

Information and Privacy Commissioner,  
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,  
Ontario, Canada

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## ORDER MO-3018

Appeal MA13-66

Toronto Hydro Corporation

February 27, 2014

**Summary:** This appeal arises out of a request made by a union for access to records relating to the surveillance by Toronto Hydro of one of its union officials. Toronto Hydro claimed that the responsive records are excluded from the *Municipal Freedom of Information and Protection of Privacy Act* under section 52(3)3 (labour relations or employment-related matters). The adjudicator finds that the records are excluded from the *Act* under section 52(3)3.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 52(3)3.

**Cases Considered:** *CUPE Local 1750 & Ontario (WSIB)*, 2009 CanLII 59467.

### OVERVIEW:

[1] The background to this appeal begins with the decision by Toronto Hydro Corporation and Toronto Hydro Electric System Ltd. (together referred to as Toronto Hydro) to conduct surveillance of a union official, in 2008. CUPE Local One (the Union) learned about this surveillance in 2010, following which it made a number of requests under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to the surveillance. This appeal concerns the request made on

December 12, 2012 for the following records, covering the time period January 2008 to December 2012:

- any and all communications between Toronto Hydro and any representative of [two named companies] and/or any other third-party contractor engaged by Toronto Hydro to conduct surveillance of [a named union official] or any other Union official; and
- any and all records, electronic or otherwise, related to surveillance of [the named union official] or any other Union official, including records held by [the named companies] and/or any other third party contractor.

[2] Toronto Hydro issued its decision in response to the request on January 11, 2013. In its decision Toronto Hydro indicated that it does not have custody and control over the records generated and retained by the named company.

[3] In addition, Toronto Hydro took the position that the request is frivolous and vexatious as the requester has made four previous requests on the same subject, all of which led to access decisions which the requester did not appeal.

[4] Further, Toronto Hydro stated that the records are excluded from the *Act* under sections 52(3)1 and 52(3)(3), as they relate to "proceedings or anticipated proceedings...relating to labour relations or to the employment of a person", as well as "communications about labour relations or employment-related matters."

[5] Finally, and without prejudice to the above, Toronto Hydro indicated that there are no records responsive to the request beyond those covered by the time frame specified in the prior requests.

[6] The Union appealed Toronto Hydro's decision. On review of the appeal, this office requested submissions from the Union on the application of section 52(3) of the *Act*, expressing the preliminary view that the records are excluded from the scope of the *Act*. The Union provided its submissions by letter dated March 28, 2013. After review of the submissions, this office streamed the appeal to the adjudication stage of the appeals process, in which an adjudicator conducts an inquiry.

[7] I issued a Notice of Inquiry seeking representations from Toronto Hydro, on the issues raised under section 52(3) only. I shared the non-confidential portions of the representations of Toronto Hydro with the Union and an affected party (the named union official), and invited them to submit representations. I then sent the complete representations of the Union and the affected party to Toronto Hydro, which submitted representations in reply.

[8] On review of the representations and material before me, I find that the records are excluded from the *Act* by application of section 52(3)3.

## **BACKGROUND**

[9] The following description of the background events is not disputed.<sup>1</sup> The affected party is an employee of Toronto Hydro. Since approximately 1996, he has been the elected Health and Safety Representative (HSR) for the Union. The collective agreement between the Union and Toronto Hydro contains provisions applicable to Union officials, including the HSR. Under those provisions, while serving in this position, the affected party has been on a paid leave of absence from his regular duties in the bargaining unit. He remains an employee of Toronto Hydro, continues to accrue seniority and service and participates in the Toronto Hydro pension and benefit plans. In addition to his wages, he is entitled to any scheduled increases and progressions applicable to his position.

[10] In 2010, the Union received information that Toronto Hydro had engaged in surveillance of the affected party during 2008. Between September 2010 and December 2011, it made four requests under the *Act* for records regarding surveillance of the affected party and other Union officials. In January 2011, Toronto Hydro disclosed certain records in response to one of the requests, which confirmed the Union's suspicions that surveillance of the affected party had taken place.

