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

ORDER MO-1264

Appeal MA-980314-1

The Corporation of the City of Barrie

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NATURE OF THE APPEAL:

The appellant, a local union, made a request to the City of Barrie (the City) under the Municipal Freedomof Information and Protection of Privacy Act (the Act) for a report prepared for the City in 1998 by a named consulting firm. During the processing of this request, several reports were located. However, as the appellant was unable to specify which report it was seeking, the request was broadened at that time to include all of the reports.

The City denied access to the requested records on the basis of the following exemptions under the Act:

- closed meeting - section 6(1)(b);
- advice or recommendations - section 7(1);
- third party information - section 10(1)(a) and (c);
- economic and other interests - section 11(d), (e) and (f);
- proposed plans of an institution - section 11(g); and
- invasion of privacy - section14(1).

The appellant appealed this decision.

Mediation was attempted in this matter but was unsuccessful. At its conclusion, the mediator assigned to this file sent out a Mediator's Report to the parties. She identified, in addition to the exemptions raised by the City, the possible application of sections 52(3) and (4) of the Act, which, if found to apply, would remove the records from the scope of the Act.

I sent a Notice of Inquiry to the appellant and the City. Representations were received from both parties. In its representations, the City indicates that it relies on the mandatory exemption in section 10(1)(b) of the Act in addition to those already claimed by it in its decision. Although the appellant has not had an opportunity to address the possible application of this exemption, I have decided it is not necessary to hear from it on this issue given my findings below.

RECORDS:

The records at issue consist of three reports prepared by the named consulting firm dated March 2, 1998 on Bargaining Unit Compensation, Exempt Compensation and Council Remuneration, and a letter from the consulting firm, dated March 30, 1998, regarding modified salary structure options.

DISCUSSION:

JURISDICTION

Sections 52(3) and (4) of the Act read as follows:

> (3) Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:

1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.

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

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

(4) This Act applies to the following records:

1. An agreement between an institution and a trade union.

2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.

3. An agreement between an institution and one or more employees resulting from negotiations about employment- related matters between the institution and the employee or employees.

4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment.

Section 52(3) is record-specific and fact-specific. If this section applies to a specific record, in the circumstances of a particular appeal, and none of the exceptions listed in section 52(4) are present, then the record is excluded from the scope of the Act.

The City relies on all three parts of section 52(3).

Employment or Labour Relations

One of the records at issue (Record 3) is a report on Council Remuneration. In my view, a determination regarding the applicability of section 52(3) to this record turns on whether the activities described in the three paragraphs of section 52(3) relate to "employment" or "labour relations".

The term "labour relations" appears in section 10(1) of the Act. In that context, Adjudicator Holly Big Canoe discussed the term "labour relations information" in Order P-653 (which dealt with section 17(1) of the provincial Act which is the equivalent of section 10(1) of the Act), and made the following statements:

> In my view, the term "labour relations information" refers to information concerning the **collective** relationship between an employer and its employees. The information contained in the records was compiled in the course of the negotiation of pay equity plans which, when implemented, would affect the **collective** relationship between the employer and its employees. [emphasis in original]

I find that Adjudicator Big Canoe's interpretation of the term is equally applicable in the context of section 52(3)3. Therefore, I find that "labour relations" for the purpose of this section is properly defined as the collective relationship between an employer and its employees.

Previous orders

In Order P-1545, Assistant Commissioner Tom Mitchinson made the following findings regarding the interpretation of section 65(6) of the provincial Act (the equivalent of section 52(3) of the Act):

> In order to qualify under any of the paragraphs of section 65(6), a record must either relate to "labour-relations or to the employment of a person", or be "about labour relations or employment related matters."
>
> Hydro [the institution in that appeal] and the affected person state quite specifically that the affected person is not an employee. The record itself includes provisions which make it clear that the contract does not create an employment relationship between Hydro and the affected person. However, Hydro submits that in carrying out his responsibilities under the contract "it could be argued that this is similar to 'employment', and the record could thus be described as related to employment matters."
>
> I do not accept Hydro's position. Section 65(6) has no application outside the employment context, and ... I find that no employment relationship exists between Hydro and the affected person. Accordingly, the record does not fall within the parameters of section 65(6) and is, therefore, subject to the Act. ...

Assistant Commissioner Mitchinson applied this same reasoning in determining that section 65(6)3 did not apply to the relationship between the Government of Ontario and Justices of the Peace, which also fell outside the employment context (see Orders P-1563 and P-1564) or to the relationship between the Government of Ontario and the members of the Ontario Medical Association where both are participating in a Physician Services Committee relating to the management of Ontario's health care program (Order P-1721). In particular, Assistant Commissioner Mitchinson stated in Order P-1563:

> MBS's representations state:

> It is conceded that justices of the peace are not, in the strictest sense, in an employee/employer relationship with the Crown. When performing their functions, they must be completely independent from the Crown. They must enjoy complete independence in their decision making.

The appellant also submits that justices of the peace are independent judicial officers, and not employees, and refers me to a number of court decisions which support this position (Reference re: Public Sector Pay Reduction Act (P.E.I.), s. 10 (1997), 150 D.L.R. (4th) 577 (S.C.C.); R. v. Valente, [1985] 2 S.C.R. 673; and Currie v. Ontario (Niagara Escarpment Commission) (1984), 46 O.R. (2d) 484 (H.C.)). [I note that Currie was reversed by the Court of Appeal in a decision reported at (1984), 48 O.R. (2d) 609, but on other grounds]. The appellant has also included with its representations a copy of a decision of an Adjudicator under the Employment Standards Act (Re Devine, [1996] O.E.S.A.D. No. 41 dated February 14, 1996) in which it was held that justices of the peace are not employees as that term is defined in section 1 of the Employment Standards Act.

I concur with the parties, and find that no employer/employee relationship exists between justices of the peace and the Government of Ontario.

