

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3946

Appeal MA19-00066

The Corporation of the City of North Bay

August 20, 2020

Summary: The appellant submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the city for specified records from an *in-camera* meeting of city council. The appellant sought records relating to an item involving the city's CAO. The city identified four responsive records and denied access in full on the basis of the discretionary exemption in section 6(1)(b) (closed meeting). The appellant appealed that decision, disputing that the exemption applied and asserting that there is a compelling public interest in disclosure of the records. During the inquiry, the city issued a supplementary decision partially disclosing some of the records but also asserting that the records were excluded from the *Act* because of the employment and labour relations exclusion in section 52(3) of the *Act*. In this order, the adjudicator finds that the records are excluded from the *Act* because of section 52(3) and dismisses the appeal.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990 C. M. 56, sections 52(3), 52(3)2, 52(4) and 52(4)3.

Orders and Investigation Reports Considered: Orders MO-1994, MO-1941, MO-1622, M-797, MO-3560, MO-3684-I and MO-3945.

OVERVIEW:

[1] The appellant submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Corporation of the City of North Bay (the city) for particular records from an *in-camera* meeting of city council. Specifically, the

appellant sought:

the resolution of council, vote, recorded vote, direction to staff or whatever other record of the means which were used for City Council to have shown their support and approval for the transition plan as outlined in the letter dated [specific date] and to direct an agreement be developed by the Managing Director of Corporate Services and the City Clerk with [a named person] to formally document the terms of the transition plan.

[2] The city identified four responsive records and denied access in full on the basis of the discretionary exemption in section 6(1)(b) (closed meeting).

[3] The appellant appealed that decision, disputing that the exemption applied and asserting that there is a compelling public interest in disclosure of the records.

[4] At the mediation stage of the appeal process, the mediator contacted the affected party who advised that the records should not be disclosed. Mediation did not resolve the appeal and it was transferred to the adjudication stage, where an adjudicator may conduct an inquiry.

[5] At the outset of the inquiry, all parties were invited to make representations; only the city and the appellant did so.

[6] During the course of the inquiry, the city issued a new access decision to the appellant, disclosing all or portions of the withheld records. In this decision, the city asserted that it also relied on section 52(3), the labour and employment relations exclusion in the *Act*. The appellant and the city were invited to, and made, representations on the possible application of the exclusion.

[7] All representations were shared with the parties in accordance with the IPC's *Practice Direction Number 7* and *Code of Procedure*.

[8] In this order, I find that the records are excluded from the *Act* because of section 52(3) and I dismiss the appeal. In light of this finding, it is not necessary for me to consider the city's claim that the section 6(1)(b) (closed meeting) exemption applies.

RECORDS:

[9] There are three records at issue in this appeal, two of which have been partially disclosed.

- Record 1 – a document fully withheld
- Record 2 – the resolution (partially withheld)

- Record 3 – the minutes (partially withheld)

DISCUSSION:

[10] The only issue in this appeal is whether section 52(3) of the *Act* applies to the records. As a result of my finding on that issue below, it is not necessary to make findings on the exemptions claimed by the city.

[11] Certain records that deal with labour relations or employment matters are excluded from the *Act*, meaning that although institutions may choose to disclose them, there is no general right of access to them under the *Act*.

[12] The city asserts that sections 52(3)2 and 52(3)3 apply to the records and they are therefore excluded from the *Act*. The appellant disputes this and asserts that the records are deemed by section 52(4), the exception to the exclusion, to be covered by the *Act*.

[13] The relevant parts of section 52(3) state (emphases added):

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. ...
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.

[14] For the collection, preparation, maintenance or use of a record to be “in relation to” the subjects mentioned in paragraphs 2 or 3 of section 52(3), it must be reasonable to conclude that there is “some connection” between them.¹

[15] The term “employment of a person” refers to the relationship between an employer and an employee. The term “employment-related matters” refers to human resources or staff relations issues arising from the relationship between an employer

¹ Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.) (*Attorney General and Toronto Star*).

and employees that do not arise out of a collective bargaining relationship.²

[16] The type of records excluded from the *Act* by section 52(3) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue.

[17] If I find that section 52(3) applies to the records, I must also consider whether any of the exceptions to the exclusion that are found in section 52(4) apply. Relevant parts of section 52(4) state,

This Act applies to the following records:

1. ...
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. ...

Section 52(3)2 – Negotiations or Anticipated Negotiations

[18] I will first consider the city's claim that section 52(3)2 applies. For section 52(3)2 to apply, the institution must establish that:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;
2. this collection, preparation, maintenance or use 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.³

Related Background – Interim Order MO-3684-I

[19] In Interim Order MO-3684-I, the city was ordered to disclose a final agreement between the city and the CAO, which is related to the circumstances in this appeal and

² Order PO-2157.

³ Orders M-861 and PO-1648.

involves the same parties. In the appeal leading to Order MO-3684-I, the city argued that the final agreement was excluded from the *Act* due to section 52(3). On that issue, the adjudicator concluded that on the basis of section 52(4)3, one of the exceptions to the exclusion, the agreement was “an agreement between the city and an employee resulting from negotiations about employment-related matters between the city and the employee” and that therefore the final agreement was subject to the *Act*.

