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

ORDER MO-1426

Appeal MA_000231_1

City of Toronto

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NATURE OF THE APPEAL:

The appellant had been a long-term municipal employee, first with the former City of Etobicoke and then with the City of Toronto (the City). He was dismissed from employment in January 2000 for unauthorized absence from work, apparently connected to a specific medical problem.

He submitted a request to the City under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for all records pertaining to his employment with the City of Etobicoke and the City, while he reported to named individuals. The request included his Employee Health and Employee Assistance Program (EAP) records.

The City denied access to the responsive records in their entirety on the basis that they fell outside the scope of the *Act* pursuant to sections 52(3)1 and 52(3)3 of the *Act*.

The appellant appealed the City's decision. In his letter of appeal, the appellant indicates that he was dismissed from employment without severance and has requested the records to assist in a hearing relating to unemployment insurance benefits.

This office sent a Notice of Inquiry to the City, initially. The City submitted representations in response and the non-confidential portions of them were then sent to the appellant along with the Notice of Inquiry. The appellant also submitted representations.

The City indicates in its submissions that during the preparation of the submissions, additional records were located. The City attached the records to its submissions and states that they also fall outside the scope of the *Act* pursuant to section 52(3). These records are included in the description of records below.

RECORDS:

The records at issue in this appeal include correspondence, memoranda, notes/chronology in the Employee Assistance file, e-mails, performance evaluations, Multi-Focus Reviews, Application for Employment, Employment and Salary Verifications, Requests for Leave, a Letter of Understanding and other employment and health-related documentation.

DISCUSSION:

APPLICATION OF THE *ACT*

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

Section 52(3) is record-specific and fact-specific. The test is whether the section applies to a specific record in the circumstances of a particular appeal. If the section does apply to a record and none of the exceptions listed in section 52(4) is present, then the section 4(1) right of access

does not apply to that record. In this case, it was not submitted that section 52(4) is relevant and I am satisfied that it does not apply.

The City has relied on paragraphs 1 and 3 of section 52(3) in denying the appellant access to the records. These sections provide:

> 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.

Section 52(3)3

To qualify under paragraph 3 of section 52(3), the City must establish that:

1. the records were 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.

Requirements 1 and 2

The City submits that it collected, prepared, maintained or used the records at issue in relation to meetings, consultations, discussions or communications about the appellant, specifically about the medical problems affecting his attendance and his ability to perform his duties, the events leading to his eventual termination and the efforts of the City to obtain treatment for him both before and after his termination.

The appellant argues on the other hand that the requested records are those collected prior to his dismissal as part of the City's normal practice of maintaining a Personnel File.

The records fall into two categories: those which would have been routinely created as part of the normal employment practices of the City, such as the appellant's application for employment and the various performance appraisals that were conducted over the term of his employment; and those that were created by various staff relating to issues arising in connection with the

appellant's medical problems, such as the notes made by the EAP counsellor and e-mails pertaining to the appellant's attendance at work and participation in treatment programs.

The second category of records was clearly prepared and used in relation to meetings, consultations, discussions and communications about the appellant and the difficulties he was experiencing in the workplace arising from his medical problems.

The first category of records relates to the appellant's ability to perform in the workplace and assessment levels of that performance. It is reasonable to expect that these types of records would be used by an institution in considering and assessing an employee's performance once problems arise. I am satisfied that the first category of records was collected, prepared, maintained or used by the City in relation to these meetings, discussions, consultations and communications about the appellant and his continued employment with the City.

Accordingly, I find that the first two requirements have been met.

Requirement 3

Section 52(3)3 requires that the meetings, consultations, discussions or communications must be "about labour relations or employment-related matters".

The City submits that issues about an employee's attendance and job performance including any medical problems affecting his ability to do his job and efforts to assist the employee with these medical problems are all employment-related matters. The City notes that the appellant was employed in a managerial position and was not part of a union.

It is clear that the meetings, consultations, discussions and communications amongst various City staff were focussed on the ability of the appellant to perform his duties as an employee with the City and, as such, they were about employment-related matters.

The only remaining issue is whether this is an employment-related matter 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 52(3)3 of the *Act* (and its provincial equivalent in section 65(6)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 Docs. 681/98, 698/98, 209/99.

The City addresses this issue as follows:

> As indicated in the background, there have been ongoing issues relating to the appellant's medical and associated attendance problems. This eventually led to the termination of the appellant's employment, although the City continued to be involved in trying to obtain treatment for him with a view to returning him to work.
>
> The appellant has informed the City that he has retained a named lawyer to file a wrongful dismissal suit against the City and a personal suit against his former Manager. He has also contacted his association COTAPSAI to assist him. although not recognized at present as a union with bargaining rights, COTAPSAI is an association for managerial staff that provides confidential support and legal advice on employment issues and options for resolving disputes. As well, COTAPSAI monitors the application of City policies and practices for fairness and equity.