However, MBS submits that, because section 65(6)3 refers to "employment-related matters" it does not require that the institution "employ" the individuals in order for the section to apply. In support of its position, MBS points to the different phrases "employment of a person by the institution" in sections 65(6)1 and 2, and "employment-related matters in which the institution has an interest" in section 65(6)3. MBS also submits that "salary is quintessentially an 'employment-related'
matter, and that the records, which deal with remuneration, are thus communications about employment-related matters for the purpose of section 65(6)3. MBS maintains that the additional hyphenated word "related" enhances the general application of the term "employment', and that "if 'employment-related matters' means nothing more than 'employment matters', then the added hyphenated word 'related' would be meaningless", which could not have been the legislative intent. In the view of MBS, the phrase "employment-related" refers to more than simply employment matters and includes records that would be related to or like those typically found in an employment relationship.

The appellant points out that the terms of reference of the Ontario Justices of the Peace Remuneration Commission make it clear that the Government of Ontario recognizes that financial compensation of justices of the peace must be kept separate from employment or labour related issues, in order to ensure the impartiality and independence of judicial officers. The appellant submits that "[o]n this basis alone, section 65(6)3 is not applicable.". The appellant relies on Order P-1545, where I found that a contract between an institution and an individual who was not an employee was not covered by section 65(6), even though the contractual arrangement was "similar to employment".

> Having carefully reviewed the detailed representations of both parties and the records, I find that section 65(6)3 is not applicable in the circumstances of this appeal. I acknowledge that section 65(6)3 includes different wording ("employment-related matter") than sections 65(6)1 and 2 ("employment of a person"), but I am not persuaded that the use of these different words means that the Legislature intended section 65(6)3 to apply to relationships outside the employment context. As I found in Order P-1545, an employer/employee relationship must exist in order to trigger the application of section 65(6) and, as both parties acknowledge, no such relationship exists between justices of the peace and the government.

In Order M-899 I considered whether police officers were "employees" within the meaning of section 52(3). I concluded, based on the common law, that they were not "employees". However, I concluded that the statutory context of the Police Services Act (the PSA) made it abundantly clear that what police officers do for the Police Services Boards constitutes "employment". Consequently, I found that section 52(3) was available to records pertaining to police officers.

In Order MO-1249 on the other hand, I considered whether an auxiliary member of a police force is in an employment relationship with the police such that there is the potential for engaging the section 52(3) interests. Referring to my analysis in Order M-899, I concluded that the PSA demonstrates an intention to treat auxiliary officers differently from full time officers, particularly in the area of discipline. I found that this factor, combined with the fact that auxiliary officers are volunteers, supported a finding that their activities with the police do not constitute "employment". As a result, I found that auxiliary members of the police are not engaged in "employment", and, therefore, a necessary prerequisite for the application of section 52(3) did not exist.

Municipal Councillors

It is clear from the record that the Mayor and Councillors are in receipt of remuneration, that they receive other benefits as part of their position with the City and are reimbursed for expenses incurred as a result of their activities relating to their positions. However, both the Mayor and municipal Councillors are "elected" into their positions as opposed to being "hired" or even "appointed" as are many of the individuals referred to in the above orders.

The British Columbia Supreme Court considered this issue in Valcourt v. Capital (Regional District) (1983), 2 D.L.R. (4th) 339 and found that the British Columbia Municipal Act clearly demonstrates that members of council should not be viewed as, among other things, employees of the municipal corporation. In analysing the British Columbia Municipal Act, which is similar to the Ontario Municipal Act, the Court stated at pages 342 - 343:

> By-law 240 was enacted pursuant to s.262 of the *Municipal Act*. That section states:
>
> 262(1) The council may, by a vote of not less than 2/3 of all members, pay a

> sum required for the protection, defence or indemnification of an officer or employee of the municipality where an action or prosecution is brought against him in connection with the performance of his duties, or where an inquiry under Part 2 of the *Inquiry Act* or other proceeding involves the administration of a department of the municipality or the conduct of a part of the municipal business, and costs necessarily incurred and damages recovered. The council shall not pay a fine imposed on an officer or employee on his conviction for a criminal offence.
>
> (2) The council may by bylaw provide that the municipality will indemnify its officers and employees against a claim for damages against an officer or employee arising out of the performance of his duties and, in addition, pay legal costs incurred in a court proceeding arising out of the claim.
>
> (3) The council may in a bylaw under subsection (2) provide that the municipality will not seek indemnity against its officers and employees where the actions of those officers or employees result in a claim for damages against the municipality by a third party unless the officer or employee has been grossly negligent or has acted contrary to the terms of his employment or to an order of a superior.

The wording of this section, particularly the words in s-s. (3), "unless the officer or employee ... has acted contrary to the terms of his employment or to an order of a superior", suggest that the "officer or employee" is not a member of the council of a municipality but rather someone employed or appointed by the council.

In my opinion that meaning is consistent with the whole of the context of the *Municipal Act* where reference to "officer" or "employee" is made.

I turn first to ss.244 to 261 of the *Municipal Act* which immediately precede s.262.

Section 251 states that the council may provide by by-law for the officers and employees that may be deemed necessary to carry on good government of the municipality. Clearly, the expression "officers and employees" in this section is used in contradistinction to members of council. The members of a council would not have to provide by by-law that they themselves were necessary to the good government of the municipality. The word "officers" mentioned in this section does not include elected members of a council.

Section 252 of the *Municipal Act* states that the council may in the same or separate by-law or by collective agreement fix officers' or employees' remuneration and other benefits and conditions of employment, as well as matter relating to appointment, promotion and dismissal. Again it is clear that such a by-law could have no application to a member of a council.

Section 253 of the *Municipal Act* makes possible the appointment of a person to two or more "offices or positions". This can have no application to a member of a council.

