Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3760

Appeal MA18-176

City of Thunder Bay

April 26, 2019

Summary: The City of Thunder Bay received a request for access to a workplace violence report that was submitted by two city staff about the requester's behaviour towards them. The city denied access to the record based on the exemptions under sections 38(a) (discretion to refuse requester's own information) together with section 13 (danger to health or safety), 38(b) (personal privacy), and the exclusion at section 52(2)3 (employment or labour relations). The adjudicator finds that the record falls outside the scope of the *Act* because of the exclusionary provision in 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; *Ontario Health and Safety Act*, R.S.O. 1990, c. O.1.

Orders and Investigation Reports Considered: Orders M-878, MO-2242, MO-2698, P-1242, PO-3669, and PO-3722.

Cases Considered: *Weber v. Ontario Hydro* [1995] 2 SCR 929, 1995 CanLII 108.

OVERVIEW:

[1] The City of Thunder Bay (the city) received the following request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*):

> In a letter to me, dated 14 Aug 2017, [a named individual] (Manager, Corporate Safety) claimed a "Workplace Violence report" was filed by "City of Thunder Bay Waste Collection staff" which alleged that I had "behaved

> in an intimidating manner and threatening manner" toward them. I request a copy of this Workplace Violence report.

[2] The city issued a decision denying access to the responsive record based on sections 13 (danger to health or safety) and 14(1) (personal privacy) of the *Act*.

[3] The requester appealed the city's decision to this office, thereby becoming the appellant in this appeal.

[4] During the mediation stage of the appeal process, the mediator raised the possible application of sections 38(a) (discretion to refuse requester's own information) and 38(b) (personal privacy) given that the record relates to the appellant, in addition to two city employees (the affected parties). The city agreed with this assessment and sections 38(a) and 38(b) were added as issues in this appeal.

[5] The appellant advised the mediator that he wished to pursue access to the record withheld by the city. No further mediation was possible, and the file was transferred to the adjudication stage for an inquiry.

[6] At this point, the city issued a supplementary decision letter, in which it advised that it was also relying on the exclusion at section 52(3)3 (employment or labour relations). Accordingly, that section of the *Act* was added as an issue in this appeal. Given that the two affected parties are city employees and members of the Canadian Union of Public Employees (CUPE) and its Local 87, I decided to add CUPE as a party in this appeal.

[7] I began my inquiry by inviting and receiving written representations on the issues from the city, CUPE, and the two affected parties. I asked the city to respond to all of the issues in dispute, while I invited representations from the affected parties on the application of section 38(b), and from CUPE on section 52(3)3, in particular. I then invited the appellant to provide written representations on all of the issues in dispute. In doing so, I provided the appellant with a copy of CUPE's and the affected parties' representations in their entirety, along with the non-confidential portions of the city's representations.[1] Included with the city's representations was an 11-page affidavit, which was accompanied by 53 pages of exhibits. I provided the appellant with the non-confidential portions of the affidavit, but did not provide copies of the exhibits, many of which the appellant already has. The appellant provided written representations, which he consented to being shared with the other parties to this appeal. I shared the appellant's representations with the city and CUPE for reply. I received reply representations from the city, which were shared with the appellant for sur-reply. The appellant provided sur-reply representations for my consideration.

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[1] Portions of the city's representations and accompanying affidavit were withheld in accordance with the confidentiality criteria set out in *Practice Direction Number 7* of the IPC's *Code of Procedure.*

[8] For the reasons that follow, I find that the record is excluded from the application of the *Act* under section 52(3)3 of the *Act*.

RECORD:

[9] The record at issue is a three-page City of Thunder Bay violent incident report. The record was prepared by city employees to document the conduct of a member of the public. The city employees are the affected parties in this appeal and the member of the public is the appellant.

ISSUE:

A. Does the labour relations and employment records exclusion at section 52(3)3 exclude the record from the scope of the *Act*?

