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

# ORDER M-830

## Appeal M_9600167

## City of Hamilton

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

## NATURE OF THE APPEAL:

The appellant is an employee of the City of Hamilton Fire Department (the City) who participated in a promotional job competition in February 1996. He submitted a request to the City under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to the following information relating to this job competition:

1. A copy of the written examination and his answer sheet.

2. A copy of his oral examination and the answer sheet from each of the senior officers on the interview panel.

3. A copy of each senior officer's score sheet for the scenario portion of his examination.

The City granted access to a copy of the appellant's own "summary of Lieutenant's Examination results", but denied access to all other responsive records on the basis of the following exemptions:

- economic and other interests - sections 11(c), (d) and (f).

The appellant appealed the City's decision.

During the course of mediation, the Appeals Officer identified the possible application of section 52(3) of the Act to the records. If this section applies, and none of the exceptions found in section 52(4) are present, section 52(3) has the effect of excluding records from the scope of the Act and thereby removing them from the Commissioner's jurisdiction.

This office sent a Notice of Inquiry to the City and appellant. The Notice included reference to the section 52(3) and (4) jurisdictional issue. Because some of the records appear to contain the appellant's personal information, section 38(a) was also raised in the Notice. Both parties submitted representations. The City's representations do not address section 11(c), and because its application has not been established, I find that this exemption is no longer at issue.

## RECORDS:

The records at issue in this appeal consist of the "Lieutenant's Written Examination - February 1996" form, the written examination correct answer sheet, the appellant's written examination answer sheet, a blank answer sheet, the "Lieutenant's Oral Examination - February 1996" and correct answers form, the "Lieutenant's Scenario - 1996" form, and the evaluators' individual score sheets/evaluations for the "scenario" and "oral" portions of the examination.

## DISCUSSION:

### JURISDICTION

The first issue in this appeal is whether the records fall within the scope of sections 52(3) and (4) of the Act. These provisions read:

(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 interpretation of sections 52(3) and (4) is a preliminary issue which goes to the Commissioner's jurisdiction to continue an inquiry.

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 and not subject to the Commissioner's jurisdiction. As a result, if I find that I do not have jurisdiction to deal with the records, it will not be necessary for me to deal with the substantive exemptions claimed by the City.

The City submits that all of the records were prepared, maintained and used in the context of the job competition, and these are clearly employment-related matters in which the City has an interest.

The appellant points out in his representations the reason for his request, but does not address any of the specific requirements of section 52(3).

**Section 52(3)3**

In Order P-1242, I stated that in order for a record to fall within the scope of paragraph 3 of section 65(6) (the equivalent provision to section 52(3)3 found in the provincial Freedom of Information and Protection of Privacy Act), an institution (in this case, the City) must establish that:

1. the record 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.

**Requirements 1 and 2**

In my view, it is clear that job competition records are either collected, prepared, maintained or used by the City, and in many cases, all four. Therefore Requirement 1 has been established.

I also find that in the context of a job recruitment process:

- an employment interview is a "meeting"; and
- deliberations about the results of a competition among the interview panel members are "meetings, discussions or communications", and sometimes all three.

Moreover, the records generated with respect to these activities would be either for the purpose of, as a result of, or substantially connected to these meetings, discussions or communications, and therefore properly characterized as being "in relation to" them (Order P_1242). Therefore Requirement 2 has also been established

**Requirement 3**

I am satisfied that the appellant was an employee of the City at the time of the competition. I also believe it is self-evident that a job competition is an employment-related matter. In my view, the only real issue is whether or not a job competition is a matter in which the City "has an interest".

In Order P-1242, I reviewed a number of legal sources regarding the meaning of this term, as well as several court decisions which considered its application in the context of civil proceedings. I concluded by stating:

> Taken together, these [previously discussed] authorities support the position that an "interest" is more than mere curiosity or concern. An "interest" must be a legal interest in the sense that the matter in which the Ministry has an interest must have the capacity to affect the Ministry's legal rights or obligations.