The City acknowledges that, to date, no litigation has arisen as a result of the appellant's termination, but indicates that this is still, in its view, a possibility. The City notes that the appellant may also file a human rights complaint with the Ontario Human Rights Commission pursuant to the *Human Rights Code* if he feels that he has been discriminated against in the termination of his employment. The City refers to particular passages of the records as providing a basis for its position that the issues relating to the appellant's termination of employment have not been resolved or settled to his satisfaction.

The appellant takes issue with the City's statement that he has retained a lawyer in order to pursue civil suits against the City and/or his former Manager as well as the City's position that it has made efforts to return him to work. He attached an affidavit to his submissions in which he states:

> 1. I at no time have retained the services of a Lawyer to represent me in a wrongful dismissal suit against my former employer, the City of Toronto, or any personal suit against my Supervisory or Managerial staff of the City or any of its other employees, past or present, nor have I stated that I have done so to the City of Toronto (my former employer).
>
> 2. COTAPSAI (City of Toronto Administrative, Professional, and Supervisory Association Inc.) is an association of which I am a member. COTAPSAI provides information, support and advice to

its members with respect to the resolution of disputes between managerial staff and the City of Toronto.

3. I have dealt solely with COTAPSAI as my representative in the matter of my dismissal and have contacted them for their advice and direction only.

4. I have first hand knowledge of records personally submitted by me to my previous Manager and placed in a Personnel File in his office in the fall of 1999. These records were not present in my official Personnel File as presented for review to COTAPSAI and myself following my dismissal.

5. I have no knowledge of any efforts made on the part of the City of Toronto to return me to work following my formal termination on January 4th, 2000.

In reviewing the records at issue, the statements made by the appellant and the various actions taken by the City in attempting to deal with the appellant's problems and in returning him to employment are well documented. Moreover, the documentation is sequential and consistent with the other information recorded in the records. I accept the appellant's sworn statement that he has not, at this time, actually retained legal counsel. However, given the circumstances during the time at which many of his statements were made, he may well have no recollection of having made them. That does not negate the fact that they were made. In this regard, based on the internal consistency within the records themselves, I accept that the City's expectation that the appellant intended to pursue legal action against it was well-founded.

The appellant was employed by the City for over 20 years. It is apparent from the records that the appellant's circumstances over the last year of his employment were very difficult for him. In his letter of appeal and during discussions with the Mediator (which are not subject to mediation privilege), the appellant expresses the difficulties he is facing as a result of the loss of his employment. He states in his letter of appeal:

> I was dismissed from my continuous employment of more than 24 years with the City of Toronto (formerly the City of Etobicoke) on January 4th of this year without ANY form of Severance whatsoever.
>
> I, along with the Management Association, COTAPSAI, who represent me have been trying unsuccessfully since March of this year to access my records in preparation for a hearing before the E.I. Commission to determine whether or not I am entitled to coverage as a result of inappropriate dismissal or for medical coverage due to illness.
>
> Records that we (i.e. - COTAPSAI and myself) have been granted access to prior to this latest attempt are not complete, and in fact do not even have any written reference to my dismissal or Medical Documents which I myself provided in

> person to the manager of my Division with the assurance that they would be placed in my file.
>
> ...
>
> As a result of the City's "beating around the bush" attitude towards granting me access to the requested files I am now on social Assistance with no other source of income or any coverage under Employment Insurance pending a hearing for which these records are required. I find it difficult to comprehend the City's denial of my access to these records and would appreciate a favourable and timely decision in this matter from your office in order that I may dedicate my time to finding employment once again. [emphasis in the original]

The appellant does not address the results of the hearing before the Employment Insurance Commission in his submissions. I am, therefore, not able to determine that they are concluded. Similarly, the City has not identified this hearing as a potential concern and I am not prepared to find that it has a bearing on its legal interest.

However, based on all of the circumstances surrounding the appellant's dismissal, including contact between the appellant (along with, on occasion, a COTAPSAI representative) and the City over a period of six months following his termination (up to the date of his access request), I find that the matter relating to its actions in terminating his employment continues to have the capacity to affect the City's legal rights or obligations. In this regard, the various legal actions open to the appellant remain foreseeable and the records provide the historical context and/or evidence which the City would use to support its actions. In addition, it is not unreasonable to expect that the overall decision-making process relating to the appellant's employment, the manner in which his medical problems were dealt with by staff and his ultimate termination will continue to be an issue with the appellant and in all likelihood, the COTAPSAI, thus involving the City in any future discussions on this issue, which, in my view, is sufficient to engage its legal interest in the matter.

Therefore, I am satisfied that the City has established the requisite degree of legal interest in the employment-related matter to which the records relate to support a finding that the records continue at present to fall outside the scope of the *Act*.

Because of these findings, it is not necessary for me to consider the application of section 52(3)1.

ORDER:

I uphold the City's decision.

Original signed by: April 27, 2001
Laurel Cropley

Adjudicator