DISCUSSION:

Issue A: Does the labour relations and employment records exclusion at section 52(3)3 exclude the record from the scope of the *Act*?

[10] The city and CUPE claim that the withheld record is excluded from the scope of the *Act* by virtue of section 52(3)3. This section 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:
>
> > 3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

[11] In this appeal, none of the section 52(4) exceptions relating to agreements and expense accounts are relevant.

[12] Past orders of this office have held that in order for the exclusion at section 52(3)3 to apply, the party or parties claiming the exclusion must establish that:

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

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 institution has an interest.[2]

[13] As both the city and CUPE maintain that section 52(3)3 of the *Act* applies to the record, they must demonstrate that each of the three requirements set out above is met in the circumstances of this appeal.

[14] For the collection, preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in paragraph 3 of section 52(3), it must be reasonable to conclude that there is "some connection" between them.[3]

[15] 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.[4] 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.[5]

[16] The phrase "in which the institution has an interest" means more than a "mere curiosity or concern", and refers to matters involving the institution's own workforce.[6]

[17] The exclusion in section 52(3)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.[7]

[18] The type of records excluded from the *Act* by section 52(3)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.[8]

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[2] Among others, see Orders MO-2537, MO-2589, MO-3101, and PO-3442.
[3] Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).
[4] *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.
[5] Order PO-2157.
[6] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above.
[7] *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.).
[8] *Ministry of Correctional Services*, cited above.

[19] For the reasons that follow, I find that the record relates to an employment-related matter in which the city has an interest, and it is therefore excluded from the *Act* pursuant to section 52(3)3 of the *Act*.

Part one: collected, prepared, maintained or used

[20] The city explains that the record was generated through the use of a template document, the Violent Incident Report,[9] which is used for all written complaints from employees who have been subjected to violence or potential violence in the workplace. The city explains that employees are required under its Violence in the Workplace Policy (the policy)[10] and Violence in the Workplace Procedure (the procedure)[11] to report threatening statements or behaviours that give them reasonable grounds to believe that there is a potential for violence in the workplace. The city submits that all workplace violence complaints are maintained by the city's Human Resources and Safety Division for one year before being archived for ten years in accordance with the city's records retention by-law.

[21] It is evident from the record that it is a template complaint form that was completed by the affected parties and their supervisor to report an incident of alleged violence in the workplace. I am satisfied that the record was collected, prepared, maintained or used by the city, and find that part one of the section 52(3)3 test has been met.

Part two: meetings, consultations, discussions or communications

[22] The city submits that the record was reviewed by the affected parties' supervisor and Corporate Safety Specialist, and informed discussions between those individuals about how best to proceed.

[23] The appellant's and CUPE's representations did not address this part of the section 52(3)3 test.

[24] I am satisfied that the record was collected, prepared, and maintained by the city for discussions, meetings, consultations and communications among city staff. Accordingly, I find that the second part of the section 52(3)3 test has also been met.

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[9] This template is found in both the city's Corporate Policy 06-01-37 ("Violence in the Workplace Policy" or "policy") and Corporate Procedures HS-30-04 ("Violence in the Workplace Procedure" or "procedure").
[10] The city's Corporate Policy 06-01-37, cited above.
[11] The city's Corporate Procedures HS-30-04, cited above.

Part three: labour relations or employment-related matters in which the institution has an interest

The city's representations: employment-related matter

[25] The city submits that the record relates to both a labour relations and an employment-related matter because its workplace violence policy and procedure apply to both unionized and non-unionized workers. The city's representations address the record as relating to an "employment-related" matter, and it relies on CUPE's representations, set out below, respecting its position that the record also relates to a "labour relations" matter.

