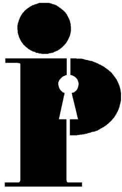

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-1622

Appeal MA-020148-2

The Corporation of the City of London

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NATURE OF THE APPEAL:

The City of London (the City) received a request from a media representative under the *Municipal Freedom of Information and Protection of Privacy Act* (the Act) for access to the following information:

(1) The terms upon which [a named individual], the former commissioner of Environmental Services, left the employment of the city in 2001, including an accounting of all benefits or money given or promised to either [the named individual] or any company in which he had an interest.

(2) Any documents including emails, that include actual or proposed terms of the above-mentioned departure between [the named individual] and the city.

(3) Any legal opinions that recommend that the above-mentioned agreement(s) not be disclosed to city council or the public, or legal opinions that discuss whether the above-mentioned agreement should be disclosed.

(4) Any other documents, including emails, either prepared for or submitted to the city, including letters to the city, that mention [the named individual's] departure or the prospect for that departure.

(5) The terms and any documents, including emails, that lay out benefits or pay given to former city manager [a named individual] and former commissioner of finance [a named individual].

(6) The terms and any documents, including emails, that lay out benefits or pay given to any senior managers who left city employment since 2000.

The City located 11 records which it felt were responsive to part five of the request and one responsive to part one of the request (Record 12). The City decided to grant access to three of them in their entirety (Records 3, 4 and 12) and partial access to another (Record 11). Access to the remaining records (Records 1, 2, 5, 6, 7, 8, 9, 10 and the undisclosed portions of Record 11) was denied on the basis that they fall outside the ambit of the *Act* due to the operation of section 52(3) of the *Act*.

The requester, now the appellant, appealed the City's decision to deny access to the records. In addition, the appellant is of the view that additional responsive records beyond those identified by the City should exist.

During the mediation stage of the appeal, the City clarified that it was relying on the provisions of section 52(3)3 for all of the records which it has identified as responsive. As further mediation was not possible, the appeal was moved to the adjudication stage.

Following the issuance of the Mediator's Report and as a result of my queries, the City indicated that it has located an additional record responsive to part one of the request (Record 13). The City has claimed that this record also falls outside the ambit of the *Act* as a result of the operation of section 52(3)3.

I provided a Notice of Inquiry to the City, setting out the facts and issues in the appeal. I received the City's submissions and shared the non-confidential portions of them with the appellant. I then sought the representations of the appellant only with respect to the application of section 52(3)3 to the records identified by the City as responsive to the request. The appellant made representations in response to the issues identified in the Notice, as well as with respect to the existence of additional records responsive to the request. As a result, I sought the representations of the City with respect to this issue in its reply submissions, as well as requesting its comments on the appellant's representations concerning the application of sections 52(3) and (4) to the records. The City made additional representations by way of reply.

RECORDS:

The records at issue in this appeal are described in the Index provided to the appellant by the City along with its revised decision letter of August 6, 2002. In addition, a further record responsive to part one of the request has been identified by the City and now forms part of the appeal (Record 13).

DISCUSSION:

JURISDICTION - APPLICATION OF THE ACT

Introduction

Sections 52(3) and (4) of the *Act* provide:

> (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.

The City relies on section 52(3)3 to deny access to the records at issue. If paragraph 3 of section 52(3) applies to the records, and none of the exceptions found in section 52(4) applies, then they are excluded from the scope of the *Act*.

Section 52(3)3

Section 52(3)3 applies if:

1. the records were collected, prepared, maintained or used by the City or on their 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 MO-1603]

The City's sole submission on this issue consists of the following statement:

> The responsive records dealing with this request were collected by the City and the collection of this information was utilized in relation to discussions of the exit package that was agreed to by the city and the individual. The exit arrangements are considered an employment related matter and the records responsive to this request are directly related to this matter. Further, the City's interest extends beyond a mere curiosity or concern as the City is financially responsible for the details of the exit arrangement.

Part 1: Were the records collected, prepared, maintained or used by the City or on its behalf?

Based on my review of the contents of the records remaining at issue in this appeal, I am satisfied that they were collected, maintained and used by the City. The first part of the test under section 52(3)3 has, accordingly, been met with respect to Records 1, 2, 5 to 10, 11 and 13.

Part 2: Were the records collected and/or used in relation to meetings, consultations, discussions or communications?

Records 1, 2 and 5 to 10 represent various communications between counsel for one of the former City employees and the City's representatives addressing the terms to be included in this individual's Retirement Agreement and Release. Clearly, these records were used in relation to a series of consultations, discussions and communications relating to this end. Similarly, Record 11 contains information relating to the group benefit coverage to be provided to another City employee following the termination of her employment with the City. I find that Record 11 was used in relation to communications and discussions between the City and its former employee. Again, Record 13 is an Agreement between the City and another employee which also was collected and/or used in relation to consultations, discussions or communications.

