Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-2810

Appeal MA12-74

City of Windsor

November 9, 2012

Summary: The appellant made a request to the City of Windsor for the financial cost of retaining legal counsel to conduct labour negotiations and arbitration. The city denied access to the record, in whole, claiming the application of the exclusion in section 52(3)2 (negotiations relating to labour relations) of the *Act*. In this order, the adjudicator finds that the record is excluded from the *Act* by virtue of section 52(3)2, 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)2.

Orders Considered: Orders MO-2024-I, MO-2537, MO-2589 and PO-2484.

Cases Considered: *Markevich v. Canada*, 2008 SCC 9 (CanLII) and *Ministry of the Attorney General and Toronto Star and Privacy Commissioner of Ontario*, 2010 ONSC 991 (CanLII).

OVERVIEW:

[1] This order disposes of the sole issue raised as a result of an access decision made by the City of Windsor (the city) in response to a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information:

> [T]he financial cost associated in retaining legal counsel [of a named lawyer at a named law firm]. The FOI request is specific to the 2010 contract negotiation and subsequent arbitration between the Windsor Police Services Board and [a named bargaining agent].

[2] The city identified a responsive record and issued a decision letter to the requester, denying access, in full, claiming the application of the exclusion in section 52(3)2 (negotiations relating to labour relations) of the *Act*.

[3] The requester, now the appellant, appealed the city's decision to this office.

[4] During the mediation of the appeal, the appellant confirmed that it is seeking access to the total legal fees paid to legal counsel in relation to the contract negotiations and arbitration described in the request. The city issued a revised decision to the appellant, confirming that it continued to rely on section 52(3)2 and that, in the alternative, it was now claiming the application of the discretionary exemption in section 12 (solicitor client privilege) of the *Act*.

[5] Mediation did not resolve the appeal, and it moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*. I sought and received representations from the city and the appellant. Representations were shared in accordance with this office's *Practice Direction 7*.

[6] In its representations, the appellant advised that the request is for the total cost for legal counsel retained to negotiate and arbitrate on behalf of the Police Services Board. I note that the record contains not only the total cost of the legal fees as described by the appellant, but also the sub-total fees. Consequently, as the request is for the total cost only, the sub-totals listed in the record are not responsive to the request and will not be referred to again.

[7] For the reasons that follow, I find that section 52(3)2 applies to exclude the record from the *Act*. I uphold the city's decision and dismiss the appeal.

RECORD:

[8] The record is one page setting out legal fees. The information at issue is the total cost of the legal fees.

DISCUSSION:

Background

[9] The city states that labour relations between itself and the members of its police force are governed by the *Police Services Act,*[1] and that the municipal police services board negotiates collective agreements with members of its police force who have formed an association. Unresolved disputes relating to the collective agreement may be referred to interest arbitration. In 2010, the Windsor Police Services Board and the police officers' bargaining agent attempted to negotiate a collective agreement. They were not able to agree and their differences were referred to interest arbitration.

Does section 52(3)2 exclude the record from the *Act*?

[10] The city is claiming that the record is excluded from the *Act* because it relates to negotiations relating to labour relations. Section 52(3)2 states:

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

[11] If section 52(3) applies to the record, and none of the exceptions found in section 52(4) applies, the record is excluded from the scope of the *Act*.

[12] For the collection, preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in paragraph 1, 2 or 3 of this section, it must be reasonable to conclude that there is "some connection" between them.

[13] The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships. The meaning of "labour relations" is not restricted to employer-employee relationships.[2]

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[1] R.S.O. 1990, c. P.15. This legislation requires that a municipality with a police force must establish a municipal police services board.

[2] *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.). See also Order PO-2157.

[14] 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.[3]

[15] The type of records excluded from the *Act* by section 52(3)2 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.