> Section 255(2) defines, for the purposes of s.255, the persons who are deemed to be "officers of the municipality" and makes provision for their protection against arbitrary dismissal. Again this could have no application to a member of a council.
>
> Section 257 prescribes an oath of officer for an "officer". Section 212 prescribes an oath of office for a person elected as mayor or alderman. Section 212 would have been superfluous if mayors and alderman were "officers". The same could be said for directors of a regional district.
>
> Section 258 refers to the commencement of employment of an officer or of a permanent employee. Clearly a member of council does not "commence employment".

The Ontario Municipal Act contains similarly worded provisions. In my view, these provisions demonstrate that the Municipal Act consistently distinguishes between "employees" and "members" when describing their rights and duties (See: ss. 100, 102.1, 24(b), paras. 46 - 50 of section 207, 253, 288(1) and 331(3)). Of particular relevance is section 37(1)1 of the Municipal Act which states:

> The following are not eligible to be elected a member of a council or to hold office as a member of a council:
>
> > Except during a leave of absence under section 30 of the Municipal Elections Act, 1996, **an employee of the municipality** or of a local board as defined in the Municipal Affairs Act, other than a person appointed under section 256. [emphasis added]

Section 256 states:

> A member of the council of a village or township having a population of 3,000 or less may be appointed commissioner, superintendent or overseer of any work, other than a highway, undertaken wholly or in part at the expense of the corporation, and may be paid the like remuneration for his or her services as if he or she were not a member of the council. R.S.O. 1980,

In my view, even when the exception in section 256 is taken into consideration, the status of "employee" and "councillor" appear to be mutually exclusive.

In my view, the reasoning in Orders P-1545 and P-1563 is similarly applicable to the relationship between the City and its municipal councillors in that an employer/employee relationship must exist in order to trigger the application of section 52(3). On the basis of the provisions of the Municipal Act, I find that there is no employer/employee relationship between the City and its municipal councillors.

Based on the above, I find that Record 3 does not pertain to labour relations or employment and the section 52(3) interests are therefore not engaged. Consequently, with certain exceptions, this record falls within the jurisdiction of the Act. The exceptions will be explained in the following discussion.

Section 52(3)3

In order for the record to fall within the scope of paragraph 3 of section 52(3), the City must establish that:

1. it was collected, prepared, maintained or used by the City or on its behalf; **and**
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 City has an interest.

[Order P-1242]

Requirements 1 and 2

The City states that the records were prepared for it by the named consulting firm under contract. The City indicates that the development of the reports entailed meetings, consultation, discussions and communications with both City staff and outside organizations. The City also provided a copy of the minutes of an in camera General Committee meeting of Council held on March 9, 1998 which clearly indicates that the records were received and considered by Council at a meeting.

On this basis, I am satisfied that Records 1, 2 and 4 were all collected, prepared, maintained or used by the City or on its behalf and that this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications involving City staff, the consultants, outside organizations and City council. Therefore, I find that the first two requirements of section 52(3)3 have been met for these records.

Requirement 3

The City states that the reports were requested, obtained and utilized by it for the review of its compensation plans relating to both its unionized and non-union employees. The City submits that there is a clear labour relations issue when dealing with a compensation plan for employees.

As I suggested in Order MO-1249, remuneration for the services performed by individuals is an integral part of the "employment" relationship. In my view, "remuneration" is of vital importance in defining this relationship. Activities undertaken by the City to address this component of the employment relationship, in my view, clearly relate to or are "about" labour relations or employment-related matters. Therefore, I find that the meetings, consultations, discussions and/or communications were about labour relations or employment-related matters.

The only remaining issue is whether this is an employment-related matter in which the City "has an interest".

Previous orders have held that an interest is more than mere curiosity or concern. An "interest" for the purpose of section 52(3)3 must be a legal interest in the sense that the matter in which the City has an interest must have the capacity to affect the legal rights or obligations of the City (Orders P-1242 and M-1147).

Several recent orders of this office have considered the application of section 52(3)3 (and its provincial equivalent in section 65(6)3) in circumstances where there is no reasonable prospect of the institution's "legal interest" in the matter being engaged (Orders P-1575, P-1586, M-1128, P-1618 and M-1161). The conclusion of this line of orders has essentially been that an institution must establish an interest that has the capacity to affect its legal rights or obligations, and that there must be a reasonable prospect that this interest will be engaged. The passage of time, inactivity by the parties, loss of forum or conclusion of a matter have all been considered in arriving at a determination of whether an institution has a "legal interest" in the records.

The appellant takes the position that, to the best of its knowledge, there are no labour relations or employment proceedings, such as grievances, in existence or contemplated. It submits that there are no negotiations or anticipated negotiations relating to these records. In this regard, the appellant states that the union and the City had entered into negotiations to renew the collective agreement that was due to expire on December 31, 1997. The appellant acknowledges that at the time the access request was made, the negotiations were on-going and resulted in a memorandum of agreement dated November 24, 1998 that binds the union and the City to a collective agreement from January 1, 1998 until it expires December 31, 2000. The appellant submits that no further labour relations negotiations will be undertaken for some time in the future.

Further, the appellant argues that any meetings, consultations, discussions or communications did not occur in the reasonable proximate past and thus have no potential impact on current labour relations or employment related matters that directly relate to the records. The appellant submits that there is no reasonable prospect that the City's legal interests will be engaged by disclosure of the records because of the significant passage of time since the last collective bargaining negotiations and inactivity of the parties concerning any relevant issue connected to the records. In this regard, the appellant also takes the position that there is currently no forum available in which to engage any legal rights.

Finally, the appellant submits that there are no other individual employment negotiations existing or anticipated that would attract the application of section 52(3)3.

In the alternative, the appellant argues that section 52(4) applies to the records in the circumstances of this appeal. In this regard, it states that the records touch upon the various agreements between the City and its bargaining agents and non-union employees concerning their working conditions, wages and benefits. Therefore, it argues that they are all related to negotiated contracts of employment or collective agreements. It submits that they may also contain expense accounts submitted by an employee for the purposes of seeking reimbursement for expenses incurred in the course of his or her employment.

