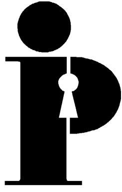

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-2507

Appeal MA09-229

City of Ottawa

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BACKGROUND:

The City provided background information surrounding the creation of the record at issue in this appeal. According to the City, the majority of the work force in OC Transpo, which is the branch of the City that provides transit services within the City, is represented by a local branch of the Amalgamated Transit Union (the "Union"). The previous collective agreement between the City and the Union expired on March 31, 2008. A significant area of disagreement between management and the Union was over how to schedule bus operator shifts. Management was not satisfied with some scheduling provisions that it had agreed to in the previous collective agreement. Throughout the second half of 2008, management was experimenting with new scheduling scenarios with a view to maximizing efficiency and cost-savings. The City and the Union were unable to resolve their outstanding bargaining issues, including operator scheduling. As a result, the Union membership elected to strike and the strike began on December 10, 2008.

The record was created in November 2008 and contains information relating to scheduling cost savings. It was used by the City as an internal document to assist in attempting to resolve the labour issue of scheduling with the Union.

On January 29, 2009 the strike ended when the Union and the City agreed to send every outstanding issue, including the scheduling issue, to binding arbitration pursuant to Part I of the *Canada Labour Code* (R.S., 1985, c. L-2). On October 9, 2009, the Arbitrator released his Award. The Award sets out a new scheduling method to which the parties are obligated to abide. The arbitrator left open the possibility that the parties would return to him for further clarification should they disagree about the scope of this method. The parties have encountered disagreements on the required language related to the scheduling of operators for inclusion in the collective agreement. The parties are currently seeking direction from the arbitrator and there remains no final agreement on the scheduling issue.

NATURE OF THE APPEAL:

The City received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for:

> The calculation that derived the $3.4 million/year cost savings, if scheduling is controlled fully by OC [Transpo], as advertised almost daily throughout the two month strike."

The City issued a decision as follows:

> …Please be advised that a thorough search of the City's records was undertaken for records responsive to your request. We have determined that at the time your request was received, no records existed that responded to the subject matter of your request. Please note that the cost savings of $3.4 M that you are enquiring about and that City staff and officials publicly discussed earlier this year, were working estimates only. As such, these working estimates formed part of the

> City's constantly evolving and ongoing consideration of strike-related issues and consequences, and records concerning these estimates were not kept by City staff.
>
> A one-page record exists containing costing information related to scheduling, but not relating to the $3.4 M figure that was the subject of your request. This one page record, as well as any other records existing at the City which contain information concerning the scheduling of operators at Transit Services, as well as other issues related to labour relations, will not be disclosed by the City at this time. These records have been produced or are being used for the purposes of ongoing interest arbitration matters between the City and the labour union, and the records pertain to labour relations matters. Consequently, the City is excluding this one page record from the application of the *Act* pursuant to the labour and employment law exclusion provided in s. 52(3) of the *Act*…"

The requester, now appellant, appealed the decision.

During mediation, the City issued a supplementary decision letter to the appellant advising that it continues to rely on section 52(3) of the *Act* to withhold the record at issue and, in the alternative, is also relying on sections 11(e), 11(f) and 11(g) (economic and other interests) of the *Act*. As the appeal was not resolved at mediation, the file was moved to adjudication, where an adjudicator conducts an inquiry.

I sent a Notice of Inquiry, setting out the facts and issues in this appeal, to the City initially. I received representations from the City, a copy of which was sent to the appellant along with a Notice of Inquiry. Portions of the City's representations were withheld due to confidentiality concerns. I received representations from the appellant. The appellant raised the issue of the applicability of the public interest override at section 16 to the record. I then sought and received reply representations from the City, including representations concerning the applicability of section 16.

RECORD:

The record is one page and is described by the City as "costing information related to scheduling".

DISCUSSION:

LABOUR RELATIONS AND EMPLOYMENT RECORDS

I will first determine whether the record is excluded from the *Act* by reason of section 52(3).

Section 52(3) states:

> 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.

2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.

3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

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

The term "in relation to" in section 52(3) means "for the purpose of, as a result of, or substantially connected to" [Order P-1223]. Meeting this definition requires more than a superficial connection between the creation, preparation, maintenance and/or use of the records and the labour relations or employment-related proceedings or anticipated proceedings [Order MO-2024-I].

The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships. The meaning of "labour relations" is not restricted to employer-employee relationships [*Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.). See also Order PO-2157].

The term "employment of a person" refers to the relationship between an employer and an employee. The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship [Order PO-2157].

If section 52(3) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507].

Section 52(3) may apply where the institution that received the request is not the same institution that originally "collected, prepared, maintained or used" the records, even where the original institution is an institution under the *Municipal Freedom of Information and Protection of Privacy Act* [Orders P-1560 and PO-2106].