[16] For section 52(3)2 to apply, the institution must establish that:

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

2. this collection, preparation, maintenance or usage was in relation to negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution; and

3. these negotiations or anticipated negotiations took place or were to take place between the institution and a person, bargaining agent or party to a proceeding or anticipated proceeding.[4]

[17] The city submits that:

- The city collected and maintained the record, which relates to the cost of retaining legal services to conduct negotiations and any ensuing interest arbitration. The legal cost arises from the invoices sent to the city;

- The record was collected, prepared, maintained and used directly as a result of negotiations or anticipated negotiations relating to labour relations; and

- The negotiations took place between the city and the police officers' bargaining agent.

[18] The city also submits that a decision of the Divisional Court has relevance to this appeal and how section 52(3)2 should be interpreted by this office. In particular, the city states that the case of *Ministry of the Attorney General and Toronto Star and Privacy Commissioner of Ontario (MAG)*[5] is relevant and applicable because of the

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[3] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507.
[4] Orders M-861 and PO-1648.
[5] 2010 ONSC 991 (CanLII).

discussion and subsequent decision regarding the interpretation of the phrase "relating to" found in the *Act*.[6]

[19] The city states that the Divisional Court held that former Senior Adjudicator Higgins found that the phrase "relating to" should be interpreted in the same manner as "in relation to," which means "for the purpose of, as the result of, or substantially connected to" and that the purpose of the provision must be taken into account in deciding whether the connection is sufficient to justify the application of the exclusion. The city goes on to submit that the Divisional Court held that former Senior Adjudicator Higgins' interpretation was incorrect in that:

- He erred in his interpretation of the words "relating to" in that he read-in a "substantial connection" requirement between the record and the prosecution. The adjudicator further erred when he relied upon a restricted purpose for the provision in deciding whether the connection is sufficient to justify the application of this exclusion;

- The meaning of the statutory words "relating to" is clear when the words are read in their grammatical and ordinary sense. There is no need to incorporate complex requirements for its application, which are inconsistent with the plain unambiguous meaning of the words of the statute;

- His interpretation of the phrase "relating to" is also discordant with the intention of the Legislature. There are no pragmatic or policy reasons to impute a substantial connection requirement and depart from reading the words in their grammatical and ordinary sense in the context of the *Act*; and

- He incorrectly limited the scope and application of the relevant section of the *Act*.

[20] The city submits that the principles set out by the Divisional Court in the *MAG* decision apply to this appeal, and that the phrase "relating to" in section 65(5.2) of the provincial *Act* and the phrase "in relation to" in section 52(3)2 of the *Act* are almost identical and should be treated as having the same meaning.

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[6] The records in *MAG* involved communications regarding the movement of a prosecution through the justice system. The ministry refused to produce the records to this office, claiming that they were excluded from the *Act* by virtue of section 65(5.2) of the provincial *Act* and filed an application for judicial review of former Senior Adjudicator John Higgins' order to produce the records, an affidavit and an index, in order to determine whether the records were excluded from the *Act* and whether other exemptions may apply.

[21] The city states:

> The Supreme Court of Canada held in *Markevich v. Canada*[7] that the words "in respect of" are of the widest possible scope. The Supreme Court held that phrase imported similar meaning as "in relation to." Thus both phrases convey the equivalent meaning and both deserve the widest possible scope. They convey some link between two subjects.
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> Consequently, the Divisional Court [in *MAG*] held that the phrase "relating to" requires only some connection between "a record" and "a prosecution" and that there was no need to incorporate complex requirements for its application. It was an error to read-in a "substantial connection" requirement.
>
> Therefore, the phrase "in relation to" also requires only a connection between "a record" and "negotiations or anticipated negotiations relating to labour relations." It does not require further analysis of whether there is some substantial connection or whether they are only remotely connected. The application of s. 52(3) should not be limited in scope by the application of additional requirements.
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> [emphasis added]

[22] The city further submits that the statutory words "in relation to" are clear when the words are read in their grammatical and ordinary sense. The Divisional Court, the city submits, has held that there is no need to incorporate complex requirements, including "a substantial connection" or "remotely related component" for the application of section 52(3). In addition, the city submits that the broad scope of the section should not be narrowly construed.