The appellant argues that, in his view, the City Manager collected, prepared, maintained and used the records without the proper legal authority to do so at the time. Regardless of legal authority, the fact remains that the records were collected and used by the City's representatives in relation to various meetings, consultations, discussions and communications.

I find that the second part of the test for section 52(3)3 has been met with respect to these records.

Part 3: Were the meetings, consultations, discussions or communications about employment-related matters in which the City has an interest?

Introduction

In order to meet the third requirement under section 52(3)3, the City must establish that the meetings, consultations, discussions or communications were "about labour relations or employment-related matters" and that the City "has an interest" in these matters.

About Labour Relations or Employment-Related Matters

In my view, discussions and communications conducted with a view to reaching an agreement on the termination of an employee's employment relationship with the City clearly qualifies as an "employment-related matter" for the purposes of section 52(3)3. In addition, communications relating to the on-going provision of employment benefits to a departing employee are also "about" an employment-related matter.

Has an interest

In *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 509, the Court stated that an "interest" must be more than a "mere curiosity or concern", though not necessarily a "legal" interest. In addition, the court stated that the "matter" must relate to an institution's own workforce and that once records are excluded from the operation of the *Act*, they remain excluded.

[Order PO-2106]

The appellant submits that the City's "interest in the matter fails to extend beyond a mere curiosity or concern." He argues that:

> The burden of proof rests on the city to prove its interest extends beyond mere curiosity or interest. That the city has a concern in the financing of the exit packages, its [sic] is just that – a mere concern. The city has offered no evidence its interest extends beyond a mere concern and therefore has failed to meet its burden.

The appellant urges me to consider a higher threshold than "a mere concern" though less compelling than a "legal interest", as indicated by the decision of the Ontario Court of Appeal referred to above in *Ontario (Solicitor General)*. He suggests that the "city's contention, absent evidence, falls below any reasonable threshold."

I find that the City's interest in the records at issue goes beyond a simple "curiosity or concern". The records reflect the negotiation of severance agreements with several senior administrative staff. The terms of these agreements include certain on-going obligations on the part of the City to its departing employees, including the payment of money to them. I further find that the records themselves demonstrate a sufficient "interest" on the part of the City in the employment-related matter reflected therein. Accordingly, I find that all of the elements required for the application of section 52(3)3 have been satisfied by the City and the records remaining at issue fall outside the scope of the *Act* on that basis.

Section 52(4)

Section 52(4) of the *Act* provides a number of exceptions to the operation of the jurisdiction-limiting provisions in section 52(3). This section states:

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.

The appellant submits that:

> In short, section 52(4) carves out exceptions to records that could otherwise be excluded in section 52(3). If any documents fall under section 52(3) – and we argue that is not the case – then those documents also fall under section 52(4.3) Agreements between the city and employees that result from negotiations about employment-related matters. The city argues in its representation that the documents were made in connection with exit arrangements (an agreement) on an employee-related matter. The city has in effect conceded the application of section 52(4).

The City has not addressed the possible application of the exceptions in section 52(4) to the records.

In my view, the fully executed Agreements and Release which form part of Record 1 and all of Record 13 represent "agreements between an institution and one or more employees". The records reflect the fact that the information contained in these documents was arrived at following negotiations between the individuals involved and the City. In addition, I have found above that the agreements and the negotiations which gave rise to them were "about employment-related matters between the institution and the employees". In my view, the Agreements which comprise part of Record 1 and all of Record 13 fall within the ambit of the exception in section 52(4)3.

I find support for this view in the decision in Order M-797 where Assistant Commissioner Tom Mitchinson found as follows:

> Sections 52(3) and (4) are record-specific and fact-specific. If a record which would otherwise qualify under any of the listed paragraphs of section 52(3) falls within one of the exceptions enumerated in section 52(4), then the record remains within the Commissioner's jurisdiction and the access rights and procedures contained in Part 1 of the *Act* apply.

The Board's representations state:

> Although this document constitutes a communication made in the course of negotiations relating to [the Superintendent's] employment, it also constitutes the final agreement between the school Board and [the Superintendent] resulting from those negotiations. The document requested by the appellant would appear to fall within the ambit of paragraph 52(4)3 of the *Act*, and is therefore subject to the application of the *Act*.

> Having reviewed the records and the Board's representations, I agree. In my view, the two records at issue in this appeal, considered together, constitute the agreement between the Board and the Superintendent with respect to his early retirement. This agreement resulted from negotiations about a matter which clearly relates to the Superintendent's employment with the Board. I find that the records fall within the scope of the exception to the section 52(3) exclusion found in paragraph 3 of section 52(4), and are therefore subject to the *Act*. Accordingly, I have jurisdiction to consider the issue of denial of access by the Board, and I will now determine whether these records qualify for exemption under section 14(1) as claimed by the Board.