[11] Later that same month, the Union filed complaints with the Ontario Labour Relations Board (the OLRB) about the surveillance, alleging that it violated the *Occupational Health and Safety Act* (OHSA) and were unfair labour practices under the *Labour Relations Act, 1995* (LRA). Toronto Hydro also filed unfair labour practice complaints, in response.

[12] The complaints by the Union and Toronto Hydro were heard together by the OLRB which, by decision dated December 1, 2011, dismissed them all.

## **SECTION 52(3)3 – THE LABOUR RELATIONS EXCLUSION**

### **General Principles**

[13] 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:

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<sup>1</sup> Some of it is taken from *Canadian Union of Public Employees, Local One v. Toronto Hydro Corporation*, 2011 CanLII 77614 (ON LRB).

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.

[14] 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*. In this appeal, section 52(4) is not relevant.

[15] In its decision, Toronto Hydro relied specifically on sections 52(3)1 and 52(3)3.

[16] For the collection, preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in paragraph 1, 2 or 3 of section 52(3), it must be reasonable to conclude that there is "some connection" between them.<sup>2</sup> The phrase "in which the institution has an interest" in section 52(3)3 means more than a "mere curiosity or concern", and refers to matters involving the institution's own workforce.<sup>3</sup>

## **Representations**

[17] The key point of contention between the parties in this appeal is whether the records are about labour relations or employment-related matters.

[18] The position of Toronto Hydro is that the affected party remains its employee notwithstanding the leave of absence from his bargaining unit position, that the requested records relate directly to both a labour relations and employment-related matter and that Toronto Hydro has a direct interest in those matters. In its representations, it addresses the affected party specifically since, in response to all requests submitted by the Union, Toronto Hydro has said there are no responsive records in relation to any Union officials apart from the affected party.

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<sup>2</sup> Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

<sup>3</sup> *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.

[19] Toronto Hydro submits that the HSR position is one that it must agree to being created and continued, as reflected by the inclusion of the position in the collective agreement, and is integrated with and part of Toronto Hydro's health and safety operations. It submits that the HSR position is not solely a Union position, and the work performed by the HSR is not solely for the Union. The Primary Function section of the HSR job description states that the HSR will advocate for health and safety by, among other things, "acting with the Employer to embed a culture of health & safety". The job description indicates that supervision of the HSR is joint, by the Union Local President and a Toronto Hydro Vice President.

[20] In support of its position, Toronto Hydro refers to the job description, which lists the responsibilities of the HSR. Some of these responsibilities involve collaboration with Toronto Hydro, either through the joint union-employer health and safety committee or other duties.

[21] Toronto Hydro states that the continuation of the HSR position was, in fact, the subject matter of collective bargaining in the negotiations to renew the collective agreement that concluded in 2008. In those negotiations, it states, changes to the HSR job description were made, as well as requirements for performance appraisals, management review of progress towards goals of reduction in injuries and increased regular attendance and reimbursement of 50% of the cost of wages and benefits of the HSR position to Toronto Hydro (if the responsibilities are not met). The collective agreement also contains a provision requiring the Union to reimburse Toronto Hydro for time spent by the HSR on business other than "Toronto Hydro/Local One Health and Safety business".

[22] Toronto Hydro submits that placing the HSR on a leave of absence under the collective agreement does not place the HSR outside the employ of Toronto Hydro, but simply reflects the temporary departure of the HSR from his or her position in the bargaining unit while elected to the HSR position and while performing the HSR functions.

[23] Toronto Hydro refers to the complaints filed by the Union with the OLRB, in which the Union relied on prohibitions in the LRA and OHS Act against employer interference with an employee's rights under those statutes. In its submission, in the complaints before the OLRB, the Union proceeded on the basis that the affected party is an employee of Toronto Hydro.

[24] Toronto Hydro submits that the employment and labour relations matters are ones in which it has an interest. Surveillance was undertaken in response to complaints to its Ethics Hot-Line that the affected party was leaving work while being paid. Its interest is related to the administration of the collective agreement, which provides for reimbursement to Toronto Hydro by the Union of the HSR wages for time not spent on HSR functions.

