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

FINAL ORDER MO-1576-F

Appeal MA-010143-2

City of Toronto

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NATURE OF THE APPEAL:

The appellant submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the City of Toronto (the City). The request was for information pertaining to the Riverdale Farm, and included:

1. records relating to *Occupational Health and Safety Act* (the *OHSA*), section 61 orders of an inspector concerning the City of Toronto or the union for its outside workers or Riverdale Farm on Winchester Street, Toronto
2. records relating to the City of Toronto Riverdale Farm as a farm operation according to the *OHSA*.
3. records believed to be with the Parks and Recreation Department of all Rare Breeds of Canada leases of animals for any and all animals at the Riverdale Farm
4. records believed to be with the Parks and Recreation Department of any and all leases of any and all farm animals at Riverdale Farm and in particular

    a) the 2 Clydesdale horses known as Rooster and Dolly
    b) the White Park cow known as Blanca
    c) the Jersey cow known as Bella
    d) the Canadian cow known as Kyline
    e) the donkey known as Dusty
    f) any of the pigs, turkeys, chickens goats or sheep

5. records believed to be with the Parks and Recreation Department of any ownership for 4a) to 4d) inclusive at Riverdale Farm and in particular for the Clydesdale horses Rooster and Dolly

In his request letter, the appellant noted that he is an elected member of the Riverdale Farm Advisory Committee and that the committee is authorized to advise the Parks and Recreation Department on matters relating to Riverdale Farm. He further advised that the committee was to have received copies of the requested records from the Toronto Parks and Recreation Supervisor, but had not received them.

The City responded to the appellant's request, and granted access as follows:

- full access to 14 records relating to the *OHSA*, section 61 orders;
- full access to the leases for certain animals; and
- partial access to the leases for certain animals (owners names severed out), based on section 14(1).

In addition, the City indicated to the appellant that it does not have the following records:

- leases with Rare Breeds of Canada (The City indicated that it has lease agreements with individual farmers and not with Rare Breeds of Canada);
- leases for the Jersey cow (The City indicated that it is not yet in possession of the lease for the Jersey cow);

- lease for the donkey (The City indicated that it owns the donkey).

The appellant appealed the City's decision, in part on the basis that more records exist.

During mediation the mediator sought clarification of the records sought by the appellant. Additionally, during the mediation process, the City indicated that it was continuing to check for additional records and that it was considering releasing the names of the owners of the leased animals.

a) Clarification of Records Sought by Appellant

The appellant sent a letter on September 10, 2001 clarifying which records he wished to access. In this regard, he indicated that he wished to access the following records, which had been referenced in the records provided to him, but which were not furnished to him:

- Records arising out of the consultation by the City with Rare Breeds Canada in 1999/2000 and Ontario Farm Safety Association in 1999/2000
- Copy of Ministry of Labour written order 844370 Order 02
- Records of consultation between City's Legal and Parks and Recreation South District departments
- Records of consultation/review of standard operating procedures with "Business Unit" Corporate Health and Safety Parks Joint Health Committee and staff in 2000
- Record Page 3a, Memo to two named individuals dated February 27, 2001
- Records after February 26, 2001 relating to the removal of the White Park cow
- Records after February 26, 2001 concerning "in future no animals with horns be accepted at Riverdale Farm"

He also indicated that he wished to know whether the City considers the *OHSA* to apply to Riverdale Farm or only Riverdale Park outside the farm fences. He stated that he believes that there is a consultant's report to the City concerning the application of the *OHSA* to Riverdale Farm. He believes that there must have been a legal opinion prepared on this issue.

b) The location of additional records and the City's Revised Decision

Following its search for additional records, the City of Toronto issued a revised decision letter to the appellant in which it:

a) granted access to the previously severed information contained in Records 15, 18-19 and 23-24 relating to the lease of the farm animals;
b) identified additional responsive records and then claimed that they fell outside the scope of the *Act* on the basis of sections 52(3);
c) advised that no records exist for the balance of the records requested.

The City specified that it was relying on sections 52(3)1 and 3, as it had prepared, collected, maintained or used the records for:

- proceedings or anticipated proceedings before a tribunal relating to the employment of an employee of the City. The City indicated that there has been a dismissal hearing as well as an ongoing arbitration relating to a number of the records;

- meetings, consultation and discussions relating to labour relations and/or an employment related matter in which the City of Toronto has interest, including the special Joint Health and Safety Committee meeting to discuss a work refusal.

Further mediation could not be effected and the appeal was moved into adjudication. I sought representations from the City, initially and sent it a Notice of Inquiry setting out the facts and issues on appeal.

The City submitted representations in response. After reviewing them, I decided to split the issues on appeal. In particular, I decided to place the issues relating to the application of section 52(3) to the records in category one (identified below) on hold pending the outcome of a leave to appeal application made by this office (the IPC) to the Supreme Court of Canada. This application was made in response to the decision of the Ontario Court of Appeal in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (leave to appeal refused [2001] S.C.C.A. No. 509), in which the court found that the Commissioner's interpretation of section 65(6) (the provincial equivalent to section 52(3)) was incorrect.