I adopt the reasoning expressed by the Assistant Commissioner in Order M-797 for the purposes of this appeal. I find, therefore, that the Agreements which comprise part of Record 1 and all of Record 13 fall within the exception in section 52(4)3 and that I have jurisdiction to determine whether these records are properly exempt under the *Act*. I will, accordingly, order the City to issue a decision letter to the appellant with respect to access to the Agreements.

REASONABLENESS OF SEARCH

In appeals involving a claim that further responsive records exist, as is the case in this appeal, the issue to be decided is whether the City has conducted a reasonable search for the records as required by section 17 of the *Act*. If I am satisfied that the search carried out was reasonable in the circumstances, the decision of the City will be upheld. If I am not satisfied, further searches may be ordered.

Where a requester provides sufficient detail about the records which he/she is seeking and the City indicates that further records do not exist, it is my responsibility to ensure that the City has made a reasonable search to identify any records which are responsive to the request. The *Act* does not require the City to prove with absolute certainty that further records do not exist. However, in my view, in order to properly discharge its obligations under the *Act*, the City must provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate records responsive to the request.

The Freedom of Information Co-ordinator for the City indicates that she requested that searches be conducted in the City's Human Resources office, as well as that of the City Solicitor for responsive records. She indicates that she received the personnel file relating to one of the individuals about whom the request was made. In the City's reply representations, the Co-ordinator addressed a number of specific questions raised by the appellant in his submissions and my own inquiries with respect to the whereabouts of certain records.

The Co-ordinator states that she again requested the City Solicitor's office to conduct a search of its record-holdings for the Report to the Board of Control from the City Solicitor dated April 2, 2002, which is referred to in the appellant's representations. The Co-ordinator further states that "no other written reports exist" and that the report provided to me by the appellant "was not released to the public".

The existence of the April 2, 2002 report is not in dispute and this document has not been disclosed to the appellant under the *Act*, despite the fact that it is clearly responsive to his request. The appellant provided me with a copy of the April 2, 2002 report along with his representations. In my view, it clearly falls within the ambit of section 52(3)3. This document was prepared and used by the City in relation to a meeting of the Board of Control held on April 2, 2002. The subject matter of the report and the discussions which ensued at the Board's meeting on that date were clearly "employment-related" matters relating to the remuneration of management staff. I further find that the City "has an interest" in these matters in its capacity as employer of the staff referred to in the report. As the April 2, 2002 report falls outside the ambit of the *Act* due to the operation of section 52(3)3, I will not order the City to issue a decision letter to the appellant regarding access to this document.

The Co-ordinator's reply submissions on behalf of the City go on to add that:

> The Legal Department also advised that while they have no information dealing with [one of the persons who was the subject of the request], there is outside counsel that does have information. When I contacted the outside legal representative, I was told that I could have access to the file as long as I could get a written letter from our City Solicitor. I have not received the letter from the City Solicitor as of this date. The lawyer also commented that he has copies of the information and that the City would have the original documents.
>
> In an attempt to obtain these documents, I requested the City Manager to see if he had any information pertaining to this matter. He indicated that he would look into this. Again, as of this date, I have not received any information.

In my view, the City has not fulfilled its obligations under the *Act* in the manner in which it has processed this request and the subsequent appeal. The City acknowledges that additional records responsive to the request exist yet it has not taken the necessary steps to locate them and make a decision respecting access to them. I will, accordingly, order the City to undertake additional searches of the record-holdings of the City Solicitor, Legal Department and City Clerk's offices

for responsive records. In addition, because it appears that outside counsel may also have copies of responsive records, I will order the City to retrieve the file maintained by such counsel in order to determine if additional records responsive to the request exist.

I am troubled by the level of disinterest and the uncooperative attitude exhibited by the City in its approach to this request and appeal. I will, accordingly, not allow the City the opportunity to seek a time extension under section 20 of the *Act* for additional time to conduct its searches and prepare a decision on access for the appellant. The City will be required to adhere strictly to the time lines provided for in section 19 of the *Act*.

ORDER:

1. I uphold the City's decision to deny access to those portions of Record 1 which do not include the Agreement and Release, Records 2, 5, 6, 7, 8, 9, 10 in their entirety and the undisclosed portions of Record 11 as they fall outside the ambit of the *Act* due to the operation of section 52(3)3 of the *Act*.

2. I order the City to provide the appellant with a decision letter with respect to the Agreement and Release documents in Record 1 and Record 13 in accordance with the time frames prescribed by section 19 of the *Act* and without recourse to a time extension under section 20 of the *Act*.

3. I order the City to undertake additional searches of the record-holdings of its City Solicitor, Legal Department, City Clerk's Office and outside counsel's file for responsive records and to provide the appellant with a decision letter respecting access to them within the time frames prescribed by section 19 and without recourse to a time extension under section 20.

Original signed by: March 11, 2003
Donald Hale
Adjudicator