[25] Toronto Hydro submits that the IPC has consistently found that records related to workplace investigations of alleged workplace behavior are not subject to the *Act* by virtue of s. 52(3)3.

[26] Toronto Hydro also submits that section 52(3)1 is applicable in that it used and maintained the surveillance-related records in anticipation of and for use during the proceedings before the OLRB.

[27] Toronto Hydro submits that the exclusion of the records is consistent with the purposes of section 52(3). The public policy objective stated in section 52(3) is that labour and employment-related proceedings, negotiations, discussions and communications should be carried out in the context of employment and labour statutes such as the LRA and OHSA, in grievance arbitrations or pursuant to complaint procedures under an employer's policies, not under the *Act*.

[28] The Union's position is that the affected party and other similar Union officials are not part of Toronto Hydro's own workforce for the purpose of determining the applicability of section 52(3)3 of the *Act*. It states that Toronto Hydro's agreement under the collective agreements to place these Union officials on leave of absence from work for the purpose of performing Union business, precludes Toronto Hydro from reliance on section 52(3)3 of the *Act* in respect of these individuals.

[29] The Union relies on the fact that the affected party is elected to the position of HSR by the Union's membership. It refers to the specific duties of the Health and Safety Representative as stated at Rule 8 of the Union's Constitution, and states that the Constitution requires the Health and Safety Representative to discharge a number of functions related to representing the interests of the Union and workers on committees, including discharging duties required under legislation such as the OHSA. The Union submits that, in performing such functions, the HSR regularly acts as an advocate for Union members. The Union also relies on Section 8 of Rule 8 of the Constitution, which specifically prohibits the HSR from performing work for Toronto Hydro in the form of overtime hours.

[30] Further, the Union submits, Toronto Hydro has long expressed to the Union its view that the HSR works for the Union, although Toronto Hydro pays the wages of this position. The Union cites a letter dated July 5, 1996, from Toronto Hydro's Director of Management Services, apparently refusing a request by the Union for certain phone or transportation services for the HSR. In this letter, Toronto Hydro states that the HSR is "acting on behalf of" the Union during his/her tenure.

[31] The Union disputes that Toronto Hydro has an interest within the meaning of section 52(3)3. It states that any complaint about the affected party's performance in the office of HSR is about whether the affected party is properly exercising his duties as

an officer of the Union and is properly dealt with by the Union under its Constitution. It is not about labour relations or employment-related matters. The Union submits that surveillance of the affected party was not the act of an institution acting as an employer, interested in the conduct of an employee.

[32] The Union relies on a decision of the Grievance Settlement Board (GSB), *CUPE Local 1750 & Ontario (WSIB)*,<sup>4</sup> stating that this case establishes that an employer has no interest in the conduct of union officials in the exercise of their union duties. It submits that even if employers generally may have an interest in the surveillance of their employees, Toronto Hydro has no interest in the surveillance of the affected party or other Union officials in the conduct of their Union duties.

[33] The Union submits that section 52(3) is record-specific and fact-specific. Even if in some or most instances surveillance of an employee by an employer engages section 52(3)3 of the *Act*, a consideration of the specific records and facts in the instant appeal is still necessary. In the instant case, consideration of the unique role of the affected party and other Union officials as officers of the Union is required.

[34] Further, the Union relies on Toronto Hydro's previous disclosure of some surveillance-related records, in response to earlier access requests. The Union submits that Toronto Hydro may not selectively employ section 52(3), and, given the earlier disclosure, there is no principled reason for its refusal to disclose other records related to the surveillance.

[35] The Union does not dispute the provisions of the collective agreement referred to by Toronto Hydro. However, it states that none of these facts establish that the HSR is part of Toronto Hydro's own workforce for the purposes of the *Act*.

[36] With respect to the proceedings before the OLRB, the Union states that it does not dispute that the affected party is an employee of Toronto Hydro for the purposes of the LRA and a worker for the purposes of the OHSA. It submits, however, that the affected party's status under other statutes is not determinative of whether or not section 52(3)3 applies to the requested records.