In order to address the remaining issue in a timely manner, I decided to proceed with the reasonableness of search issue, and sought representations from the appellant on this issue only. I disposed of the reasonable search issue in Interim Order MO-1528-I.

On June 13, 2002, the Supreme Court of Canada dismissed the IPC's application and, therefore, the Court of Appeal's decision stands. I subsequently sought representations from the appellant on the possible application of section 52(3) to the records at issue in category one. I provided the appellant with the non-confidential portions of the City's original representations that address this issue. In addition, I asked the appellant to provide representations on the applicability of the Court of Appeal decision, as well as a recent order of this office considering that decision (Order MO-1560-R), in the circumstances of this appeal.

The appellant did not submit representations.

RECORDS:

The records at issue in the appeal are:

Category one records - those records identified by the City of Toronto as being subject to section 52(3), as per its revised decision letter:

- Ontario Ministry of Labour Premise/Project forms 88270, 844367, 844368, 844369, 844370, 844372, and 844382.
- Letter from the Chair of the Joint Health and Safety Committee to CUPE Local 416 dated May 18, 2000
- Letter from the union to the Ministry of Labour
- Internal memo dated May 1, 2000
- Minutes of a special Joint Health and Safety Committee meeting held on May 17, 2000
- Undated compliance plan

DISCUSSION:

APPLICATION OF THE ACT

Introduction

As indicated above, the City relies on section 52(3) to deny access to the above-noted records. Section 52(3) is record-specific and fact-specific. If section 52(3) applies to the records, and none of the exceptions found in section 52(3) applies, then the records are outside the scope of the *Act*.

The City claims that paragraphs 1 and 3 of section 52(3) apply to the records. I will first consider the application of section 52(3)1.

Section 52(3)1

Section 52(3)1 reads as follows:

> 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:
>
> > 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.

In order for the records to qualify under 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.

Requirements 1 and 2

The City indicates that a Farm Attendant "conducted a work refusal" because she felt her personal safety was in danger. The City notes that a Ministry of Labour Inspector subsequently performed an inspection at the Riverdale Farm and issued an Occupational Health and Safety Premise/Project Form pursuant to the *OHSA*. The Farm Attendant subsequently, through her union, filed a grievance.

The City submits that the records at issue were collected, prepared, maintained or used by the City in relation to the grievance and subsequent arbitration of it. Relying on previous orders of this office (Orders M-815, M-1107 and M-1034), the City submits that this collection, preparation, maintenance and usage was in relation to proceedings or anticipated proceedings before a court, tribunal or other entity.

In Order M-815, Assistant Commission Tom Mitchinson found that the arbitration process under the collective agreement between an institution and an appellant's union is "a dispute or complaint resolution process conducted by a court, tribunal or other entity which has, by law, binding agreement or mutual consent, the power to decide grievances" and is properly characterized as a proceeding for the purposes of section 52(3)1.

He also found that an arbitrator has the authority to conduct "proceedings" and the powers to determine matters affecting rights, and is properly characterized as an 'other entity" (Orders M-1107 and M-1034).

I agree with the Assistant Commissioner's findings regarding the grievance arbitration process. Based on the City's representations and my review of the records, I am satisfied that they were collected, prepared, maintained or used in relation to proceedings (the grievance arbitration) before a court, tribunal or other entity. Accordingly, I find that the first requirement has been met.

Requirement 3

The City states that the Farm Attendant filed her grievances under the collective agreement between the City and her union. The City submits that the grievance proceedings relate both to labour relations and to the employment of a person by the City.

In Order M-1107, Assistant Commissioner Mitchinson considered an appeal involving records relating to a grievance. He concluded:

> "[L]abour relations" for the purposes of section 52(3)1 is properly defined as the collective relationship between an employer and its employees (Order P-1252).
>
> The appellant filed his grievance in accordance with the collective agreement between the Board and his union.
>
> Accordingly, I find that the grievance arbitration is a proceeding relating to labour relations, and the third requirement of section 52(3)1 has been satisfied.

The City notes that the grievance was on-going at the time the appellant made his request, but was subsequently resolved by way of settlement. The City indicates that Minutes of Settlement were signed shortly after the City received the request but prior to the submission of its representations in this appeal.

I agree with the conclusions in Order M-1107, and find that the grievance proceedings pertaining to the Farm Attendant's grievances are proceedings relating to labour relations. Accordingly, I find that the third requirement has been met, despite the fact that the proceedings are no longer continuing. The judgment of the Court of Appeal for Ontario in *Ontario (Solicitor General)* makes it clear that section 52(3) can apply, despite the passage of time or change of circumstances, including conclusion of the matter, as long as the requirements of the section are met at the time the records were collected or prepared (see: Orders MO-1560-R and PO-2038).

Based on the above, I find that all three requirements of section 52(3)1 are met. In addition, I find that none of the section 52(4) exceptions applies. Therefore, the *Act* does not apply to the records at issue in Category One. Accordingly, it is not necessary for me to make a finding on the application of section 52(3)3.

ORDER:

I uphold the City's decision that the *Act* does not apply to the records in Category One.

Original Signed By: October 7, 2002
Laurel Cropley
Adjudicator