[26] The city maintains that the record is clearly an employment-related concern given the connection between the *Ontario Health and Safety Act*[12] (the *OHSA*) and the city's policy and procedure. In support of this position, the city notes that past orders of this office have found that the phrase "employment-related matter" applies in the context of records generated in relation to:

- a workplace harassment complaint made pursuant to a municipality's "Respect in the Workplace" policy;[13]
- a workplace harassment complaint, including records associated with the resulting investigation, made pursuant to a municipality's "Workplace Harassment Policy";[14] and
- an investigation into a complaint made pursuant to the provincial government's "Workplace Discrimination and Harassment Prevention Program." [15]

[27] Moreover, the city submits that arbitrators hearing grievances under various collective agreements in Ontario have specifically determined that the *OHSA* is an "employment-related statute."[16]

[28] The city states that the record is necessarily an employment-related matter, given that the policy and procedure pursuant to which the Violent Incident Report form

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[12] RSO 1990, c. O.1. Specifically, Part 111.0.1 of the *OHSA*, which requires employers to have a policy and program in place to protect workers from violence, and sections 32.0.1(1) and 32.0.2(1) of the *OHSA*, which require employers to develop and maintain a program to implement the policy with respect to workplace violence. In addition, section 32.0.2(1) requires the program to include measures and procedures for workers to report incidents of workplace violence to their supervisor and employer, and for the employer to investigate such complaints.

[13] *St Charles (Municipality), Re (2016)*, 2016 CarswellOnt 21041 (IPC) at para 15.

[14] Order M-878.

[15] Order P-1242.

[16] See for example, *Daybar Industries Limited v United Steelworkers of America, Local 9042*, Arbitrator Paula Knopf, August 23, 2012, 2012 CanLII 50011 (ONLA) at p 5.

is used were adopted and implemented by the city in order to meet its legal obligations and responsibilities under the *OHSA*. Specifically, the city submits that the objectives of the policy and procedure are, among other things, to ensure the workplace is free from violence and to provide a means for the city to track, follow up on, assess and, if need be, investigate complaints of violence in the workplace. Together, these documents outline the human resources practices that must be followed by the city as a corporation and by its unionized and non-unionized employees. On this basis, the city maintains the policy and procedure clearly and directly relate to an employment-related matter, being violence in the workplace.

[29] The city submits that the record at issue arises out of the city's relationship, as an employer, with the employees who filed the complaint. The city maintains that it has a legal interest in the record that is more than "a mere curiosity or concern." This interest originates from the fact that workplace violence has the capacity to affect the city's legal rights and obligations, particularly with respect to the *OHSA*. The city states that if it did not have effective policies and procedures in place to address workplace violence, and did not "include measures and procedures for workers to report incidents" of workplace violence, then it could be found to be in contravention of the *OHSA*, and therefore liable under section 66 of that statute. The city notes that penalties for contravening the *OHSA* can include significant monetary fines and/or imprisonment.

[30] The city provided an affidavit from the Director of Human Resources and Safety (the affiant) to further support its position. Among other things, which I have taken into consideration but will not set out here,[17] the affiant explains that the city maintains a "zero tolerance" policy toward any acts of workplace violence. The affiant indicates that the city will take "all necessary and reasonable actions, including remedial, disciplinary, and/or legal action against any persons who commit a violent act against an employee, while in the workplace." The affiant states that violence in the workplace is not limited to employee-on-employee violence; rather, it extends to violence by members of the public on employees who are performing duties related to their jobs, regardless of whether they are on public or private property.

[31] The affiant explains that requiring employees to report incidents of workplace violence through the city's Violent Incident Report form helps to ensure that the city works to prevent and address incidents of workplace violence, and that employees participate in the creation of a safe workplace, as required by the *OHSA*.

CUPE's representations: labour relations matter

[32] CUPE, the bargaining agent for city employees, maintains that it has an interest

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[17] Much of the affidavit evidence duplicates what has already been set out in the summary of the city's representations. The affidavit also contains some confidential information, as described in *Practice Direction Number 7* of the IPC's *Code of Procedure*.

in matters related to the representation of its members in the workplace. CUPE submits that violent incident reports, such as the one at issue, are designed so that employees can report violent incidents that arise during the course of their professional duties. Although these reports are created in confidence, CUPE states that there is a possibility for the employer to act on its findings in a way that could involve the union, such as by disciplining one of its members. Accordingly, CUPE maintains that the *Act* does not apply to the record at issue, as it deals with communications about labour relations matters as contemplated by section 52(3)3 of the *Act*.