The exclusion in section 52(3) does not exclude all records concerning the actions or inactions of an employee simply because this conduct may give rise to a civil action in which the Crown may be held vicariously liable for torts caused by its employees [*Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.)].

The type of records excluded from the *Act* by section 52(3) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees' actions [*Ministry of Correctional Services*, cited above].

Section 52(3)1: court or tribunal proceedings

Introduction

For section 52(3)1 to apply, the institution must establish that:

1. the record was collected, prepared, maintained or used by an institution or on its behalf;

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 institution.

The City provided both confidential and non-confidential representations. In its non-confidential representations concerning section 52(3)1 it submits that:

> The record was prepared, maintained and used in relation to anticipated proceedings before an arbitrator appointed by the Federal Minister of Labour on agreement of the parties pursuant to Part I of the *Canada Labour Code*. When the record was prepared in November 2008, the City and the Union had been negotiating scheduling issues on and off for approximately 9 months. Since the date the City received the request for information from the appellant, an arbitrator conducted a hearing and issued a binding award dated October 9, 2009. Pursuant to section 60 of the Canada Labour Code, an arbitrator or arbitration board has wide powers to make binding determinations in respect to the collective agreement, including scheduling. At page 11 of the Award, the Arbitrator references City submissions in respect to cost-savings should a particular type of scheduling system be adopted:
>
> > "In the instant case, the Board has considered the rationale advanced and has closely looked at appropriate comparators. We have concluded, based on what has been seen, that a change to the method of scheduling is warranted. The Day Booking system that the employer wishes to implement, or reasonable facsimiles of that system, exist in virtually every transit system in Ontario. It is the

> system used in major cities in Canada and is the predominant scheduling method in the United States. Further, the Board is cognizant of the savings to the employer which it (the employer) estimates to be four to four and one-half million dollars per year. Accordingly, the Board, as proposed by the employer, Awards a Day Booking system which is to be consistent with the majority of transit operators across North America. The parties are to draft the appropriate scheduling provisions within 30 days of receipt of this award. If no agreement is reached, the matter may be remitted to the Board for determination."

> The City states that even though the record at issue was prepared in November 2008 prior to the strike, it was prepared in anticipation of the above-noted proceeding, as such a proceeding was reasonably anticipated because the ongoing negotiations between the parties... The record relates to labour relations, specifically aiding management in presenting its case for new scheduling terms as part of a new collective agreement. The City submits that the requirements for exclusion were met at the time the record was prepared. This exclusion continues to apply even though the proceedings have concluded, as contemplated in Order MO-1576-F and *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O. R. (3d) 355 (C.A.) at para. 38. Furthermore, as noted above, the Arbitrator's award leaves open the possibility that the parties will need to further address the issue of scheduling with the arbitrator.

The appellant did not provide direct representations in response to the City's representations. He did agree that the strike was based on two issues, one of which was the cost savings if the City changed from a piece booking to a block booking scheduling.

The appellant also submits that section 52(3)1 does not apply to the record because it does not meet criteria 2 and 3. The appellant did not provide any specific information as to why he believes that criteria 2 and 3 were not met in this case.

Part 1: collected, prepared, maintained or used

As stated above, the appellant does not dispute that part 1 of the test has been met under section 52(3)1. I find that this part of the test has been met as the City prepared, maintained and used the record.

Part 2: proceedings before a court or tribunal

The word "proceedings" means a dispute or complaint resolution process conducted by a court, tribunal or other entity which has the power, by law, binding agreement or mutual consent, to decide the matters at issue [Orders P-1223 and PO-2105-F].

For proceedings to be "anticipated", they must be more than a vague or theoretical possibility. There must be a reasonable prospect of such proceedings at the time the record was collected, prepared, maintained or used [Orders P-1223 and PO-2105-F].

A "tribunal" is a body that has a statutory mandate to adjudicate and resolve conflicts between parties and render a decision that affects the parties' legal rights or obligations [Order M-815].

"Other entity" means a body or person that presides over proceedings distinct from, but in the same class as, those before a court or tribunal. To qualify as an "other entity", the body or person must have the authority to conduct proceedings and the power, by law, binding agreement or mutual consent, to decide the matters at issue [Order M-815].

I find that part 2 of the test has been met as the record was prepared, maintained and used in relation to anticipated proceedings before an arbitrator appointed by the Federal Minister of Labour on agreement of the parties pursuant to Part I of the *Canada Labour Code* [Order M-815].

Part 3: labour relations or employment

I agree with the City that the information in the record was prepared, maintained and used for the purpose of resolving issues that pertained to the collective relationship between the City and a local branch of the Amalgamated Transit Union. It was used by City staff in its negotiations with the Union and in the arbitration proceeding concerning the new collective agreement with the Union. The record was substantially connected to resolving the scheduling issue that formed part of the labour relations dispute between the City and the Union [Order P-1223].

