



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

ORDER MO-2537

Appeals MA09-58 and MA09-61

City of Vaughan



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NATURE OF THE APPEAL:

The City of Vaughan (the City) received two requests under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information that was exchanged in emails between individuals employed at the City and former employees of the City during the period of June 16, 2007 to November 20, 2007. The request identified six named individuals.

The City located two responsive email chains and denied the requesters access to both on the basis that these emails are not subject to the *Act* pursuant to the exclusionary provision in section 52(3)1.

The City also advised that no records exist responsive to the portion of the request that sought access to information contained in emails between the City and two named individuals employed at the City of Hamilton.

The requesters (now the appellants) appealed the City's decision to this office. During mediation, the appellants confirmed that they accept the City's position that no records exist which is responsive to their request for information exchanged between the City and two named individuals employed at the City of Hamilton. Accordingly, the issue as to whether the City conducted a reasonable search for responsive records is no longer an issue in these appeals.

The parties were unable to resolve the remaining issues, and the appeals were transferred to the adjudication stage of the appeals process, in which an adjudicator conducts an inquiry under the *Act*.

The adjudicator assigned to the file sought and received representations, including reply and surreply, which were shared between the parties in accordance with Section 7 of this office's *Code of Procedure and Practice Direction Number 7*.

RECORDS:

The records at issue consist of the following two email chains which were initiated by one of the appellants:

1. Email chain between the City and a former employee (2 pages)
2. Email chain between the City and its former counsel (1 page)

DISCUSSION:

LABOUR RELATIONS AND EMPLOYMENT RECORDS

Section 52(3)1 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:

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.

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

In *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991, the Ontario Divisional Court defined “relating to” in section 65 (5.2) of the *Act* as requiring “some connection” between the records and the subject matter of that section. Should that definition be adopted for the words, “in relation to” in section 65(6)? If so, for section 65(6) to apply, there must be some connection between “a record” and either “proceedings or anticipated proceedings”, “negotiations or anticipated negotiations” or “meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.”

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 *Freedom of Information and Protection of Privacy Act* [Orders P-1560, PO-2106].

The exclusion in s. 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 s. 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.

Part 1: collected, prepared, maintained or used

The City submits that the records at issue in these appeals relate directly to the relationship between itself as an employer and its former employee and also refer to human resources and staff relations issues arising from that relationship. The City states that it did not actively collect the records, but that they were sent to the City by two former employees. The City states that it maintained the records.

The appellants do not dispute that the records were sent to the City by its former employees or that the City maintained the records.

Analysis/Findings

Based upon my review of the records and the parties' representations, I find that they were maintained by the City. Therefore, part 1 of the test has been met.

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].

The word "court" means a judicial body presided over by a judge [Order M-815].

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].

The City submits that:

The records in question were maintained by the City of Vaughan for usage in anticipated proceedings before a court. At the time the records in question were forwarded to the City of Vaughan, the City was anticipating legal action against the appellants for violation of the Memorandum of Settlement executed on June 22, 2006. An excerpt of the Statement of Claim filed by the City of Vaughan against the appellants on November 20, 2007 has been attached as Document 1.

The appellants submit that there was no anticipated legal action against either of the two appellants at the time the records were forwarded to the City in mid June 2007.

In reply, the City submits that:

The July 5, 2007 letter provided by the appellant clearly indicates the imminence of legal action. The letter states that "one more breach will result in immediate legal action against him" [emphasis in original]. The City's Statement of Claim filed in November 2007 also refutes the appellant's assertion in this regard. Clearly, legal action was contemplated at the time the records were forwarded to the City.

Analysis/Findings

The records were sent to the City in June 2007 and were maintained by the City since that date.

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. 507, the Ontario Court of Appeal found that:

...the time sensitive element of subsection 52(3) is contained in its preamble. The Act “does not apply” to particular records if the criteria set out in any of sub clauses 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.

The records are email chains commenced on June 16, 2007 as a result of an email written by one of the appellants. As a result of the information contained in the records, the City was in a position from that date to commence legal action against the appellants for violation of the Memorandum of Settlement executed on June 22, 2006. This Memorandum of Settlement had settled a court action commenced by one of the appellants in June 2005. Accordingly, on July 5, 2007, the City wrote to the appellants’ solicitors and advised that as a result of the emails in the records written by one of the appellants, the Memorandum of Settlement had been violated.

In this case, the records were maintained by the City from the time they were received in relation to anticipated court proceedings against the appellants. Based on the fact that prior court proceedings had settled with an understanding that further proceedings could result from a violation of the settlement, these proceedings were more than just a vague or theoretical possibility [Orders P-1223 and PO-2105-F]. I note that court proceedings were actually initiated by the City shortly after receipt of the records. Therefore, I find that part 2 of the test has been met.

Part 3: labour relations or employment

The City submits that:

The anticipated proceedings stem from a lawsuit against the City of Vaughan launched by one of the appellants (a former City employee) in June 2005. The lawsuit was related to employment of the appellant with the City of Vaughan. The lawsuit was settled and resulted in the aforementioned Memorandum of Settlement between both appellants and the City of Vaughan.

The appellants submit that the records do not pertain to the employment of City employees. They argue that the recipients of the initiating emails written by one of the appellants were no longer City employees at the time they received these emails; rather, they were employees of another municipality.

In reply, the City submits that:

The [records] discuss employment-related matters. The employment-related matters took place when [the recipients of the emails] were City employees. [They] were contacted [by one of the appellants] because they were employees at the time the employment-related matters took place. The current employment situations of [the recipients] do not change the fact that the records at issue are related to the former employment of an individual and that they were maintained in anticipation of proceedings before a court...

The records at issue discuss employment matters related to [one of the appellants]. The employment-related matters took place when [this appellant] was a City employee. The current employment situation of [this appellant] does not change the fact that the records at issue are related to [this appellant's] former employment and that they were maintained in anticipation of proceedings before a court...

In surreply, the appellants submit that the records are not related to employment as they were created by the appellant that has never been an employee of the City. They also submit that the subject matter of the records do not concern employment.

Analysis/Findings

To meet the third part of the test in section 52(3)1, the proceedings need to be related to employment or labour relations per se - that is, to litigation relating to terms and conditions of employment, such as disciplinary action against an employee or grievance proceedings. In other words, section 52(3)1 excludes records relating to matters in which the institution has an interest as an employer. It does not exclude records where an institution is sued by a third party in relation to actions taken by its employees. [*Ministry of Correctional Services*, cited above]

Based upon my review of the records and the parties' representations, I find that the records are excluded from the operation of the *Act* under section 52(3)1. I find that the records were maintained by the City in anticipation of proceedings before a court. The Statement of Claim of November 2007 specifically refers to information contained in the records. These court proceedings were constituted as a result of the employment by the City of one of the appellants and originated directly from the alleged breach of the settlement entered into between the City and this appellant. The lawsuit commenced in June 2005 and the corresponding settlement was related to the employment of one of the appellants with the City.

Therefore, I find that the proceedings relate to the litigation involving the terms and conditions of employment of a person by the City and that part 3 of the test has been met.

Neither party claimed that the exceptions to section 52(3) in section 52(4) apply to the records and I find that section 52(4) has no application.

Conclusion

Based upon my review of the records and taking into consideration the parties' confidential and non-confidential representations, I find that the records are excluded from the application of the *Act* by reason of section 52(3)1.

ORDER:

I uphold the City's decision and dismiss the appeals.

Original Signed by: _____
Diane Smith
Adjudicator

_____ June 30 , 2010