[37] The Union also submits that section 52(3)1 is inapplicable, in that the creation of the requested records pre-dates the proceedings before the OLRB, and were not relied on by Toronto Hydro in those proceedings. It submits that Toronto Hydro's position on section 52(3)1 runs counter to Toronto Hydro's claim that the collection, preparation, maintenance and use of the records were in response to an ethics complaint about the affected party.

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<sup>4</sup> 2009 CanLII 59467.

[38] The affected party does not address the application of section 52(3) to the records. He submits that the request for information is not frivolous or vexatious, that he believes his privacy rights have been violated, and that the methods and extent of surveillance were inappropriate, excessive and unduly intrusive.

[39] In its reply representations, Toronto Hydro reiterates that the records relate to both an employment and labour relations matter. They relate to employment in that the affected party remains its employee throughout his assignment as HSR. Its surveillance was conducted as part of an investigation into a complaint that the affected party was leaving work while being paid. The purpose was to determine whether he was performing HSR duties when he was being paid to perform HSR duties. The records surpass the requirement to have a "connection" to employment.

[40] Further, the records are about a labour relations matter in that, had the investigation disclosed that the affected party had been paid for time that he spent on matters unrelated to HSR business, Toronto Hydro would have been entitled to reimbursement from the Union.

[41] Toronto Hydro states that the Union has mischaracterized the nature of the HSR functions and responsibilities. Rather than having unilateral obligations to the Union, working solely in the Union's interests, it submits that HSR responsibilities are based on joint goals and responsibilities.

[42] Toronto Hydro submits that the IPC should not embark on a determination of the labour relations disagreement between itself and the Union regarding the status of the affected party or the position of the HSR. To find that section 52(2)3 does not apply would require the IPC to determine the employment status of the affected party, which is itself a labour relations matter that the parties dispute. The purpose of sections 52(3)3 and 52(3)1 is to remove the conduct of labour relations matters and proceedings from the ambit of the *Act*, and avoid the use of the *Act* as a proxy for the prosecution of labour relations issues. It would be contrary to this purpose to make the finding the Union seeks.

[43] With respect to the Union's argument that it has selectively employed section 52(3), Toronto Hydro states that section 52(3) does not prohibit disclosure and it is within the discretion of Toronto Hydro to disclose such information. There is no estoppel if an institution decides not to apply the exclusion in response to a request under the *Act*, and to disclose outside of the *Act*. Toronto Hydro can decide, in its discretion, to refuse to process an access request to which this exclusion applies and there are good reasons for it to have decided so in processing the current request.



## **Analysis and Conclusions**

[44] On my review of the representations and other material before me, I find that the records are about labour relations or employment-related matters in which Toronto Hydro has an interest.

[45] I accept for the purposes of my determinations here that the only records responsive to the request relate to the affected party. Toronto Hydro has stated, and there is no reason to doubt, that there are no responsive records relating to the surveillance of any Union official apart from the affected party. I also note that parts of Toronto Hydro's representations were not shared with the other parties, for confidentiality reasons. In arriving at my determinations, it was unnecessary to rely on any of the evidence and submissions contained in those parts.

[46] As indicated above, the phrase "in relation to" in section 52(3) and its provincial equivalent has been interpreted to mean that there is "some connection" between the collection, preparation, maintenance or use of a record and the subjects mentioned in paragraph 1, 2 or 3 of this section.<sup>5</sup> "Has an interest" has been described as something more than a "mere curiosity or concern". In this appeal, the evidence before me establishes that there is more than some connection between the records sought and labour relations or employment-related matters in which Toronto Hydro has an interest.