The City reiterates that the records were requested as part of its review of employee compensation plans. The City states that it is obligated to pay employee wages and benefits and at the same time be accountable to the taxpayers for the wise and efficient administration of public moneys. The City refers to a number of conclusions in the reports and states that not all recommendations in the reports have been fully implemented. The City asserts that disclosure of the records at this time could reasonably be expected to attract employee repercussions.

In this regard, the City indicates that it takes a very proactive stand on position re-evaluations. It submits that in the event that one or more of the positions detailed in the reports is to be reviewed by the Job Evaluation Committee, the current salary could be challenged based on the recommendations of the reports. The City takes the position that a challenge could result in costs being incurred by the City and would likely result in a domino effect of challenges for positions to be re-evaluated. The City submits that such a result would result in significant costs to the City.

The City notes that contract negotiations and compensation plans are ever changing and that it is constantly monitoring this issue. The City states that these records will be used for reference in the 2000 budget process and beyond. The City submits that disclosure of these records will provide the representatives and bargaining agents of the various employee groups with increased bargaining power in future negotiations.

The records contain detailed analysis of compensation issues specific to the City and include comparative analysis from outside sources. I am satisfied that the City has a legal interest in compensation issues pertaining to its employees, both in ensuring fair wage practices and in being accountable to the public with respect to the use of public money. I accept the City's position that disclosure of the information in the records could have immediate repercussions with respect to its various employee groups in that a challenge to the salary or wage for a particular position based on the information in the record could impact on the City's fiscal planning and any legal obligations resulting from such a challenge. I also accept that the information in the records will continue to have relevance to the issue of employee compensation in the near future and that premature disclosure of this information would put the City in a disadvantaged bargaining position.

Section 52(3) was enacted as part of a statute whose title states its purpose: "An act to restore balance and stability to labour relations in Ontario and to promote economic prosperity and to make consequential changes to statutes concerning labour relations" (S.O. 1995, c. 1). In my view, the purpose of this legislation would be defeated by premature disclosure of the information in the records.

Consequently, I find that the City has established a current legal interest in a labour relations and employment- related matter involving the City and its employees that has the capacity to affect the City's legal rights or obligations. Therefore, the third requirement for section 52(3)3 has been established, and I find that Records 1, 2 and 4 fall outside the jurisdiction of the Act.

Section 52(4)

The records clearly on their face do not contain any "agreements" between the City and any of its employee groups nor do they contain expense account information as described in section 52(4)4. Accordingly, I find that section 52(4) does not apply to the records in the circumstances of this appeal.

Record 3 - Council Remuneration

Record 3 was created as part of a complete package containing Records 1, 2 and 3. Certain portions of this record are identical to the information contained in Records 1 and 2 or would reveal the discussion in these records. In my view, disclosure of this information would effectively result in disclosure of the same information to which the Act does not apply. Because of the manner in which these records were produced and their intended use, I find that it would be contrary to the principles underlying section 52(3) to allow this information to be disclosed simply because the record standing alone does not meet the requirements of section 52(3). Therefore, I have highlighted in yellow on the copy of Record 3 which is being sent to the City's Freedom of Information and Privacy Co-ordinator those portions of Record 3 which also fall outside the jurisdiction of the Act.

As a result of the above, Records 1, 2, 4 and the highlighted portions of Record 3 fall outside the jurisdiction of the Act. I will consider whether any of the other exemptions claimed by the City apply to the remaining portions of Record 3.

CLOSED MEETING

Section 6(1)(b) of the Act states:

> A head may refuse to disclose a record,
>
> > that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public.

In order to qualify for exemption under section 6(1)(b), the City must establish that:

1. a "closed" or "in camera" meeting of a council, board, commission or other body or a committee of one of them took place; **and**
2. that a statute authorizes the holding of this meeting in the absence of the public; **and**
3. that disclosure of the record at issue would reveal the actual substance of the deliberations of this meeting.

[Order M-64]

Requirement 1

The City submits that the records were discussed at an in camera meeting of Council which was convened for the purpose of discussing the findings and recommendations of the records. The City attached to its representations the agenda and minutes of the General Committee meeting held on March 9, 1998 which indicates that upon adoption of the required procedural motion it met in camera in order to discuss a personal information matter.

I accept that a closed meeting of the General Committee took place on March 9, 1998, thereby satisfying the first requirement of section 6(1)(b).

Requirement 2

In order to satisfy the second requirement, the City must establish that a statute authorizes the holding of this particular meeting on an in camera basis.

Section 55(5) of the Municipal Act provides that a meeting may be held in camera where it relates to (b) personal matters about identifiable individuals.

Record 3 contains salary details concerning identified individuals. I am satisfied that the in camera meeting was properly authorized under section 55(5)(b) of the Municipal Act and the second requirement of section 6(1)(b) has been met.

Requirement 3

"Substance" has been defined in previous orders as "the 'theme or subject' of a thing" (Order M-196). "Deliberations" has been interpreted as meaning "...discussions which were conducted with a view towards making a decision" (Order M-184). I adopt these interpretations for the purpose of this appeal.

The minutes of the General Committee meeting clearly indicate that Record 3 was neither received by the Committee nor considered by it. Consequently, I find that disclosure of the record would not reveal the actual substance of any deliberations relating to the issue of Council Remuneration.

Therefore, the third requirement of the section 6(1)(b) exemption claim has not been established, and I find that the record does not qualify for exemption under this section.

ADVICE OR RECOMMENDATIONS

Section 7(1) provides:

> A head may refuse to disclose a record if the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

This exemption is subject to the exceptions listed in section 7(2).

To qualify as "advice" or "recommendations", the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process. [Order 118]

The "advice or recommendations" exemption purports to protect the free flow of advice and recommendations within the deliberative process of government decision-making or policy-making [Orders 94 and M-847]. Put another way, its purpose is to ensure that:

> ... persons employed in the public service are able to advise and make recommendations freely and frankly, and to preserve the head's ability to take actions and make decisions without unfair pressure [Orders 24 and P-1363].