[23] The record at issue, the city argues, is clearly "in relation to" negotiations relating to labour relations and should, therefore, be excluded from the *Act* under section 52(3)2, and that, in addition, section 52(4)[8] of the *Act* does not apply.

[24] The appellant submits that the facts in this appeal are distinguishable from those in the *MAG* appeal. For example, the appellant states, the records sought in the request that led to the *MAG* decision were substantially more comprehensive than the record at issue in this appeal, as they consisted of briefing notes, political correspondence, and ministry communications about the movement of an ongoing criminal case through the justice system.

[25] The appellant also submits that the request in the *MAG* case can be further distinguished from the request at issue in this appeal, as it was intended to obtain

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[7] 2008 SCC 9 (CanLII).
[8] Section 52(4) sets out exceptions to the exclusions in section 52(3).

information regarding an ongoing prosecution, in which the relevant section of the provincial *Act* states that the *Act* "does not apply to a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed."[9]

[26] In this appeal, the appellant submits, the request is limited to the financial cost of legal counsel for the negotiations and arbitration of the 2010 collective agreement, and does not relate in any way to "records collected, prepared, maintained or used" for the purposes of negotiating a collective agreement.

[27] The appellant further submits that there is no nexus between the cost of retaining counsel and the arguments and/or positions that counsel argues on a client's behalf, and the fees paid to counsel cannot reveal any communication.

[28] In addition, the appellant states:

> The information requested by the [appellant] is a result of the accounting obligations of the City and thus would not require an individual to undertake any specific or separate task outside the bookkeeping procedures currently performed by the City. Succinctly put, the information requested was not prepared for the purposes of negotiations nor was it presented or discussed during the negotiations and subsequent arbitration for the 2010 collective agreement.

[29] In reply, the city submits that although the facts of the *MAG* case may differ from those in this appeal, the legal principles arising from the Divisional Court's decision in *MAG* are applicable, authoritative and binding.[10] The city states that the essential point of the *MAG* decision is the interpretation of the words "relating to" or "in relation to" when used in legislation, and the principle that words in legislation are to be read in their entire context and in their grammatical sense.

[30] The city further argues that the Divisional Court specifically interpreted the meaning of the words "in relation to" and "relating to" found in the provincial freedom of information legislation, whose scheme and objects are the same as that of the municipal *Act*. The city argues that the Divisional Court's decision regarding the meaning of the words "in relation to" and "relating to" is binding in this case.

[31] In addition, the city reiterates that the words "in relation to" and "relating to" have broad scope and merely require "some link" between the two subject matters. The city argues that the section is not triggered only if there is a "substantial connection" and is not inapplicable if the subject matter is only "remotely connected." The city states that the appellant has failed to show how the record is not related to the subject matter of the section.

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[9] Section 65(5.2) of the *Freedom of Information and Protection of Privacy Act*.
[10] The legal principal of *stare decisis*.

[32] The city also states:

> All the City of Windsor need show is that the record sought to be produced, i.e. the financial cost associated in retaining counsel to conduct the labour negotiations, has some link or connection to the negotiations relating to labour relations between the institution and the [appellant]. The relation between the two is uncontroverted and clear.

[33] Further, the city submits that the appellant argues that the records must be collected, prepared, maintained or used "for the purposes of negotiating a collective agreement." In doing so, the city argues, the appellant imports a meaning that is not the ordinary meaning of the words of that section. The appellant, the city argues, applies an interpretation to section 52(3)2 that the Divisional Court in *MAG* "warns" should not be done. The city submits that the words "for the purposes of" are not found in that section and import an incorrect restrictive meaning to the words "in relation to."

[34] In response, the appellant submits that while it is aware of the importance and impact of legal precedents, not all cases are the same. Consequently, the appellant argues, decisions have to be made on a case by case basis, taking into consideration the merits of each request.[11]

[35] In addition, the appellant reiterates that the information in the record is not related to section 52(3)2, and that the city's argument that all that needs to be demonstrated is "some" link or connection between the record and the negotiations, regardless of how tenuous or unsubstantiated, should be dismissed for purposes of this appeal.

