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

ORDER MO-1296

Appeal MA-990212-1

City of Toronto

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NATURE OF THE APPEAL:

The appellant is involved in civil litigation arising from a motor vehicle accident. In connection with this matter, the appellant made a request to the City of Toronto (the City) under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for a complete copy of his employment and medical files.

The City located responsive records and denied access to them on the basis that they fall outside the jurisdiction of the Act pursuant to sections 52(3)1 and 3 of the Act.

The appellant appealed the City's decision. In doing so, the appellant attached a copy of the Statement of Claim relating to the motor vehicle accident litigation. He stated that the request for a copy of the employer's file is a regular request in litigation of this type as a person's ability to work and loss of income are in issue. He stated further that the claim has nothing to do with labour relations or his employment.

I sent a Notice of Inquiry to the City, initially. The City submitted representations in response. I enclosed the non-confidential portions of these representations with the Notice of Inquiry which was then sent to the appellant. The appellant did not submit representations.

RECORDS:

The City originally sent 390 pages of records to this office consisting of the appellant's employment file and his medical file. Along with its representations, the City enclosed an additional 20 pages of records which were located in its Finance Department. The City states that these records were located during the preparation of its representations and believes that they are also responsive to the request. The City states further that these records are also excluded from disclosure pursuant to sections 52(3)1 and 3.

The records include attendance and payroll documents, letters and memoranda regarding absenteeism, injury reports, performance reviews, application forms, physical examinations, assessments and evaluations reports, medical notes, insurance and WCB/WSIB decision letters, financial information pertaining to the appellant's WCB/WSIB claim, various memos and letters relating to the employee's medical condition.

DISCUSSION:

JURISDICTION

The sole issue to be determined in this appeal is whether the requested information falls within the scope of paragraphs 1 and 3 of section 52(3) and section 52(4) of the Act. 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) applies, then the record is excluded from the scope 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 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.

[Order P-1242]

Requirements 1 and 2:

The City provides a detailed outline of the appellant's employment, commencing in 1994. The primary focus of this outline is the medical/injury, attendance and WCB history of the appellant as an employee of the City, and includes information pertaining to the financial arrangements which were made between the City and the appellant in advance of his WCB claims. With respect to the WCB matters, the City indicates that the appellant's WCB (now WSIB) claims were denied and the appellant was requested to repay the amounts advanced to him. The City indicates that the appellant is currently on leave without pay.

The City submits that the records at issue were either collected, prepared, maintained or used by it in relation to meetings, consultations, discussions or communications about the appellant, specifically about his attendance, performance, medical condition and assessments, WCB/WSIB insurance claims and appropriate workplace accommodation.

I am satisfied that there have been on-going issues between the City and the appellant since he began employment with the City and that all of the records at issue were collected, prepared, maintained and used by the City in connection with these issues. I find further that these records were collected, prepared, maintained and used in relation to meetings, consultations, discussions and communications about the appellant. Therefore, I find that the first two requirements have been met.

Requirement 3:

The City submits that these meetings, consultations, discussions and communications all relate to employment-related matters pertaining to the appellant. In this regard, the City states that medical assessments and evaluations or an employee's ability to perform his duties, insurance claims arising from employment and activities relating to finding suitable workplace accommodation are all employment-related matters.

I am satisfied that the meetings, consultations, discussions or communications were about matters pertaining to, or arising from the appellant's employment with the City, in particular, his performance, absenteeism, injuries sustained on the job, accommodation and issues relating to his WCB/WSIB claims. Therefore, I find that the first part of this requirement has been met.

The only remaining issue is whether these are employment-related matters in which the City has "an interest".

In Order P-1242, Assistant Commissioner Tom Mitchinson stated the following regarding the meaning of the term "has an interest":

> Taken together, these [previously referenced] 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.

