently taking place in the Ontario Court of Justice (General Division) and submits that the proceedings have continuing potential impact for ongoing labour relation issues which are directly related to the records in this appeal.

I have not been advised as to the results of the January 22 motion. However, I am satisfied that the legal proceedings between the appellant and the City are, if not currently being litigated, then in the "reasonably proximate past so as to have some continuing potential impact for any ongoing labour relations issues". Consequently, I find that the records in this appeal were collected, prepared, maintained or used by the City, that they are now collectively in use in relation to a legal proceeding, and that the proceeding relates to the employment of the appellant. Therefore, the three part test of section 52(3)1 has been met, and the records fall outside the jurisdiction of the Act.

Because of these findings it is not necessary for me to consider the possible application of section 52(3)3 of the Act.

ORDER:

I uphold the City's decision.

Original signed by: _____
Laurel Cropley

February 18, 1999

Adjudicator