The City states that the report was commissioned to assist its management team in developing a position on compensation packages for various employee groups which was then presented to Council for their consideration.

The appellant submits that the "deliberative process" has long ago ended. He argues that section 7(1) has a temporal effect concerning the deliberative process. The appellant submits further that some or all of the exceptions in section 7(2) apply to the record. In particular, he points out that much of the record, by its nature would contain factual or statistical information and thus section 7(2)(a) and/or (b) would apply to it.

It is clear from the record that it was prepared by the consultant retained by the City for the purpose of reviewing compensation at the City and making recommendations in that regard. As I indicated above, Record 3 was not considered by Council at the March 9, 1998 meeting of the General Committee. However, as noted above, the suggested course of action need only be made for the purpose of "ultimately being accepted or rejected by its recipient" during the deliberative process. Moreover, this exemption is not time limited. A record may continue to be exempt under section 7(1), even though an institution may have completed its decision-making on a matter (Order P-920).

In Order P-434 Assistant Commissioner Tom Mitchinson made the following comments on the "deliberative process":

> In my view, the deliberative process of government decision-making and policy-making referred to by Commissioner Linden in Order 94 does not extend to communications between public servants which relate exclusively to matters which have no relation to the actual business of the Ministry. The pages of the record which have been exempt[ed] by the Ministry under section 13(1) [of the provincial Act] in this appeal all deal with a human resource issue involving the appellant and, in my view, to find that this type of information is exemptible under section 13(1) of the Act would be to extend the exemption beyond its purpose and intent.

This approach has been applied in several subsequent orders of this office (Orders P-1147 and

P-1299). In a general sense, compensation is essentially a human resources matter. It is important to point out, however, that the only portion of the record at issue in this appeal pertains to Councillor remuneration. As I found above, since they are not "employees" it is arguable that the information in this record does not pertain to a human resources matter.

In my view, it is not necessary for me to make a determination on this issue however, because I am satisfied that the City undertook to review the various compensation packages for which it is responsible as part of the deliberative process relating to its fiscal responsibilities and accountability which extends well beyond issues relating to human resources. The consultants make recommendations throughout the report, based on their analysis of the current levels in comparison with other jurisdictions, in which they suggest a course of action which the City can take in both addressing each component of the remuneration structure and in establishing policies which reflect the City's responsibilities to its employees and the public.

Therefore, I am satisfied that the recommendations in the report qualify for exemption under section 7(1) of the Act.

I must now consider whether any of the mandatory exceptions contained in section 7(2) of the Act apply to the record. This section provides:

> Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,
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> (a) factual material;
>
> (b) a statistical survey;
>
> (c) a report by a valuator;
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> (d) an environmental impact statement or similar record;
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> (e) a report or study on the performance or efficiency of an institution;
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> (f) a feasibility study or other technical study, including a cost estimate, relating to a policy or project of an institution;
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> (g) a report containing the results of field research undertaken before the formulation of a policy proposal;
>
> (h) a final plan or proposal to change a program of an institution, or for the establishment of a new program, including a budgetary estimate for the program;
>
> (I) a report of a committee or similar body within an institution, which has been established for the purpose of preparing a report on a particular topic;

(j) a report of a body which is attached to an institution and which has been established for the purpose of undertaking inquiries and making reports or recommendations to the institution;

(k) the reasons for a final decision, order or ruling of an officer or an employee of the institution made during or at the conclusion of the exercise of discretionary power conferred by or under an enactment or scheme administered by the institution.

I am not persuaded that the record at issue can be described as fitting any of the types of records in sections (c) through (k). However, the body of the report clearly contains factual information relating to the results of a survey conducted by the consulting firm as well as some discussion of the rationale for its recommendations. Appendix A is a table setting out the survey results.

The question remains, therefore, to what extent the exemption in section 7(1) applies to all of the information in the record. In Order P-1054, former Adjudicator Anita Fineberg commented on portions of a record which do not actually contain "advice or recommendations", but which would reveal such information which is contained in other parts of the record. She found:

> I have carefully reviewed those portions of the record which the Board has declined to disclose, taking into consideration the role of the Revenue Policy Branch and the scope of the exemption in section 13(1) of the Act. The portions at issue consist of the title of the record, the second paragraph of the "issue" section, sections on "advantages" and "risks", two paragraphs of the "conclusions" section and the "recommendations" section in its entirety. In my view, disclosure of these portions of the record would reveal the advice or recommendations advanced by the policy analyst who wrote the draft policy paper.
>
> Some of the information, such as the title of the paper, as well as the "conclusions" and "recommendations" sections, actually consists of the advice and recommendations themselves. Disclosure of the "advantages" and "risks" sections, which provide a rationale for the recommendations, would permit the drawing of accurate inferences as to the nature of the advice and recommendations and thus reveal the advice and recommendations put forth.
>
> Accordingly, I find that the portions of the record at issue consist of advice or recommendations provided during the deliberative process of policy-making within the Board.

In Order P-920, former Adjudicator Fineberg again examined this issue and concluded:

> I have considered the application of these exceptions to those portions of Record 3 which I have found qualify for exemption pursuant to section 13(1). The factual material in these portions of the document are so intertwined with the advice and recommendations that it is not possible to disclose the factual material without also disclosing the material which is properly exempt. Therefore, the section 13(2)(a) exception does not apply.

In my view, similar considerations are applicable in the current appeal. Because of the manner in which the Report is written and the nature of the content, much of the factual and/or statistical information contained in the body of the report is so intertwined with the recommendations the consultants are making that to sever it out would still reveal the substance of the recommendations or would permit the drawing of accurate inferences as to the nature of the advice and recommendations. Therefore, I find that section 7(2)(a) and (b) do not apply to the information in the body of the report. As a result, I find that the body of the Report is exempt under section 7(1).