The appellant's representations

[33] The appellant submits that the record is not related to a labour relations or employment-related matter, and therefore does not fall within the scope of the section 52(3)3 exclusion.

[34] With respect to whether the record relates to a labour relations matter, the appellant maintains that "labour relations" are between an employer and the bargaining agent representing employees of that employer, not between employer and the employees themselves. The appellant submits that the city developed its workplace violence policy and procedure, as required by the *OHSA*, without consulting or negotiating with CUPE, or requiring CUPE ratification.

[35] The appellant submits that labour relations in Ontario are governed by the *Labour Relations Act, 1995* (*LRA*),[18] and neither the *LRA* nor the collective bargaining agreement between the city and CUPE addresses violence in the workplace. Moreover, he notes that in its representations, the union claimed that the, "reporting mechanism for violent incidents in the workplace is just one aspect of labour relations *between CUPE and its Local 87,*" [emphasis added by appellant] rather than labour relations between the city and the union. The appellant maintains that the matter at hand would not become a labour relations matter between the city and the union unless the city disciplined or terminated the affected parties, and the union subsequently decided to grieve the action. If that were to happen, the appellant accepts that the union's grievance and the institution's response would be excluded from the *Act* as labour relations matters.

[36] With respect to whether the record relates to employment-related matters, the appellant relies on Order PO-3815, in which the adjudicator stated:

> The type of records excluded from the *Act* by section 65(6)[19] are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources

[18] SO 1995, c 1.
[19] Section 65(6) of the *Freedom of Information and Protection of Privacy Act* is the provincial equivalent to section 52(3) of *MFIPPA*.

> questions are at issue. *Employment-related matters are separate and distinct from matters related to employees' actions*.[20] [emphasis added by appellant]

The city's reply representations

[37] The city's response focuses on the appellant's reliance on Order PO-3815 and the definition of "employment-related matters." The city maintains that the definition of "employment-related matter" is not, as the appellant suggests, related to any or all actions taken by an employee. Rather, the exclusion "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."[21]

[38] The city also submits that the facts leading to Order PO-3815 are distinguishable because there is no anticipation of litigation in the present case. In addition, the city maintains that the record arose in the context of an employment-related matter as it was created and collected in accordance with the city's policy and procedure, which are the means by which the city fulfils its legal obligations and responsibilities as set out in the *OHSA*. The city submits that one final distinguishing feature of the current appeal is that it is the appellant's actions at issue in the record, not the actions of the city employees.

[39] The city maintains that adopting the appellant's position and interpretation of "employment-related matter" would create an absurd result and render section 52(3)3 a nullity, as all actions taken by employees in their course of duty, for any reason and within any context, would be required to be disclosed, if requested.

The appellant's sur-reply representations

[40] In response, the appellant submits that one of the affected parties corroborated the other's "fallacious version of the events" because he was under "extreme duress to do so." In support of this position, the appellant points to the following, section B.8.4 of the 2017 CUPE National Constitution, which he submits imposes a "cone of silence" on union members:

> I promise to support and obey the Constitution of this Union, to work to improve the economic and social conditions of other members and other workers, to defend and work to improve the democratic rights and

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[20] *Ontario (Ministry of Correctional Services) v. Goodis (2008)*, 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.).
[21] *Ibid* at para 22.

> liberties of workers and that I will not purposely or knowingly harm or assist in harming another member of the Union.[22]

[41] The appellant maintains that union members are led to believe that if they testify against another member, the union will rescind their membership and expel them from the bargaining unit. Because union membership is a condition of employment, the appellant submits that members fear that loss of their union membership will lead to loss of employment.

