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

ORDER M-210

Appeals M-9200148, M-9200435 and M-9300101

City of Toronto

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

ORDER

BACKGROUND:

The City of Toronto (the City) received identical requests from three persons, under the Municipal Freedom of Information and Protection of Privacy Act (the Act), for access to records in the possession or control of the City's Job Evaluation Division pertaining to the positions of Archivist and of Records & Information Analyst.

The City identified 122 records as being responsive to the request. The City granted full access to 25 records, partial access to 20, and denied access to 64 records. In denying access, the City claimed exemptions under sections 7, 11(c), (d), (e) and (f), and 14 of the Act. After receiving the comments of the President of the CUPE local (the Union) which had created or provided information contained in 13 of the records to the City, the City denied access to the 13 remaining records on the basis of section 10 of the Act. The three requesters appealed the City's decision to deny access to the records.

Mediation of these appeals was unsuccessful, and notice that an inquiry was being conducted was sent to the three appellants, the City, and the Union. Representations were received from the City and two of the appellants.

During the course of the inquiry it was determined that disclosure of various records could affect the interests of six other persons. These persons were sent a Notice of Inquiry relating to the section 10 exemption, but none of them submitted representations.

In its representations, the City removed its application of exemptions to Records 69 and 100. The City also withdrew its claim for exemption under section 11(f).

While the representations were being considered, Commissioner Tom Wright issued Order M-170, adopting the Ontario Court (General Division) (Divisional Court) June 30, 1993 decision in the case of John Doe et al. v. Information and Privacy Commissioner et al. (unreported). This decision interpreted several provisions of the Act in a way which differed from the interpretation developed in orders of the Commissioner. Since similar statutory provisions were also at issue in the present appeal, it was determined that copies of Order M-170 should be provided to the parties, and the appellant and the City were provided with the opportunity to change or to supplement the representations previously submitted. Additional representations were received from the City.

The records at issue consist of draft job descriptions, job evaluation forms, job ratings, grievance forms, memoranda and correspondence.

ISSUES:

The issues arising in this appeal are:

A. Whether the information contained in the records qualifies as "personal information" as defined in section 2(1) of the Act.

B. If the answer to Issue A is yes, whether the mandatory exemption provided by section 14 of the Act applies.

C. Whether the mandatory exemption provided by section 10 of the Act applies.

D. Whether the discretionary exemption provided by section 7 of the Act applies.

E. Whether the discretionary exemption provided by section 11 of the Act applies.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the information contained in the records qualifies as "personal information" as defined in section 2(1) of the Act.

"Personal information" is defined in section 2(1) of the Act, in part, as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> ...
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> ...
>
> (e) the personal opinions or views of the individual except if they relate to another individual,
>
> ...

The City submits that Records 9-14, 16, 79-82, 85-87, 106-108, 120 and 122 contain personal information relating to the employment history of individuals, identifying numbers, or personal opinions or

views of individuals. I have reviewed these records, and find that, with the exception of Record 122, they contain personal information as defined in section 2(1) of the Act. Additionally, I find that Records 83 and 84 contain information which qualifies as personal information under the Act. However, it is my view that when the employee names are removed from Records 83 and 84, the remaining information does not qualify as personal information.

ISSUE B: If the answer to Issue A is yes, whether the mandatory exemption provided by section 14 of the Act applies.

Section 14(1) of the Act prohibits the disclosure of personal information to any person other than the individual to whom the information relates, except in certain circumstances listed under the section.

In my view, the only exception to the section 14(1) mandatory exemption which has potential application in the circumstances of this appeal is section 14(1)(f), which reads as follows:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > if the disclosure does not constitute an unjustified invasion of personal privacy.

Because section 14(1)(f) is an exception to the mandatory exemption which prohibits the disclosure of personal information, in order for me to find that section 14(1)(f) applies, I must find that disclosure of the personal information would **not** constitute an unjustified invasion of personal privacy.

Sections 14(2), (3) and (4) of the Act provide guidance in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.

Section 14(3) lists the types of information, the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. The City submits that section 14(3)(d) applies to Records 9-14, 16, 79-82, 85-87, 106-108, 120 and 122. This section reads:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> > relates to employment or educational history;

Even if I were to find that a presumed unjustified invasion of personal privacy exists in this appeal, a section 14(3) presumption will be overcome if the personal information at issue falls under section 14(4) of the Act. Section 14(4)(a) reads:

> Despite subsection (3), a disclosure does not constitute an unjustified invasion of personal privacy if it,
>
> > discloses the classification, salary range and benefits, or employment responsibilities of an individual who is or was an officer or employee of an institution;

In Order M-30, Commissioner Tom Wright stated:

> To me it is significant that the words "of an individual" are used in section 14(4)(a). The use of these words clearly reflects the fact that the types of information listed in section 14(4)(a) is information about an identifiable individual. Therefore, in my opinion, section 14(4)(a) includes and applies to the names of individuals who are or were employed by the institution and the disclosure of the names would not constitute an unjustified invasion of personal privacy.