[47] I find the following factors the most persuasive in establishing the labour relations or employment-related interest:

- the affected party has remained an employee of Toronto Hydro throughout;
- although he was on paid leave, his responsibilities as HSR require collaboration with Toronto Hydro in working towards shared workplace health and safety goals;
- under the job description, the HSR position is jointly supervised by the Union Local President and a member of Toronto Hydro management;
- the surveillance was initiated as a result of a complaint that the affected party was leaving the workplace while being paid;
- Toronto Hydro has the right to reimbursement for wages paid to the affected party for time not spent on matters related to HSR responsibilities;
- the Union pursued complaints before the OLRB based on interference with the affected party's rights, as an employee, under the LRA and the OHSA.

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<sup>5</sup> *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.), adopted in Order MO-2589 and others.

[48] In these circumstances, it is not accurate to suggest that Toronto Hydro has no employment or labour relations interest in the HSR position, or in whether the individual in that position is fulfilling his or her responsibilities. I agree with Toronto Hydro that the HSR cannot be seen simply as working solely for the Union. Toronto Hydro's interest in the position is recognized in the job description as well as the collective agreement. As stated in the HSR job description, the primary function of the HSR requires working with the employer to "embed a culture of health and safety culture". Further, the collective agreement recognizes the employer's interest in having the HSR work performed by providing for a wage refund to Toronto Hydro for time not spent on HSR functions.

[49] In these circumstances, the fact that an individual holding the HSR position is granted leave from regular bargaining unit duties does not erase Toronto Hydro's employment and labour relations interest in the work performed by that individual. Neither does the fact that the selection of the individual is made through a vote of the Union's membership. The provisions of the Union's Constitution governing the HSR position are also consistent with Toronto Hydro's continuing employment and labour relations interest. Rule 8 of the Constitution, for example, refers to the job description which was agreed to by the Union and Toronto Hydro and which contains a number of provisions reflecting Toronto Hydro's interest in this position.

[50] As I have indicated, the job description provides for joint supervision of the HSR by the Union Local President and a Toronto Hydro Vice-President. Despite this, the Union denies that Toronto Hydro supervises the HSR. It seems unlikely that "supervision" of the HSR, as provided in this job description, amounts to the same kind of "supervision" that a supervisor engages in with respect to a bargaining unit member. Nevertheless, the inclusion of this provision demonstrates, at the very least, a degree of employment or labour relations interest by Toronto Hydro in the performance of the duties and responsibilities of this position.

[51] With respect to the 1996 letter, there is no doubt that the HSR represents and advocates for union members. In this respect, the HSR's role is clearly different from that of other employees who are actively engaged in bargaining unit work. This has, as demonstrated by this letter and the 2008 negotiations about the HSR position, clearly led to discussions between the Union and Toronto Hydro about their respective responsibilities for various aspects of the position. However, for the reasons I have given above, I find that the role of the HSR, in acting on behalf of the Union and its members, is not incompatible with Toronto Hydro's continuing employment and labour relations interest.

[52] I find the decision of the GSB in *CUPE Local 1750 & Ontario (WSIB)*, on which the Union relied, distinguishable on its facts. In that decision, the GSB determined that an employer was not justified in disciplining a union official over conduct that the GSB found occurred entirely within a union committee, while conducting union business.

The arbitrator considered a number of cases that considered the extent of an employer's interests in conduct engaged by union officials, while acting as a union official. The conclusions of the arbitrators, as acknowledged in those cases, depended on the particular facts before them. None dealt with circumstances analogous to those before me. None support the conclusion that Toronto Hydro has no labour relations or employment related interest in the records at issue.

[53] Finally, Toronto Hydro's previous decision to disclose some records related to the surveillance does not influence my determinations under section 52(3). The exclusion of records from the *Act* under section 52(3) does not prevent an institution from choosing to disclose them. Its decision to do so does not affect the application of section 52(3) to the facts of this appeal.

### **Conclusion**

[54] I find that the records sought by this request are excluded from the *Act* under section 52(3)3. In view of my conclusion it is unnecessary to consider whether section 52(2)1 may also apply.

### **ORDER:**

I uphold Toronto Hydro's decision that the records are excluded from the scope of the *Act* as a result of section 52(3)3.

Original signed by: \_\_\_\_\_  
Sherry Liang  
Senior Adjudicator

\_\_\_\_\_ February 27, 2014