[42] In response to the city's submission that there is no anticipated litigation in the present case, the appellant refers me to a letter that he received from the city's Manager of Corporate Safety, which says, "[s]taff have been advised that in the future they are to contact police if they are feeling threatened." The appellant submits that if the city chooses to involve the police, or relies on the record or a "similarly fictitious record," the city will be held directly and vicariously liable for the actions of their staff and subject to charges under the *Criminal Code*. In particular, the appellant refers me to the public mischief provision at section 140 of the *Criminal Code*, which addresses, among other things, instances where individuals make false statements accusing another person of having committed an offence, and reporting that an offence has been committed when it has not.

[43] The appellant further submits that the "malicious action" of the affected parties and the "tainted" record that arose from those actions fall outside the purview of employment-related matters. The appellant agrees with the city's submission that the actions at issue in the record are his, not the affected parties', and he maintains that the "affected parties have falsely accused [him] of workplace violence, knowingly and in a malicious manner, contrary to the Institution's own *'Violence in the Workplace Prevention'* Procedure."

Analysis and findings

[44] I begin my analysis by noting that previous decisions issued by this office have held that section 52(3) requires a record-specific and fact-specific analysis.[23]

[45] The record at issue is a three-page violent incident report that was completed by the affected parties for the purpose of reporting an alleged incident of workplace violence to their employer, the city. I have found that the record was collected, maintained or used by the city and has some connection to meetings, consultations, or discussions. The remaining question is whether these communications are about "labour relations" or "employment-related" matters in which the city has an interest. For the reasons that follow, I find that the record pertains to an employment-related

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[22] *2017 CUPE National Constitution*, page 70.
[23] See Orders P-1242 and MO-3163.

matter, being violence in the workplace. I also find that the city has an interest in the employment-related matter that is more than a mere curiosity or concern. Accordingly, the record is excluded from the *Act* pursuant to section 52(3)3.

[46] The city submits that the record is about an employment-related matter as it relates to a specific occurrence in which city employees reported violence in the workplace, and was created as a result of both the city and the employees fulfilling their respective roles as required by the city's Violence in the Workplace Policy and Violence in the Workplace Procedure. The city further submits that it has an interest in the record as part of its legal responsibility to maintain a safe environment for its workforce and to protect workers from violence in the workplace, as required by the *OHSA*. The city maintains that this interest is more than a "mere curiosity or concern."

[47] The appellant submits that employment-related matters are distinct from matters relating to employees actions. He also maintains that if the city relies on this record and involves the police at a later date, the city may be held vicariously liable for the actions of its staff under the public mischief provisions of the *Criminal Code*.

[48] In Order M-878, former Adjudicator Donald Hale found that a municipality's workplace harassment policy, which was implemented to address, among other things, harassment by or against municipality employees, related to an employment-related concern. He also found that an investigation taking place pursuant to the terms of the policy was properly characterized as an "employment-related matter" for the purposes of section 52(3)3 of the *Act*.

[49] With regard to whether the municipality had "an interest" in the matter, Adjudicator Hale cited and adopted former Assistant Commissioner Tom Mitchinson's conclusions in Order P-1242. Assistant Commissioner Mitchinson had found that a provincial institution had an interest in an investigation undertaken pursuant to its workplace harassment policy because of the obligations placed on employers under the *Ontario Human Rights Code* (the *Code*). In particular, he stated:

> As indicated by a number of board of inquiry cases under the *Code*, where an employer is aware of a harassment situation and does not take adequate steps to remedy or prevent it, if the harassment allegation is sustained, the employer has "indirectly" breached Part I of the *Code* within the meaning of section 9, and may be found liable under section 41(1) of the *Code*.
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> […]
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> ... if the Ministry fails to act on a harassment complaint, it risks potential liability under section 41(1) of the *Code*, while an effective [Workplace Discrimination and Harassment Policy] investigation may reduce or preclude such liability. In my view, therefore, the [Workplace Discrimination and Harassment Policy] investigation has the potential to affect the Ministry's legal rights and/or obligations, and for this reason I

> find that the [Workplace Discrimination and Harassment Policy] investigation is properly characterized as matter "in which the institution has an interest

[50] I note, however, that in both Orders M-878 and P-1242 the adjudicators considered records relating to the conduct of an institution's own employee who could be subject to disciplinary action by the institution. In contrast, in the present appeal, the alleged perpetrator of the violence that gave rise to the record (the appellant) is not a city employee and is therefore not subject to any disciplinary action by the city.