However, Appendix A is completely separate and distinct from the body of the report. In my view, this portion of the record is factual as it sets out the details of the results of the survey taken of a number of other municipal organizations regarding the provision of compensation and expenses to members of their council. I am not persuaded that disclosure of this information would reveal nor permit the drawing of accurate references with respect to the recommendations made by the consultants. Therefore, I find that section 7(2) applies to the information in Appendix A and this information is not exempt under section 7(1).

As a result of the above, the only information remaining at issue in the following discussions is the information contained in Appendix A of Record 3.

THIRD PARTY INFORMATION

The City claims that the record qualifies for exemption pursuant to sections 10(1)(a),(b) and (c) of the Act, which state:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

For a record to qualify for exemption under section 10(1), the City must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; **and**

2. the information must have been supplied to the City in confidence, either implicitly or explicitly; **and**

3. the prospect of disclosure of the record must give rise to a reasonable expectation that the harm specified in (b) of section 10(1) will occur.

[Order 36. See also Orders M-29 and M-37]

The Ontario Court of Appeal recently overturned the Divisional Court's decision quashing Order P-373 and restored Order P-373. In that decision the Court stated as follows:

> With respect to Part 1 of the test for exemption, the Commissioner adopted a meaning of the terms which is consistent with his previous orders, previous court decisions and dictionary meaning. His interpretation cannot be said to be unreasonable. With respect to Part 2, the records themselves do not reveal any information supplied by the employers on the various forms provided to the WCB. The records had been generated by the WCB based on data supplied by the employers. The Commissioner acted reasonably and in accordance with the language of the statute in determining that disclosure of the records would not reveal information supplied in confidence to the WCB by the employers. Lastly, as to Part 3, the use of the words **"detailed and convincing"** do not modify the interpretation of the exemption or change the standard of proof. These words simply describe the quality and cogency of the evidence required to satisfy the onus of establishing reasonable expectation of harm. Similar expressions have been used by the Supreme Court of Canada to describe the quality of evidence required to satisfy the burden of proof in civil cases. If the evidence lacks detail and is unconvincing, it fails to satisfy the onus and the information would have to be disclosed. It was the Commissioner's function to weigh the material. Again it cannot be said that the Commissioner acted unreasonably. Nor was it unreasonable for him to conclude that the submissions amounted, at most, to speculation of possible harm. [emphasis added]

[Ontario (Workers Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner) (1998), 41 O.R. (3d) 464 (C.A.)]

Part 1 - type of information

The City takes the position that the records contain financial and labour relations information.

As I indicated above, "labour relations information" has been defined as the collective relationship between an employer and its employees (Order P-653). I found above that Record 3 does not pertain to an

"employment" relationship. Therefore, the information cannot be characterized as "labour relations information".

"Financial information" has been defined in previous orders to mean information relating to money and its use or distribution and must contain or refer to specific data. Examples of financial information are cost accounting methods, pricing practices, profit and loss data, overhead and operating costs (Orders P-47, P-87, P-113, P-228, P-295 and P-394).

The record contains specific remuneration information relating to the Mayor and councillors for the City as well as similar information from various other organizations who were canvassed by the named consulting firm. I am satisfied that information pertaining to the remuneration and reimbursement of expenses relates to money and its use. Therefore, I find that the record contains "financial information" and part one of the test has been met.

Part 2 - supplied in confidence

In order to satisfy the requirements of sections 10(1)(a), (b) and/or (c), the City must establish that the information contained in the record was supplied to it in confidence, either explicitly or implicitly.

The City states that the record was provided to it by the named consulting firm. The appellant takes the position that the information in the records was obtained by the City.

The record was clearly prepared by the named consulting firm and was provided to the City. I am satisfied that it was supplied to the City by the consulting firm even though it was done so under a contract.

The City notes that the cover letter to the report is marked "confidential" and submits that "the clear intent was for confidentiality at all times".

The appellant submits that there is no objective basis for a finding that the record was supplied in confidence.

Record 4 (which is not at issue in this discussion) is clearly marked "confidential". Although not at issue, this record provides evidence that an expectation of confidentiality was communicated to the City at the time the reports were delivered. The reports themselves, and in particular, Record 3 (which is at issue in this discussion) are not so marked. However, given the general communication expressed in the covering letter and the nature of the information itself, I am prepared to accept that the record was supplied to the City in confidence. Therefore, part two of the test has been satisfied.

Part 3 - harms

To discharge the burden of proof under the third part of the test, the City must present evidence that is detailed and convincing, and must describe a set of facts and circumstances that could lead to a reasonable

expectation that one or more of the harms described in section 10(1) would occur if the information was disclosed [Order P-373].

Sections 10(1)(a) and (c)

The City's primary concern with respect to disclosure of the record pertains to the identities of the various organizations who provided information to the consulting firm. In addition, the City's representations focus on the harms which it believes would occur should the information in Records 1, 2 and 4 be disclosed. Further, the harms which the City addresses relate more to interference with its own interests as opposed to third party interests. The scheme of the Act contemplates that harm to the competitive or financial position of an institution should be addressed in a claim for exemption under section 11 of the Act, not section 10 (Orders P-218, P-323 and M-892). Accordingly, section 10(1) is not applicable with respect to the City's interests. I will consider these interests below under the heading "economic and other harms".

The City also submits, however, that disclosure of the employee information could reasonably be expected to significantly prejudice the competitive position and contractual negotiations of many organizations and employers that use its compensation packages as a "benchmark" for their own collective bargaining. Again, the focus of these concerns relates to Records 1, 2, and 4.

The City has not specifically referred to the expected harm from disclosure of Councillors' remuneration.

I am not persuaded that the chilling effect to the negotiations process of any organization or employer could reasonably be expected to occur by disclosure of information pertaining to Councillors' remuneration as set out in Appendix A. I accept that organizations that participated in the preparation of the report may have some concerns in this regard. However, as I noted above, certain portions of Record 3 have been removed from the scope of the Act as they would reveal information which is found in the records which fall outside the scope of the Act. Some of this information pertains to the identities of the participating organizations. In my view, having removed this information from the scope of the appeal, the remaining information cannot serve to identify any of the participating organizations. Therefore, I do not accept that any of them could reasonably expect to suffer any harm as a result of the disclosure of the information in Appendix A of Record 3.