The proceedings in this appeal relate to labour relations. The record is related to matters in which the City is acting as an employer and the terms and conditions of employment of employees or human resources questions form the subject matter of it. The record concerns proposed scheduling of its workers and resultant cost savings. The record was created by the City in anticipation of proceedings before a labour arbitrator.

Upon my review of the contents of the record, along with the representations of the parties, I find that the labour relations matters in the record do not concern the actions or inactions of an employee where the employee's conduct may give rise to a civil action in which the Crown may be held vicariously liable for torts caused by its employees [*Ministry of Correctional Services*, cited above].

Therefore, part 3 of the test has been met. I will now consider whether the exceptions in section 52(4) apply. If the record falls within any of the exceptions in section 52(4), the *Act* applies to it. Section 52(4) states:

> 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.

The City submits that:

> …the record does not fall within any of the first three exceptions in section 52(4) as the record is not an agreement. Finally, as the record is not related to an expense account, the City submits that it does not fall within the fourth exception.

The appellant submits that paragraphs 1 and 2 of section 52(4) apply as "the legal signing of the contract has ended all proceedings as published through the media..."

The appellant relies on the findings of Adjudicator Dawn Maruno in Order MO-1448, where she stated:

> Assistant Commissioner [Tom] Mitchinson found in Order P-1618 that the requirements under section 65(6)1 [the provincial equivalent to section 52(3)1] are "time sensitive." He concluded that in order to meet the requirements, 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. He went on to find:
>
>> In my view, section 65(6) must be understood in context, taking into consideration both the stated intent and goal of the *Labour Relations and Employment Statute Law Amendment Act* (Bill 7) - to restore balance and stability to labour relations and to promote economic prosperity; and overall purposes of the *Act* - to provide a right of access to information under the control of institutions and to protect the privacy of and provide access to personal information held by institutions. When proceedings are current, anticipated, or in the reasonably proximate past, in my view, there is a reasonable expectation that a premature disclosure of the type of records described in section 65(6)1 could lead to an imbalance in labour relations between the government and its employees. However, when proceedings have been completed, are no longer anticipated, or are not in the reasonably proximate past, disclosure

> of these same records could not possibly have an impact on any labour relations issues directly related to these records, and different considerations should apply.

In Order MO-1567-R, Senior Adjudicator David Goodis reconsidered this finding of Adjudicator Maruno. In finding that a record once excluded from the application of the *Act* remains excluded, he stated that:

> 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] the Court of Appeal stated the following with respect to the "time sensitive" element under the provincial equivalent of section 52(3)1:
>
> > In my view, the time sensitive element of subsection [65(6)] is contained in its preamble. The *Act* "does not apply" to particular records if the criteria set out in any of subclauses 1 to 3 are present when the relevant action described in the preamble takes place, i.e. when the records are collected, prepared, maintained or used. Once effectively excluded from the operation of the *Act*, the records remain excluded. The subsection makes no provision for the *Act* to become applicable at some later point in time in the event the criteria set out in any of subclauses 1 to 3 cease to apply.
> >
> > . . . . .
> >
> > In my view, therefore, [Assistant Commissioner Mitchinson] was wrong to limit the scope of the exclusions in the way that he did.
>
> Applying a "correctness" standard of review to the Assistant Commissioner's interpretation of the provincial equivalent of section 52(3)1, the Court of Appeal thus determined that his interpretation of the "time sensitive" element of this provision was incorrect.
>
> The finding in Order MO-1448 that section 52(3)1 does not apply is based solely on the application of this "time sensitive" approach. Based on the court's direction in Ontario (Solicitor General), the fact that the matter in question concluded some time before the access request, and the fact that there are no on-going or anticipated proceedings relating to the employment of the appellant, do not negate the application of section 52(3)1. Accordingly, I find that section 52(3)1 applies, and the former adjudicator's finding constitutes a jurisdictional defect under section 18.01(b) of the IPC's Code of Procedure. Therefore, the order should be reconsidered.

Based upon my review of the record, I find that section 52(4) does not apply, as the record does not come within any of the paragraphs set out in section 52(4). The record is not an agreement. It did not settle or resolve the dispute between the parties, nor is it a collective agreement. In addition, once effectively excluded from the operation of the *Act*, the record remains excluded [Order MO-1567-R].

Therefore, as all three parts of the test under section 52(3)1 have been met and the exceptions in section 52(4) do not apply, the record is excluded from the application of the *Act*. As such, it is not necessary for me to consider whether the record is also excluded by reason of sections 52(3)2 and 52(3)3. As the record is excluded from the application of the *Act*, I am unable to determine whether the claimed exemptions in sections 11(e), (f) and (g) apply to the record or whether the public interest override in section 16 applies.

ORDER:

I uphold the City's decision that the record is excluded from the application of the *Act* by reason of section 52(3)1 and dismiss the appeal.

Original signed by: March, 22, 2010
Diane Smith
Adjudicator