I agree.

In my view, the information contained in Records 9, 10, 14, 16, 79, 80, 81, 82, 85, 86, 87, 106, 107, 108 and 120 (other than the individual employee numbers) describes the classification, salary range and/or employment responsibilities of individuals who are or were employees of the City, and section 14(4)(a) applies. Accordingly, I find that these records (with the exception of the individual employee numbers) are not exempt under section 14 of the Act.

Records 11, 12 and 13 are Personnel Action Forms, with personnel data, assignment information and job history information. I find that section 14(3)(d) applies to these records, and section 14(4)(a) does not. Accordingly, I find that these records are properly exempt under section 14. However, I note that Records 11, 12 and 13 relate individually to each of the three appellants. Where the appellant is the person named in the record, I find that section 14 does not apply.

Having found that Records 83 and 84 contain information which qualifies as personal information, and in the absence of any submissions weighing in favour of finding that disclosure of these records with the names included would **not** constitute an unjustified invasion of personal privacy, I find that the exception contained in section 14(1)(f) does not apply to the names, and the names are properly exempt from disclosure under section 14 of the Act.

ISSUE C: Whether the mandatory exemption provided by section 10 of the Act applies.

The City claims that the exemptions under sections 10(1)(a), (c) and (d) of the Act apply to Records 6, 32, 74, 83, 84, 105, 112-117 and 119.

Sections 10(1)(a), (c) and (d) of the Act read:

> 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;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or
>
> (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

In order to qualify for exemption under sections 10(1)(a), (c) and/or (d), the City and/or the Union must establish 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 institution in confidence, either implicitly or explicitly; **and**

3. the prospect of disclosure must give rise to a reasonable expectation that one of the outcomes specified in (a), (c) or (d) of section 10(1) will occur.

(Order 36)

Turning to part three of the test and section 10(1)(a), the City submits:

> By disclosing positions, i.e. not maintaining confidentiality, the integrity of the bargaining process is lost. ... Disclosure would harm the Union since it would significantly interfere with contractual negotiations between the City and the Union with respect to Job Evaluation.

The majority of records for which this section has been claimed do not contain bargaining positions of the Union. Those that do are dated 1984-85, and I have not been provided with any information which would directly connect their disclosure with a reasonable expectation of harm to the Union. In my view, section 10(1)(a) does not apply.

On section 10(1)(c), the City submits:

> Interference in the negotiation process would result in an undue loss to the Union in that its membership would no longer benefit from its negotiation with respect to job evaluation.

As above, I am not convinced that disclosure of the records would interfere with the negotiating process. Additionally, I am not satisfied that it is reasonable to expect that the Union will walk away from its obligation to represent its members because records which it provided to the employer are ordered disclosed. In my view, section 10(1)(c) does not apply.

On section 10(1)(d), the City submits:

> Finally, disclosure would reveal information supplied to the JED, who are acting in the capacity of persons appointed to resolve a labour relations dispute.

The harm to be expected under section 10(1)(d) is the harm to the mediation process and to harmonious labour relations in general. The statutory scheme which deals with "harmonious labour relations in general" is the Labour Relations Act. In addition, certain employee sectors are covered by separate statutory schemes, such as the Colleges Collective Bargaining Act, where mediators and conciliation officers may be appointed by the Ontario Labour Relations Board, and the Crown Employees Collective Bargaining Act, where the Ontario Public Service Labour Relations Tribunal may appoint a mediator or an investigator.

The term "person appointed to resolve a labour relations dispute" is not defined in the Act. However, the language describing the listed persons in section 10(1)(d) is taken directly from the Labour Relations Act, and it is my opinion that section 10(1)(d) was intended to cover the information furnished to, and the reports of conciliation officers, mediators and others who are appointed as **neutral third parties** to resolve labour relations disputes, and **only** those who are appointed under statutory schemes.

In the circumstances of this appeal, the parties involved are not neutral third parties, and were not appointed under a statutory scheme. In my view, section 10(1)(d) does not apply.

ISSUE D: Whether the discretionary exemption provided by section 7 of the Act applies.

The City submits that section 7(1) of the Act applies to Records 17-19, 20-21, 23-30, 34, 37, 40-41, 44-62, 64-65, 67-68, 70-73, 88-99, 101, 104, 106-111 and 121.

Section 7(1) of the Act states:

> 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.

Advice, for the purposes of this section, must contain more than mere information. Generally speaking, "advice" pertains to the submission of a suggested course of action, which will ultimately be accepted or rejected by its recipient in the deliberative process (Orders 118, P-304 and P-348). "Recommendations" should be viewed in the same vein (Orders 161, P-248 and P-348).