Section 10(1)(b)

The City submits that if the record is disclosed, the consulting firm who prepared the report and any other firms will be much less able and inclined to gather, prepare and supply such information in the future.

Many previous orders of this office have considered the impact of disclosure of records where there is a financial incentive for providing the information to an institution, for example, to receive funding (Orders P-1019 and P-1095), or to engage or fulfill a contractual obligation (Orders P-270, P-394 P-418, P-647 and MO-1199). In my view, the named consulting firm has a financial and business interest in obtaining government contracts and it is not reasonable to expect that it will discontinue this relationship or that other consulting firms will not contract for similar services.

With respect to their ability to gather similar types of information, I note that in Order P-278, Assistant Commissioner Tom Mitchinson concluded that where a party states that it is "less likely" that it will provide such information to the government in the future, the burden of proof under section 17(1)(b) of the provincial Act (the equivalent to section 10(1)(b) of the Act) is not established. I find this conclusion similarly applicable to the City's arguments in this regard.

Moreover, the information which remains at issue in this appeal pertains to the payments which have or will be made to members of municipal councils for a number of unnamed municipalities, including expenses and benefits information. I note that sections 242(1) to 247(1) of the Municipal Act refer to the provision of remuneration and expenses for municipal councils. In particular, section 247(1) provides:

> The treasurer of every municipality shall on or before the 28th day of February in each year submit to the council of the municipality an itemized statement of the remuneration and expenses paid to each member of council in respect of his or her services as a member of council or as an officer of the municipal corporation in the preceding year and to each person mentioned in subsection 244(1) in respect of his or her services as a member of the local board or other body in the preceding year.

The City confirms that, in its case, this type of information is set by resolution or is otherwise contained in various policy documents all of which are public information once passed by Council. The City confirms that the Treasurer's Statement contains a monthly breakdown of financial information pertaining to remuneration and expenses for each councillor, although it does not detail how the expenses were incurred.

The information at issue in Appendix A is no more detailed than that which would be included in the documents which the City indicates are publicly available. In my view, there is no reason to conclude that this type of information would not also be similarly available in other municipalities. Consequently, I am not persuaded that disclosure of information which in all likelihood is publicly available could reasonably be expected to result in similar information no longer being supplied.

Based on the above discussion, I find that the City has not established that disclosure of Appendix A of the consultant's report on Councillor Remuneration could reasonably be expected to result in similar information no longer being supplied to it.

ECONOMIC AND OTHER INTERESTS

The City claims that sections 11(d), (e) and (f) apply to the record at issue. These sections provide:

> A head may refuse to disclose a record that contains,
>
> (d) information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution;

(e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution;

(f) plans relating to the management of personnel or the administration of an institution that have not yet been put into operation or made public;

Section 11(d)

To establish a valid exemption claim under section 11(d), the City must demonstrate a reasonable expectation of injury to its financial interests.

The City's representations focus on its financial interests and the harm to these interests which would result from the disclosure of the information in Records 1, 2 and 4. The basis for its concern is its bargaining position vis-a-vis non-unionized staff and its collective bargaining units. In my view, there is no linkage between the remuneration paid to municipal councillors and the employee negotiation process such that disclosure of this record could reasonably be expected to result in any harm to its financial interests in the negotiations or as a result of any other human resources issues regarding its employees. Consequently, I find that section 11(d) does not apply to the remaining information at issue.

Section 11(e)

For a record to qualify for exemption under section 11(e), each part of the following test must be established:

1. the record must contain positions, plans, procedures, criteria or instructions; **and**

2. the positions, plans, procedures, criteria or instructions must be intended to be applied to any negotiations; **and**

3. the negotiations must be carried on currently, or will be carried on in the future; **and**

4. the negotiations must be conducted by or on behalf of an institution.

[Order M-92]

Broadly speaking, section 11 is designed to protect certain economic interests of institutions covered by the Act. Sections 11(c), (d) and (g) all take into consideration the **consequences** which would result to an institution if a record was released. They may be contrasted with sections 11(a) and (e) which are concerned with the **type** of record, rather than the consequences of disclosure.

As stated above, the first part of the section 11(e) test requires that the record contain positions, plans, procedures, criteria or instructions. As such, the first part of the test relates to the form of the record and not to its intended use.

The City states that the report contains the positions that are recommended to the City for compensation packages.

In Order MO-1199-F, I made the following comments regarding section 11(e) of the Act:

> Previous orders of the Commissioner's office have defined "plan" as "... a formulated and especially detailed method by which a thing is to be done; a design or scheme" (Order P-229).
>
> In my view, the other terms in section 11(e), that is, "positions", "procedures", "criteria" and "instructions", are similarly referable to pre-determined courses of action or ways of proceeding.
>
> In my opinion, the record at issue does not disclose any "pre-determined" course of action on the part of the Board.

Applying this reasoning, I find that there must be some evidence that a course of action or manner of proceeding is "pre-determined", that is, there is some organized structure or definition given to the course to be taken.

Record 3 is a report which outlines the results of an assessment of compensation in other municipalities and relates that information to the situation at the City. Although the information in the report may be used to formulate a position, the report, in and of itself, does not contain a pre-determined course of action or way of proceeding to be taken by the City. Moreover, the only information at issue in this discussion is Appendix A. In my view, this information can not be characterized as a "position", "plan", "criteria" or "instruction" as it is simply a compilation of statistical information intended only to be used as comparison information for the City. Therefore, I find that the City has failed to establish the first part of the section 11(e) test and this exemption does not apply.

