



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

ORDER MO-1300

Appeal MA-990132-1

City of Toronto



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NATURE OF THE APPEAL:

During a review of his personnel file at the City of Toronto (the City), the appellant was told that there were four sealed envelopes containing documents which he was not permitted to view. The appellant then made a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) to the City for access to the contents of all sealed envelopes contained within his personnel file.

The City denied access to the requested records, claiming that these records were excluded from the scope of the Act pursuant to sections 52(3)1 and 53(3)3 of the Act.

The appellant appealed the City's decision, indicating that the records should be covered by the Act. The appellant further indicated that a grievance which was outstanding at the time of his request has been withdrawn.

RECORDS:

The records at issue consist of documents contained in four sealed envelopes within the appellant's personnel file. Each envelope is marked with the appellant's name. The first contains information which relates to two grievances, one filed in September 1997 and resolved in January 1998, and the other filed in July 1998 and withdrawn by the appellant in May 1999. This envelope is marked "to be opened only by direct managers." The second envelope contains a copy of a letter sent to the appellant in 1996 about reporting late for work. The third envelope contains information relating to attendance issues involving the appellant between 1995 and 1998, and is also marked "to be opened only by direct managers." The fourth envelope is marked "third party info" and contains a memo sent in 1991 from another City employee about the appellant.

DISCUSSION:

In this appeal, the only issue to be decided is the interpretation of sections 52(3) and (4) of the Act. These amendments to the Act may apply to the records requested by the appellant.

If section 52(3) applies, and none of the exceptions found in section 52(4) apply, section 52(3) has the effect of excluding records from the scope of the Act.

In order for a record to fall within the scope of section 52(3)1, the City must establish 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.

In order to fall within the scope of paragraph 3 of section 52(3), the City must establish 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 meetings, consultations, discussions or communications; **and**
3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the City has an interest.

The City submits that three of the envelopes had been part of the appellant's supervisor's files and were placed in the appellant's personnel file for safekeeping upon the supervisor's departure from employment with the City. The City claims that the records in all four envelopes were either collected, prepared, maintained or used by the City with respect to the appellant's employment, in particular his grievance. All of the meetings, consultations, discussions or communications referred to by the City in its representations relate to the appellant's grievance.

The appellant questions whether his grievances are directly related to the records in the envelopes.

In Order P-1223, Assistant Commissioner Tom Mitchinson reviewed several possible interpretations of the phrase "in relation to" and concluded:

... in my view, the case law does provide a clear indication that in order to be "in relation to" something, the activity or object in question must do more than merely "affect" that thing; there must be a substantial connection between the activity and the thing to which it is supposed to be "in relation."

Applying this interpretation to the particular circumstances of this appeal, in order for me to find that the WDHP report was prepared in relation to the grievance proceedings, it would not be sufficient that this activity had an impact on the grievance proceedings. In my view, in order for the preparation to have been "in relation to" the proceedings, a more substantial connection would be required. The question is, how substantial does this connection have to be?

Following the approach taken in the constitutional cases, the connection must be fairly substantial. 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.

I agree with Assistant Commissioner Mitchinson.

The first envelope

Having reviewed the records at issue in this appeal, it is my view that there is an obvious and
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substantial connection between the City's collection, preparation, maintenance and use of the records in the first envelope and the meetings, consultations, discussions and communications about the appellant's grievance.

Further, the appellant is a member of the Canadian Union of Public Employees (CUPE), Local 79, and filed his grievance under the Collective Agreement which governs the relationship between the City and CUPE. I am satisfied, therefore, that the meetings, consultations, discussions or communications about his grievance were about labour relations matters.

The appellant submits that because the supervisor whose conduct was the subject of his grievance has left the employ of the City and because he has withdrawn his grievance, the context has changed. He submits that the City has no remaining interest capable of affecting its legal rights or obligations.

The City argues that although the appellant's supervisor left her employ with the City, labour relations issues are procedurally carried forward from one manager to another. Further, the City states that the appellant withdrew his grievance on a without prejudice basis, and he can reinstate his grievance at any time.

In Order M-1128, Adjudicator Laurel Cropley considered a request for the appellant's application for employment and related documentation. In considering whether an institution "has an interest," Adjudicator Cropley concluded that there must be a reasonable prospect that this interest will be engaged. She states:

The records at issue in this discussion were collected and used by the Police over ten years ago. There is no indication from either the appellant or the Police that the hiring process has been challenged or is at issue in any way. The fact that no action has been taken in this regard since the appellant was hired leads me to conclude that there is no reasonable prospect that the institution's legal interest in the circumstances of this hiring would be engaged in the future.

In this appeal, the grievance was withdrawn after the City issued its access decision and before the appellant appealed that decision to this office. The grievance was withdrawn on a "without prejudice" basis, such that it can be reactivated by the appellant at any time. I am satisfied that there is a legal forum in which the appellant can challenge the City with respect to his grievance under the terms of the collective agreement with CUPE. The matter has not been resolved, and given the timing and circumstances under which the appellant withdrew the grievance, I find that there is a reasonable prospect that the City's legal interest in this matter could be engaged in the future.

Accordingly, I find that the records in the first envelope were collected, prepared, maintained or used by the City in relation to meetings, consultations, discussions or communications about labour relations matters in which the City has an interest, and section 52(3)3 applies.

The second, third and fourth envelopes

With respect to the information in the second, third and fourth envelopes, although the appellant's most recent grievance involved an allegation that he was being harassed by his supervisor, the allegation stemmed from his request to attend a course. The records in the second, third and fourth envelopes relate to other issues, specifically the appellant reporting late for work, other attendance issues, and the memo written by the other employee nine years ago. Further, it is expected that an employer would collect, prepare, maintain

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and use these types of records for the purpose of and as a result of its everyday responsibilities as employer.

Although the City states that the information in the second, third and fourth envelopes was collected, prepared, maintained and used in relation to the appellant's grievance, it has not substantiated this claim with evidence or even argument.

Based on my review of the information before me, I am not satisfied that there is a substantial connection between the records in these three envelopes and the meetings, consultations, discussions or communications about the appellant's grievance. For the same reasons, I am not satisfied that these records were collected, prepared, maintained or used in relation to anticipated proceedings relating to the appellant's recently withdrawn grievance either. Accordingly, I find that sections 52(3)1 and 3 do not apply to the records in the second, third and fourth envelopes.

ORDER:

1. I uphold the City's decision with respect to the records in the first envelope.
2. I order the City to issue a decision to the appellant regarding access to the remaining records in accordance with sections 19, 22 and 37(2) of the Act, treating the date of this order as the date of the request.
3. I order the City to provide me with a copy of the decision letter referred to in Provision 2 by sending a copy to my attention, c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario M5S 2V1.

Original signed by: _____ May 9, 2000
Holly Big Canoe
Adjudicator