

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4395

Appeal MA21-00338

City of Toronto

June 19, 2023

Summary: The City of Toronto (the city) received a request for records including its policies, procedures, guidelines for the investigation of suspected malingering/abuse of sick leave for employees who are members of a specified union. The city issued a decision denying access to the responsive record claiming it was excluded from the *Act* by section 52(3)3 (labour or employment relations). The requester appealed. In this order, the adjudicator finds that section 52(3) applies to exclude the record from the *Act* and dismisses the appeal.

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

Orders and Investigation Reports Considered: Order MO-1654-I.

Cases Considered: *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, 2001 CanLII 8582 (ON CA), application for leave to appeal to the Supreme Court of Canada dismissed June 13, 2002, and, *Ontario (Ministry of Correctional Services) v. Goodis*, 2008 CanLII 2603 (ON SCDC).

OVERVIEW:

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

“...policies, procedures, guidelines, etc. for the investigation of suspected malingering/abuse of sick leave for employees who are members of

[specified union]. Please include information on whether the procedure is different depending upon whether the employee is on regular sick leave vs. Long Term Disability. Please include details of the roles of all potentially involved parties, including management, Employee Health, Labour Relations, Auditor General's office, etc."

[2] In response to the request, the city issued a decision and denied access to the responsive record it located, claiming that the *Act* does not apply to it, pursuant to section 52(3)3 (employment or labour relations).

[3] The requester, now the appellant, appealed the city's decision to the Office of the Information and Privacy Commissioner of Ontario (IPC).

[4] As mediation was unsuccessful, the appeal moved to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry.

[5] The original adjudicator assigned to this appeal began an inquiry under the *Act* by inviting representations from the city. Representations were received and at this stage, I was assigned as the adjudicator for this appeal. I sent the city's representations to the appellant who provided her own. After reviewing the representations, I decided to seek additional representations from the parties. Representations were shared in accordance with the IPC's *Code of Procedure*.

[6] In this order, I find that the record is excluded from the *Act* by section 52(3)3 and dismiss the appeal.

RECORDS:

[7] A two-page record is at issue, an internal guideline, withheld in full.

DISCUSSION:

[8] The sole issue in this appeal is whether section 52(3)3 applies to exclude the guideline from the *Act*.

[9] Section 52(3)3 of the *Act* provides:

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.

[10] Section 52(3) is record-specific and fact-specific. If section 52(3) applies to a record, it has the effect of excluding the record from the scope of the *Act*. If that is the case, I do not have jurisdiction to consider the issue of the denial of access by the municipality and whether the record qualifies or does not qualify for exemption under the *Act*.

[11] 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.¹

[12] 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 in the context of the institution's possible vicarious liability in relation to those actions, as opposed to the employment context.²

[13] The phrase "labour relations or employment-related matters" has been found to apply in the context of:

- a job competition;³
- an employee's dismissal;⁴
- a grievance under a collective agreement;⁵
- disciplinary proceedings under the *Police Services Act*;⁶
- a "voluntary exit program";⁷
- a review of "workload and working relationships";⁸ and
- the work of an advisory committee regarding the relationship between the government and physicians represented under the *Health Care Accessibility Act*.⁹

¹ *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, 2001 CanLII 8582 (ON CA), application for leave to appeal to the Supreme Court of Canada dismissed June 13, 2002 (Gonthier, Major and LeBel JJ.). S.C.C. File No. 28853. S.C.C. Bulletin, 2002, p. 781.

² See *Ontario (Ministry of Correctional Services) v. Goodis*, 2008 CanLII 2603 (ON SCDC) (Goodis).

³ Orders M-830 and PO-2123.

⁴ Order MO-1654-I.

⁵ Orders M-832 and PO-1769.

⁶ Order MO-1433-F.

⁷ Order M-1074.

⁸ Order PO-2057.

[14] The phrase “labour relations or employment-related matters” has been found not to apply in the context of:

- an organizational or operational review;¹⁰ or
- litigation in which the institution may be found vicariously liable for the actions of its employee.¹¹

[15] 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.¹²

[16] For section 52(3)3 to apply, the municipality 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.

Representations

[17] The city explains that the record is an unpublished internal city guideline used when there are meetings and discussions between union staff members, their union representative and an employee relations staff member with respect to employment-related investigations. It submits that the guideline was prepared by its employee relations staff to be used by city staff to conduct employment-related meetings that stem from investigations conducted by the city’s employee relations staff. The city emphasizes that the record is not a training guide but a guideline, prepared by and used by its employee relations staff.

[18] The city submits that although this record was not written specifically for an individual employee, it still meets the three-part test of section 52(3).

[19] The appellant submits that the record is not employment-related because it does not concern a specific employee. She submits that the city’s arguments do not establish the “employment related” content of the document itself and that it is the application of, and consequences of the guideline contained in the document that could produce material that may be considered employment-related.

⁹ *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.).

¹⁰ Orders M-941 and P-1369.

¹¹ Orders PO-1722, PO-1905 and *Ontario (Ministry of Correctional Services) v. Goodis*, cited above.

¹² *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above.

[20] The appellant argues that because the record is a guideline and/or policy, it does not relate to the employment of a specific individual. The appellant suggests that because the record applies generally to all employees it should be characterized as an operational record and as such not be excluded from the *Act*. The appellant refers to Order MO-1654- I “for elaboration on this issue.”