Section 11(f)

In order to qualify for exemption under section 11(f) of the Act, the City must establish that the record satisfies each element of the following:

1. the record must contain a plan or plans, **and**

2. the plan or plans must relate to:
   (i) the management of personnel or

(ii) the administration of an institution, **and**

3. the plan or plans must not yet have been put into operation or made public.

In Order P-348, former Commissioner Tom Wright made the following finding under section 18(f) of the provincial Act, which is equivalent to section 11(f) of the Act:

> The eighth edition of The Concise Oxford Dictionary defines "plan" as "a formulated and especially detailed method by which a thing is to be done; a design or scheme". In my view, the record cannot properly be considered a "plan". It contains certain recommendations which, if adopted and implemented by the institution, might involve the formulation of a detailed plan, but the record itself is not a plan or a proposed plan. Therefore, in my view, the record does not qualify for exemption under either section 18(1)(f) ...

As I noted above, the information at issue is simply a compilation of background information intended only to be used as comparison information for the City. In my view, this information does not contain the sort of detailed methods, schemes or designs which are characteristic of a plan.

PROPOSED POLICIES OF AN INSTITUTION

Section 11(g)

In order to qualify for exemption under this section, the City must establish that a record:

1. contains information including proposed plans, policies or projects; **and**

2. that the disclosure of the information could reasonably be expected to result in:

   (I) premature disclosure of a pending policy decision, or

   (ii) undue financial benefit or loss to a person.

Each element of this two-part test must be satisfied (Order P-229).

The City states that the test for section 11(g) is met in that the research and recommendations contained in the reports were intended for use in the development of compensation policies for the City. The City suggests that the recommendations "could have become the policies of the City". As the City has pointed out throughout its representations in this matter, however, the recommendations were not necessarily or fully accepted by the City. In my view, my discussion above under the other section 11 provisions claimed by the City are relevant to the application of this provision as well. I find that the record at issue does not contain the type of information referred to in part one of the test.

Moreover, the City's representations in this appeal have focussed on the other records at issue. The City does not appear to have turned its mind to the expected harm which could reasonably be expected to result from disclosure of information relating to Councillor remuneration. On the other hand, the evidence which was provided by the City regarding Councillor remuneration suggests that this issue is not currently being considered. Even if it were, however, I would conclude that disclosure of the information at issue could not reasonably be expected to reveal a policy decision let alone prematurely disclose a pending policy decision.

Finally, given that such matters are dealt with by vote of Council and that the information is not only publicly available but determinations as to whether to accept or reject the consultant's recommendations will be made by the very people about whom the information relates, I am not persuaded that disclosure of the information in the record could reasonably be expected to result in undue financial benefit or loss to a person.

Consequently, I find that the City has failed to establish the application of section 11(g) to the information remaining at issue.

PERSONAL INFORMATION/INVASION OF PRIVACY

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including the individual's name where it appears with other information relating to the individual.

Appendix A of Record 3 is a table which sets out moneys received by individuals holding the position of Mayor and Councillors, including payments, expenses and benefits. This information is clearly "financial" information. The City is one of the municipalities referred to in the record. Although the information does not specifically refer to individuals, the identities of the Mayor and Councillors are easily discernable and can be linked to the information in the record. Therefore, I find that the record contains information "about" the Mayor and the Councillors for the City and thus qualifies as their "personal information". The remaining municipalities listed in the table are not identifiable, therefore, the information in these portions of the Appendix cannot be linked to any identifiable individual and it does not qualify as "personal information".

Once it has been determined that a record contains personal information, section 14(1) of the Act prohibits the disclosure of this information unless one of the exceptions listed in the section applies. Two of these exceptions may be relevant to the circumstances of this appeal - sections 14(1)(d) and (f). I will first consider the application of the exception in section 14(1)(d), which states as follows:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > under an Act of Ontario or Canada that expressly authorizes the disclosure.

In Order P-1246, Adjudicator Donald Hale considered the application of this provision. In referring to several orders of this office regarding section 21(1)(d) of the provincial act (which is equivalent to section 14(1)(d) of the Act), he stated:

> In Order M-292, Inquiry Officer Anita Fineberg stated that the interpretation of the phrase "expressly authorizes" as it is found in section 21(1)(d) should mirror that of the same phrase found in section 38(2) of the Act. In Compliance Investigation Report I90-29P, the following comments were made about this section:
>
> > The phrase "expressly authorized by statute" in subsection 38(2) of the Act requires either that the specific types of personal information collected be expressly described in the statute or a general reference to the activity be set out in the statute, together with a specific reference to the personal information to be collected in a regulation made under the statute, i.e., in the form or in the text of the regulation.

In Order MO-1179 Senior Adjudicator David Goodis found that where the power to disclose personal information is discretionary rather than mandatory, this provision does not apply.

I agree with the principles set out above. As I indicated above, section 247(1) of the Municipal Act "requires" that a statement of the remuneration and expenses paid to each member of council be tabled before Council. The City confirms that such information is disclosed to the public in such a forum. On this basis, I conclude that section 247(1) expressly authorizes the disclosure of the remuneration and other expenses information pertaining to municipal council members and the exception in section 14(1)(d) applies to it. Therefore, the personal information in the record is not exempt under section 14(1).

SUMMARY

In conclusion, I find that Records 1, 2, 4 and parts of Record 3 fall outside the scope of the Act by virtue of section 52(3)3. The body of Record 3 is exempt under section 7(1) of the Act, however, I find that none of the exemptions claimed by the City is applicable to Appendix A of Record 3 and this portion of the record should be disclosed to the appellant.

ORDER:

1. I order the City to provide the appellant with Appendix A to Record 3 "Councillor Remuneration" in accordance with the highlighted copy of this record which I have attached to this order, by providing him with a copy of this record by January 17, 2000.

2. I uphold the City's decision to withhold the remaining records and parts of records from disclosure.

3. In order to verify compliance with this order, I reserve the right to require the City to provide

me with a copy of the record which is disclosed to the appellant pursuant to Provision 1.

Original signed by: December 21, 1999
Laurel Cropley
Adjudicator