[36] The appellant refers to Order MO-2024-I in which former Senior Adjudicator Higgins stated the following regarding section 52(3)2:

> In my view, meeting this definition requires more than a superficial connection between the creation, preparation, maintenance and/or use of the records and the labour relations or employment-related proceedings or anticipated proceedings.
>
> The City's record of payments to a law firm, and particularly the total amount paid, is too remote to qualify as being "in relation" to proceedings for which the law firm was retained by the City. This record, which the City states was prepared by its Clerk, appears to be extracts from the City's accounting records, which were created and maintained for accounting reasons that have nothing to do with the proceedings.

[11] The appellant cites page 26 of Order PO-2484 in support of its position.

[37] Further, the appellant submits that the city has failed to demonstrate how the total cost paid to its legal counsel was of import to the 2010 negotiations and subsequent arbitration. This information, the appellant reiterates, was not relevant to the collective bargaining process nor relied upon by the city for the purposes of bargaining. Lastly, the appellant submits that it is disingenuous of the city to argue that the information in the record is related to labour relations.

Analysis and finding

[38] As previously stated, for section 52(3)2 to apply, the institution must establish that:

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

2. this collection, preparation, maintenance or usage was in relation to negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution; and

3. these negotiations or anticipated negotiations took place or were to take place between the institution and a person, bargaining agent or party to a proceeding or anticipated proceeding.

[39] In *MAG,*[12] the Ontario Divisional Court defined "relating to" in section 65(5.2) of the provincial *Act* as requiring "some connection" between the records and the subject matter of that section. This definition has been adopted for the words, "in relation to" in sections 52(3)1 and 52(3)3.[13] In particular, there must be some connection between "a record" and either "proceedings or anticipated proceedings" or "meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest." In this appeal, the city is claiming the application of section 52(3)2 and, consequently, I am to consider whether there is a connection between the record and "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."

[40] I am satisfied that the record was collected, maintained and prepared by the city, from the invoices sent to the city by counsel who conducted the negotiations and participated in the arbitration proceeding. Accordingly, I find that the city has established the first of three requirements for the application of the section 52(3)2 exclusion, set out above.

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[12] See note 5.
[13] See Orders MO-2537 and MO-2589.

[41] I am also satisfied that the collection, preparation, maintenance and use of the record was in relation to anticipated negotiations, actual negotiations and arbitration relating to labour relations. Following *MAG*, the determination of "in relation to" in section 52(3)1 rests on whether it is reasonable to conclude that there is some connection between the record and the negotiations, anticipated negotiations, an anticipated proceeding or an actual proceeding. This office has previously applied *MAG* in interpreting "in relation to" in section 52(3), with the result being that records were found to be excluded from the *Act* under section 52(3)1 because they bore some connection to proceedings or anticipated proceedings.[14]

[42] The same principle used in section 52(3)1 applies to section 52(3)2. I am satisfied that the record was created as a result of the city retaining counsel to assist in labour relations negotiations. On this basis, and in view of the above-noted case law, I conclude that the record bears "some connection" to labour relations negotiations. Consequently, I find that the record meets the second requirement for the application of section 52(3)2 of the *Act.*

[43] I find that the third requirement for the application of section 52(3)1 is met, as there is no dispute that the city and the appellant engaged in collective bargaining negotiations and subsequent arbitration.

[44] All three parts of the test for exclusion under section 52(3)2 of the *Act* have been established. Neither the city nor the appellant argued that any of the exceptions in section 52(4) apply, and I find that section 52(4) has no application in the circumstances of this appeal. Accordingly, I find that section 52(3)2 applies and that the record is excluded from the *Act*.

[45] In view of my finding that the record is excluded from the *Act*, it is not necessary for me to consider whether the exemption claimed to deny access to it applies.

ORDER:

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

Original Signed by: November 9, 2012
Cathy Hamilton
Adjudicator

[14] Order MO-2537.