[51] In Order MO-2698, Adjudicator Jennifer James addressed a similar fact situation in which an institution was required to take steps to prevent its employees from being harassed by a member of the public, as opposed to one of its own employees. As with this appeal, the appellant was not an employee of the institution, but a member of the public seeking access to records relating to the complaint made against him by the employees.

[52] Adjudicator James noted that decisions from this office have consistently held that records relating to an employer's investigation into complaints about employees are employment-related, as they could result in disciplinary action against the employee.[24] However, she distinguished the case before her on the basis that the records did not contain allegations of employee misconduct. She found that the records set out the employees' concerns, but they did not contain information that reviewed, assessed, or investigated the employees' responses, actions, or conduct, nor did they contain the institution's replies to the employees' complaint.

[53] Adjudicator James found that although the institution had an obligation to protect its employees from harassment under the *OHSA*, that fact on its own did not remove records relating to complaints of workplace violence from the scope of the *Act*. In considering the records before her, Adjudicator James found that they described employees' observations about the appellant, who was not an employee of the institution and therefore not in an "employment-like relationship" with the institution. Based on the evidence before her, Adjudicator James found that the records did not contain information relating to human resources or staff relations issues between the institution and its employees. It followed, then, that any meetings, consultations, discussions, or communications that the institution had relating to the use of the records did not relate to an employment-related matter, which led Adjudicator James to conclude that third requirement for the application of section 52(3)3 had not been met.

[54] This approach to records relating to the actions of a member of the public was subsequently applied by former Adjudicator Donald Hale in Order PO-3272.

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[24] See for example, Orders MO-1635, MO-1723, PO-2748, and PO-2809.

[55] However, as mentioned above, the section 52(3) exclusion is record- and fact-specific. In addition, the principle of binding precedent or *stare decisis* does not apply to require administrative tribunals to follow their own decisions. In Order PO-3669, Adjudicator Daphne Loukidelis commented on the extent to which this office is bound to follow previous orders:

> At its core, the decision to maintain the *status quo* is based on the notion that consistency in decision-making promotes predictability and supports the rule of law. Without doubt, such consistency is an important factor in building and maintaining public confidence in the integrity of the administrative justice system, of which this office is a part. It is also true that past decisions frequently offer useful guidance by illustrating legal principles that assist in achieving consistent and predictable results for administering and apply [the provincial *Act*]. The common law doctrine that decisions should be guided by precedent is known as *stare decisis*. However, […] I am not bound by *stare decisis* and may depart from earlier interpretations of the same provision, particularly when doing so is required, for example, to clarify its meaning.

[56] Further, in *Weber v. Ontario Hydro*,[25] the Supreme Court of Canada affirmed that tribunals are not constrained by past precedent:

> The first significant difference between courts and tribunals relates to the difference in the manner in which decisions are rendered by each type of adjudicating body. Courts must decide cases according to the law and are bound by *stare decisis*. By contrast, tribunals are not so constrained. When acting within their jurisdiction, they may solve the conflict before them in the way judged to be most appropriate.

[57] Therefore, though I will consider the principles set out in Orders M-878, P-1242, MO-2698, or PO-3272, I am not bound by the findings therein.

[58] In this appeal, the record at issue originated as a result of the affected parties reporting threatening behaviour in their workplace to their employer. I accept the city's position that violence in the workplace is not limited to incidents between employees; rather, it can extend to violence by members of the public on employees who are performing professional duties, regardless of whether they are on public or private property.