It would appear that employment law, as it applies generally (including the Employment Standards Act), does not impose any requirement of fairness with respect to the selection of candidates in competitions, nor to the documentation required in connection with job competitions. By-law 68-34 of the City of Hamilton, which governs the operation of the City's fire department, also does not appear to contain any such requirements.

However, I must also consider whether there are any external requirements which may bring job competition activities within the realm of "interest" as I have defined it in Order P-1242.

The Ontario Human Rights Code (the Code) applies to the Ministry, and includes the following sections which are relevant to the issue of the institution's legal obligations and the possible effects of failing to observe them:

> 5(1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or handicap.
>
> 9 No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part. [Note: section 5(1) is in "this Part" - i.e. Part I of the Code.]
>
> 41(1) Where the board of inquiry, after a hearing, finds that a right of the complainant under Part I has been infringed and that the infringement is a contravention of section 9 by a party to the proceeding, the board may, by order,
>
> (a) direct the party to do anything that, in the opinion of the board, the party ought to do to achieve compliance with

> this Act, both in respect of the complaint and in respect of future practices; and
>
> (b) direct the party to make restitution, including monetary compensation, for loss arising out of the infringement, and, where the infringement has been engaged in wilfully or recklessly, monetary compensation may include an award, not exceeding $10,000, for mental anguish.

From these sections, it is clear that, if an employer engages in discrimination in selecting an employee in a job competition, the employer has committed a direct breach of section 5(1) of the Code, and, as a party to a Board of Inquiry proceedings, could be liable in damages. Thus, in my view, it can properly be said, that the job competition process involves legal obligations which the employer must meet.

I discussed other provisions of the Code in Order P-1242, which dealt with whether the Ministry of Community and Social Services "had an interest" in records prepared or used in the context of an investigation conducted under the Ontario government's Workplace Discrimination and Harassment Program (the WDHP). In that case I concluded that:

> ... if the Ministry fails to act on a harassment complaint, it risks potential liability under section 41(1) of the Code, while an effective WDHP investigation may reduce or preclude such liability. In my view, therefore, the WDHP investigation has the potential to affect the Ministry's legal rights and/or obligations, and for this reason I find that the WDHP investigation is properly characterized as matter "in which the institution has an interest".

Similarly, I find that if the employer conducts a proper job competition and avoids discriminatory practices, it would avoid liability under the Code, and therefore, on this basis, the competition is properly characterized as matter "in which the institution has an interest".

For these reasons, I find that job competitions are matters in which the City "has an interest", and Requirement 3 is met.

The appellant in this case is a member of the Hamilton Professional Firefighters Association (the Association), which has a collective agreement with the City (the collective agreement). Schedule C of the collective agreement, dated October 12, 1995, sets out various policies governing promotions, including the standards for promotional evaluations, including the following:

> The criteria for examinations shall be set after consultation with the Association.
>
> All examinations so set shall be relevant to the position for which promotion is required or sought.
>
> The written examination shall consist of multiple choice questions.

In my view, the collective agreement imposes binding legal obligations on the City. Failure to meet these obligations may result in a successful grievance. This, in my view, clearly means that the City "has an interest" in the job competition process, which lends support to my finding that Requirement 3 has been met in this appeal.

In summary, I find that the records at issue in this appeal were collected, prepared, maintained and/or used by the City, in relation to meetings, discussions and consultations about employment-related matters in which the City has an interest. All of the requirements of section 52(3)3 of the Act have thereby been established by the City. None of the exceptions contained in section 52(4) are present in the circumstances of this appeal, and I find that the records fall within the parameters of section 52(3)3, and therefore are excluded from the scope of the Act.

Because of the way in which I have decided the jurisdictional issue under sections 52(3) and (4), it is not necessary for me to consider the section 38(a) and 18(1)(d) and (f) exemption claims and, in fact, I am precluded from doing go.

## ORDER:

I uphold the City's decision not to disclose the records.

Original signed by: September 4, 1996
Tom Mitchinson
Assistant Commissioner