[21] The appellant also submits that other similar policies, protocols, and guidelines are readily available from the city despite the fact that they would, under the definition the city utilized here, appear to be “employment related.” She submits that the most similar policy is the attendance management policy, which is not a part of the collective agreement. The appellant provides the city’s link for this document and notes that it is a guideline that provides protocols for management, and discusses the discretionary powers of management, in dealing with culpable and non-culpable employee absenteeism, and the potential consequences of compliance and non-compliance with the various stages of the policy for employees.

[22] The parties provided reply and sur-reply representations which will be referred to in my analysis below, as needed.

Analysis and finding

[23] I have reviewed the record at issue along with the parties’ representations and for the following reasons, I find that the exclusion at section 52(3)3 applies.

[24] To satisfy parts 1 and 2 of the 3-part test set out above, the city must establish that the record was collected, prepared, maintained or used by it or on its behalf, in relation to meetings, consultations, discussions or communications. Based on the representations of the parties and a review of the record, I am satisfied that the record at issue, which is a guideline to be used by city staff in meetings and discussions between a union staff member and their union representative, was prepared by the city in relation to meetings, consultations or discussions resulting in the creation of the guideline. Accordingly, I am satisfied that the first and second parts of the test in section 52(3)3 have been met.

[25] To satisfy part 3 of the test, the city must also establish that the meetings, consultations or discussions that took place were about labour relations or employment-related matters in which it has an interest.

[26] The term “labour relations” refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to similar relationships. The meaning of “labour relations” is not restricted to employer- employee relationships.¹³

¹³ *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above; see also Order PO-2157.

[27] 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.¹⁴

[28] The phrase “labour relations or employment-related matters” has been found not to apply in the context of an organizational or operational review.¹⁵

[29] The phrase “employment related matters 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.¹⁶ The decision of the Divisional Court in *Ontario (Ministry of Correctional Services) v. Goodis* went on to confirm that section 65(6)3 (the provincial equivalent to section 52(3)3) must be interpreted narrowly in light of the purposes of the *Act* so as to exclude only those records that actually relate to employment matters in which the institution has an interest. The Court also noted that whether or not a particular record is employment-related would depend on an examination of the particular record.¹⁷

[30] After examining the record at issue, I agree that it is as the city described it: a guideline setting out the approach to be taken by its employee relations staff in meetings with an employee and their union representative that stems from an investigation. I accept that a guideline on how city staff will conduct investigative meetings and discussions with a union representative and a staff member is about a labour relations matter, namely the relationship between the city and its union in the context of these kinds of meetings. Further, I accept that the approach to be taken in these kinds of meetings is a labour relations matter in which the city would have an interest.

[31] Despite the appellant’s suggestion that the record is not employment-related because it does not relate to the employment of a specific individual, I note that section 52(3)3 does not require the record to be in relation to a specific employee. In my view, the record relates to a labour relations matter because it sets out the approach that city staff will take in meetings that occur when employees are being investigated for misconduct and when a union representative is present. How city staff engage in these kinds of meetings is a labour relations matter in which the city has an interest.

[32] In her representations, the appellant refers to Order MO-1654-I to support her submission that the record is operational and/or procedural in nature and therefore not covered by the exclusion. The request in Order MO-1654-I, concerned records related to the review of management and/or operations of the City of Hamilton’s emergency medical service (EMS). The adjudicator divided the records into two categories: category 1 for records relating to the former manager of EMS; and, category 2 for

¹⁴ Order PO-2157.

¹⁵ Orders M-941 and P-1369.

¹⁶ *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above.

¹⁷ *Goodis*, cited above.

records relating to an identified consultant. The adjudicator found that the records in category 1 were all excluded by section 52(3)3 since they related to the city's ongoing litigation with its former manager and also dealt with various employment related staffing and recruitment matters in which the city had an interest. I note that one of the records that was found excluded was a report on ambulance staffing and recruitment issues (record 5) which the adjudicator noted dealt primarily with staffing issues involving the City and its workforce.

[33] The adjudicator in Order MO-1654-I found that the records relating to category 2 were not excluded by section 52(3)3 because they were created in the context of a consultant's organizational review and were not subsequently maintained or used for meetings, consultations, discussions or communications about labour relations or employment-related matters. While I agree with the finding in Order MO-1654-I, I find it is not helpful to the appellant as the record at issue here is different from the consultant's report at issue in that order. The record at issue here is a city policy created for labour- relations purposes regarding the approach to be taken in certain meetings involving union representatives when employee misconduct is being investigated and is vastly different from a consultant's organization review and more similar to the employment related staffing and recruitment matters that the adjudicator found to be excluded.

[34] Further, the appellant's argument that similar policies or guidelines are available from the city is not relevant to my determination of whether the record at issue in the present appeal is excluded under the *Act*. There is no requirement that the record not be available to the public for it to be excluded under section 52(3).

[35] In my view, this is clearly a record that was prepared by the city in relation to meetings, consultations, discussions or communications about labour relations matters in which the city has an interest, namely the approach to be taken by city staff in certain meetings involving union representatives and employees under investigation. As all three parts of the test are met, the record is excluded from the *Act* by section 52(3)3.

[36] Section 52(4) sets out exceptions to section 52(3) and states that the *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.

[37] None of the parties submitted that section 52(4) is relevant in this appeal and after reviewing the record, I find that section 52(4) does not apply to it.

ORDER:

The appeal is dismissed.

Original Signed By: _____

Alec Fadel
Adjudicator

_____ June 19, 2023