A number of orders have considered the application of section 65(6)3 of the provincial Act (and its municipal equivalent in section 52(3)3) in circumstances where there is no reasonable prospect of the institution's "legal interest" being engaged (Orders P-1575, P-1586, M-1128, P-1618 and M-1161). Specifically, this line of orders has held that an institution must establish an interest, in the sense that the matter has the capacity to affect its legal rights or obligations, and that there must be a reasonable prospect that this interest will be engaged. The passage of time, inactivity by the parties, loss of forum or conclusion of a matter have all been considered in arriving at a determination of whether an institution has the requisite interest. Orders P-1618, P-1627 and PO-1658, all of which applied this reasoning, were the subject of judicial review by the Divisional Court and were upheld in Ontario (Solicitor General and Minister of Correctional Services) v. Ontario (Information and Privacy Commissioner) (March 21, 2000), Toronto Doc. 681/98, 698/98, 209/99.

The City submits that it has a current legal interest in the employment-related matters relating to the appellant and that there is a reasonable prospect that its interests will be further engaged. In this regard, the City notes that the appellant is currently on leave without pay. The City indicates that the issues relating to the appellant's medical/physical condition and finding appropriate workplace accommodation for him is on-going. The City states that the medical reports it has received indicate the nature of the work that the appellant should be able to perform. It states further that the appellant has disputed their findings and has indicated that he is going to seek another medical opinion. The City indicates that the appellant was advised that when he feels he is ready to work in the positions which were recommended by the medical reports, he is to contact the City. According to the City, he has not yet done so.

The City states that it has an on-going legal obligation under the Ontario Human Rights Code and the Collective Agreement which governs the appellant's employment relationship with the City to try and find suitable workplace accommodation for the appellant and that it must continue to determine the best steps to take to return the appellant to work. The City indicates that if the appellant remains dissatisfied with any steps or decisions taken by the City in this matter, he has the right to file a grievance or a human rights complaint, although the City does not indicate that he has actually done so or that he has expressed an intention to do so.

The City indicates further that it is currently trying to recover the money that was advanced to the appellant in connection with his WCB/WSIB claims. The City states that, although requested to do so, the appellant has made no efforts to repay the amounts owing. The City claims that it has a legal obligation to recover this money as it has been paid from the public purse. The City details the steps it is currently taking with respect to the collection of these funds.

Although I recognize that the appellant is seeking access to the records to assist in preparing for the litigation arising from a motor vehicle accident, they are also relevant to employment-related matters between himself and the City. In this regard, there are two primary issues in which the City has claimed a legal interest. The first pertains to workplace accommodation.

In determining whether the City has established a legal interest in the issue of workplace accommodation, I must decide whether its representations indicate only a "mere possibility of future legal action" or whether there is "something that arises to give reality to the prospect or anticipation of such action" (Order PO-

1718). As I noted above, the City does not indicate that the appellant has taken any action to date or that he has expressed an intention to do so. However, it is clear from the City's representations that the matters pertaining to his accommodation are on-going, that he has expressed dissatisfaction with the steps taken by the City in this regard and that the matter has not been resolved. In these circumstances, I find that there is a reasonable prospect that the City's legal interest in the employment-related matter pertaining to workplace accommodation will be engaged in the future.

The second legal interest claimed by the City pertains to the money owing by the appellant to the City in repayment for funds advanced in anticipation of his WCB/WSIB claim, which was ultimately unsuccessful. I accept that this money has not been repaid and that the City is currently taking steps to recover it. I am satisfied that the City has established a current legal interest in this employment-related matter.

Accordingly, I find that the City has established that the records were collected, prepared, maintained and used by it in relation to meetings, consultations, discussions or communications about employment-related matters in which it has an interest. Therefore, all three requirements have been met.

I find further that section 52(4) does not apply to the records in the circumstances of this appeal.

As a result, the records fall outside the jurisdiction of the Act.

ORDER:

I uphold the City's decision.

Original signed by: April 27, 2000
Laurel Cropley
Adjudicator