The City submits:

> In each case, the letters and memoranda have been prepared to provide advice to senior level decision makers. In each case the authors have recommended specific courses of action with respect to the rating of the position.
> ...
>
> Implicit in each draft job description is a statement at the top saying "we recommend that the following words appear in the job description for this position".
> ...
>
> Notes from Appeals [and] ... Notes to file re: rating ... include the writer's recommendations with respect to the rating of the position.

I have carefully reviewed the records for which the City is claiming the section 7(1) exemption. Despite the City's submission, there is no wording or other evidence indicating whether the information in certainrecords is being recommended or not. There is no indication, for example, that many of the records produced over a period of several years containing draft job descriptions and draft ratings were intended as anything more than options to be subject to further discussion as part of a process that would ultimately lead to advice being given or recommendations being made to the City. Other records are primarily descriptive in nature.

In my opinion, records to be given the benefit of the section 7(1) exemption must clearly contain advice or recommendations which will ultimately be accepted or rejected by its recipient in the deliberative process. In the circumstances of this appeal, I am not satisfied that section 7(1) applies.

ISSUE E: Whether the discretionary exemption provided by section 11 of the Act applies.

The City submits that the exemptions under sections 11(c), (d) and (e) apply to Records 17-21, 23-30, 37, 44-62, 64, 65, 67, 68, 70-73, 88-99, 101, 104, 106-111 and 121. Sections 11(c), (d) and (e) of the Act read:

> A head may refuse to disclose a record that contains,
>
> (c) information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

(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;

Sections 11(c) and 11(d)

In order to qualify for exemption under sections 11(c) and (d) of the Act, the City must successfully demonstrate a reasonable expectation of harm to its economic interests, competitive position or its financial interests should the information contained in the records be disclosed. Further, the evidence to support such an expectation must be "detailed and convincing" (Orders 87, M-27 and M-37).

The City submits that if the information contained in the records is disclosed, it would "... have the effect of giving the Union an unfair advantage in the negotiating process with the City", that "Should one party (the Union) have an unfair advantage, it is implicit that there will be upward wage pressure and increased job evaluation activity", and that "... it is clearly evident that giving an unfair bargaining advantage to one party ... would seriously increase job evaluation activity and consequently the City's payroll costs."

In my view, the evidence provided by the City is not sufficiently detailed and convincing to demonstrate a reasonable expectation of harm. The City fails to make the necessary connection between the disclosure of the information contained in the records themselves and any specific "use" or "misuse" of it that could reasonably be expected to prejudice or harm the City's financial or economic interests or its competitive position. Accordingly, I find that the records do not qualify for exemption under section 11(c) or (d) of the Act.

Section 11(e)

For a record to qualify for exemption under section 11(e) of the Act, the City must establish that:

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

2. the record is intended to be applied to negotiations; **and**

3. the negotiations are being carried on currently or will be carried on in the future; **and**

4. the negotiations are being conducted by or on behalf of an institution.

The City submits that the records contain information which constitutes the positions of the parties involved in the negotiations and, in some instances, plans and instructions relating to this process. I have reviewed the documents, and am satisfied that the information contained in them does constitute the positions of the parties. Part 1 of the test has therefore been met.

The City submits that the positions, plans and instructions are part of the negotiation process, and that the negotiations are an ongoing process. I have, however, been given no evidence that the bulk of the records for which this exemption is sought, which date from 1977 to 1984, relate to a current or future negotiation process. Moreover, the evidence with respect to the records dating from 1990 to 1992 is conflicting. The City argues that the negotiations through the Job Evaluation programmes are an ongoing process. One of the appellants argues that the documents in issue relate to an evaluation in which a final decision has been made, and for which negotiations are, therefore, no longer taking place. As the City's argument appears to relate to the job evaluation process in general rather than to the specific records in issue, I prefer the evidence of the appellant. I am therefore of the view that Parts 2 and 3 of the test have not been met.

Given my decision with respect to parts 2 and 3 of the test, it is not necessary for me to consider Part 4.

Accordingly, I find that none of the records qualify for exemption under section 11 of the Act.

ORDER:

1. I uphold the City's decision to deny access to Records 11, 12 and 13. Where one of these records relates to one of the appellants, I order the City to disclose it to that appellant within 15 days of the date of this order.

2. I order the City not to disclose the employee names found in Records 83 and 84.

3. I order the City to disclose the remaining records, with the exception of the employee numbers, to the appellants within 35 days following the date of this order and not earlier than the thirtieth (30th) day following the date of this order.

4. In order to verify compliance with the provisions of this order, I order the City to provide me with a copy of the records which are disclosed to the appellants pursuant to Provisions 1 and 3, **only** upon request.

Original signed by: November 3, 1993
Holly Big Canoe
Inquiry Officer