[59] The affected parties perceived the incident involving the appellant to be threatening, and they reported it using the Violent Incident Report form as required by their employer's Violence in the Workplace policy and procedure. In doing so, the

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[25] [1995] 2 SCR 929, 1995 CanLII 108 at para. 14

affected parties described their observations of the appellant's behaviour and the impact of that behaviour on them. This information was provided so that their employer could determine how best to proceed in order to foster a harassment-free workplace.

[60] In my view, violence in the workplace is, inherently, an employment-related concern. The fact that the appellant is a member of the public who is not in an "employment-like relationship" with the city and is therefore beyond the city's disciplinary reach is a consideration; however, it is not a determinative factor in deciding whether the record relates to an "employment-related matter" for the purpose of section 52(3)3 of the *Act*. Other relevant considerations include, for example, the relationship between the city and the individuals who filed the report and the nature of the allegations in the report. In a fact- and record-specific analysis, such as that required under section 52(3)3, an adjudicator may find that a record reporting violence in the workplace is an employment-related matter in one case, but not in another.

[61] Based on the evidence before me, I am satisfied that the record at issue contains information relating to violence in the workplace, which I am satisfied is a human resources or staff relations issue between the city and its employees. In the context of this appeal, it is clear that both the affected parties and their employer considered the incident to be an employment-related matter from the outset. The affected parties completed the form, which is held by the city's human resources department, and the employer took steps to protect its employees from future incidents of a similar nature. Accordingly, I find that the record is directly concerned with "employment-related matters" within the meaning of section 52(3)3.

[62] Again, this is not to say that every negative interaction between city employees and members of the public will be considered a human resources or staff relations issue. For instance, there may be cases where, notwithstanding an employer's insistence on the use of a "violent incident" or similar form to report negative interactions with the public, it is evident that the incident is more of a customer relations issue than a workplace safety issue. As noted above, each set of facts must be assessed individually.

[63] In addition, I find that the city "has an interest" in the subject matter of the record in its capacity as the employer of its unionized and non-unionized employees, all of whom are subject to its Violence in the Workplace policy and procedure. Similar to the legal obligations and potential ramifications recognized by past adjudicators in Orders M-878 and P-1242, I am satisfied that the city's workplace violence reporting mechanisms were adopted in accordance with its legal obligations as set out in the *OHSA*. Moreover, I am satisfied that the city risks potential liability under section 66 of the *OHSA* if it fails to comply with those requirements. Accordingly, I find that the city's interest in the record is engaged because of its role as the employer responsible for the management of all aspects of human resources for its employees, including maintaining the health and safety of its employees and ensuring the workplace is free of violence.

[64] As the components of the third part of the test have been satisfied, I find that all three parts of the section 52(3)3 test have been met and the record is excluded from

the scope of the *Act*. It is therefore unnecessary for me to also consider whether the record relates to a "labour-relations" matter in which the city has an interest, as submitted by CUPE. It is also not necessary for me to consider the other issues that were raised in this appeal, being the application of the exemptions at section 38(a) in conjunction with section 13, and section 38(b).

[65] As a final note, my finding that the record is excluded from the scope of the *Act* does not prohibit the city from disclosing the record in full or in part, or from providing the appellant with additional information about the content of the record. As former Senior Adjudicator Frank DeVries stated in Order MO-2242:

> ... although I have found that the records are excluded from the scope of the *Act* as a result of the application of section 52(3)3, this section in no way prohibits an institution from disclosing records or portions of records, it simply removes them from the access and privacy regimes established by the *Act*. Outside the scope of the *Act*, an institution still has the discretion to disclose records even when section 52(3) is applicable.[26]

ORDER:

I uphold the city's decision and dismiss this appeal.

Original signed by
Jaime Cardy
Adjudicator

October 23, 2020

[26] See also Orders PO-2613 and MO-2822.