[20] The adjudicator in Order MO-3684-I also ordered the city to conduct further searches and the records discovered in those further searches are the subject of Order MO-3945. As seen below, the appellant refers to Order MO-3684-I in support of his claims about the city’s treatment of his access requests in general.

Representations

[21] The city’s position in this appeal is that the records were all prepared, maintained and used by the city in relation to negotiations relating to the employment of the chief administrative officer (the CAO). The city’s representations contained additional context about Record 1 that I am not able to reproduce in this order because it would reveal the content of the records.

[22] The city says that the first requirement is met and provided context about each of the records at issue. Regarding Record 1, which has been withheld in its entirety, the city provided specific information about the context which is consistent with my review of the record itself. Regarding the resolution (Record 2) and the minutes (Record 3), the city states that they were prepared by city staff to comply with record keeping obligations but also to “document[...] the CAO supplying information in confidence to his/her employer, being Council, as well as Council’s attendance, vote and direction given.”

[23] The city says that the second requirement is met and points to the test established in *Attorney General and Toronto Star*⁴ that it must establish “some connection” between the records and, in this case, labour relations or employment of a person by the city. The city asserts that “the records were prepared, maintained and used by the [c]ity in relation to anticipated negotiations about the employment of the CAO by the [c]ity.” In addition, the city provided other information and context about the records that is consistent with my review of the records. Based on the information provided, the city asserts that there is “far more than simply ‘some connection’” between the records and the anticipated negotiations.

[24] Regarding the third requirement, the city provided information and context about the anticipated negotiations.

[25] In response, the appellant disputes the city’s argument that the matters at issue relate to the employment of the CAO as a Corporate Advisor, which is the position that

⁴ Cited above.

the CAO held after he ceased to be the CAO. In specific reference to section 52(3)2 (negotiations), the appellant disputes that any negotiations occurred based on his understanding of the circumstances.

[26] The appellant states that the city's representations are misleading and that the city acted in "bad faith" toward him in the past. In support of this assertion, he points to Order MO-3684-I, in which the adjudicator ordered further searches, as evidence of the city's conduct toward access requests made by him.

[27] The appellant also argues that the city's representations are unreliable and that this office should obtain additional evidence from people present at the council meeting in question to verify any descriptions given by the city about what happened at the meeting. Further, with reference to the final agreement that was ordered to be disclosed in Order MO-3684-I, the appellant disputes some of the statements in that agreement that suggest that city council gave staff any direction to enter into the agreement. The appellant alleges that this is an untrue statement.

[28] The appellant also makes allegations about the circumstances surrounding the final agreement, which are not relevant to the issue before me and I will accordingly not describe these allegations.

[29] Finally, the appellant argues that section 52(4)3 applies to the records, meaning that the records are captured by the exception to the exclusion and that therefore they are covered by the *Act*. The appellant states that the records "formed the basis of the subsequent 'employment' contract with [the CAO] and were in fact the agreement" so that the *Act* applies to them.

Analysis and Finding

[30] I have carefully reviewed the records in this appeal and I find that they are excluded from the *Act* because of section 52(3)2. Generally speaking, the records relate to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue.

[31] The records were prepared or used by the city, meeting the first requirement of section 52(3)2 set out above. The records have "some connection" to the employment of the CAO, meeting the second requirement. Finally, I am satisfied that negotiations were anticipated at the time the records were prepared and used and therefore the third requirement of the section 52(3)2 test is met.

[32] In reaching this conclusion, I have considered but remain unpersuaded by the appellant's arguments that the city's representations are not reliable or credible. The appellant has not provided sufficient evidence to substantiate this claim and after a review of the records in this appeal and those in the appeal resulting in Order MO-3945, I am satisfied that the city's representations are reliable.

[33] I have also carefully considered the appellant's argument that the exception in section 52(4)3 applies to the records in this appeal. The appellant's argument is a common argument that has been made in prior appeals⁵ involving similar circumstances. The appellant asserts that the exception applies because when they are considered together, the records comprise an agreement.

[34] Based on my review of the records, I find that the records individually or when considered together, do not constitute an agreement within the ordinary meaning of that word or within the meaning of section 52(4)3.

[35] The argument advanced by the appellant required careful consideration and it is important to acknowledge that he does not have the benefit of the content of the records before him.

[36] As described by the adjudicator in Order M-797, section 52(3) and (4) are record-specific and fact-specific. I am satisfied that the records at issue in this appeal are excluded from the *Act* because of section 52(3)2.

[37] I have also been mindful of the appellant's main argument in this appeal that there is public interest in favour of disclosure. Arguments like the appellant's are relevant when considering whether the public interest override in section 16 of the *Act* applies to override some of the exemptions in the *Act*. However, section 16 arguments are not available or able to be considered by this office when the records at issue are excluded from the *Act* because of one of the exclusions, like section 52(3).

[38] As a result of this finding, I need not consider the city's alternative claim that section 52(3)3 or the exemption in section 6(1)(b) applies.

ORDER:

I find that the exclusion in section 52(3) applies to the records and the appeal is therefore dismissed.

Original signed by: _____
Valerie Jepson
Adjudicator

August 20, 2020 _____

⁵ For example, see Orders MO-1994, MO-1941, MO-1622, M-797 and MO-3560.