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

ORDER M-1033

Appeal M-9700228

Town of Oakville

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NATURE OF THE APPEAL:

The Town of Oakville (the Town) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for copies of test and interview results in connection with a job competition.

The Town identified a number of records responsive to the request and denied access on the basis that the records fall within the provisions of section 52(3) of the Act. The requester (now the appellant) appealed this decision to the Commissioner's office.

This office sent a Notice of Inquiry to the Town and the appellant. Representations were received from the both parties.

PRELIMINARY ISSUES:

APPLICATION OF SECTION 52(3)

In his representations, the appellant states that section 52(3) is not relevant to the determination of this appeal because the events which gave rise to the request took place before the section came into force.

The amendments to the Act creating the current sections 52(3) and (4) were part of what is known as "Bill 7", which was passed by the Legislature in the fall of 1995, and came into force on November 10, 1995. The appellant states that section 52(3) is not retroactive to information gathered prior to the effective date of the amendment.

Assistant Commissioner Tom Mitchinson addressed this issue in Order P-1258 when considering section 65(6) of the Freedom of Information and Protection of Privacy Act, which is the provincial equivalent to section 52(3)3 of the Act. In that order he found that if the appellant had made her request prior to November 10, 1995, it would have been subject to the law in effect prior to the enactment of Bill 7. However, requests made after that date were subject to the amendments regardless of the fact that the information related to events which occurred prior to November 10, 1995. Order P-1258 also involved a request for job competition information.

I find that the appellant's request was made on July 25, 1997, well after Bill 7 came into force. Therefore, the request and subsequent appeal are subject to sections 52(3) and (4) of the Act.

THE RAISING OF ADDITIONAL DISCRETIONARY EXEMPTIONS LATE IN THE APPEALS PROCESS

Upon receipt of the appeal, the Commissioner's office provided the Town with a Confirmation of Appeal notice. This notice indicated that, based on a policy issued by this office, the Town would have 35 days from the date of the notice (an expiry date was provided) to raise any additional discretionary exemptions not claimed in its decision letter. No additional exemptions were raised during this period.

In its representations, the Town indicated for the first time that it wished to rely on section 11 of the Act (economic or other interests) to deny access to the records. By this time, the expiry date provided in the Confirmation of Appeal had passed.

Notwithstanding this policy, I would consider the circumstances of each case and may exercise my discretion to depart from the policy in appropriate cases. However, should I find that the records in this appeal fall outside the scope of the Act by virtue of section 52(3), I need not consider this issue.

DISCUSSION:

JURISDICTION

The interpretation of sections 52(3) and (4) is a preliminary issue which goes to the jurisdiction of the Commissioner or her delegate to continue an inquiry. If the requested records fall within the scope of section 52(3) of the Act, they would be excluded from the scope of the Act unless they are records described in section 52(4). Section 52(4) lists exceptions to the exclusions established in section 52(3).

These sections state:

> (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.

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.

The three records at issue consist of two written tests and the results of the appellant's oral interview for the job competition.

Section 52(3)3

In Order P-1242, Assistant Commissioner Tom Mitchinson held that in order for a record to fall within the scope of paragraph 3 of section 65(6), an institution must establish that:

1. the record was collected, prepared, maintained or used by the institution 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 institution has an interest.

Requirement 1

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

Requirement 2

The Town states that all the information in the records was used in relation to the hiring process of the Town.

In Order P-1223, Assistant Commissioner Mitchinson stated that if the preparation (or collection, maintenance, or use) of a record was "for the purpose of, as a result of, or substantially connected to an activity listed in [sections 52(3)1, 2, or 3]", it would be "in relation to" that activity.

Previous orders have found that, in the context of a job competition, an employment interview is a "meeting" and that deliberations about the results of a competition among the panel are "meetings, discussions or communications" (Orders M-861 and P-1258).

In addition, records generated with respect to these activities would either be for the purpose of, as a result of, or substantially connected to these communications, and therefore, properly characterized as being "in relation to" them (Order P-1258).

In the circumstances of this appeal, I find that the Town prepared, maintained or used all the records "in relation to" communications which took place around the job competition process. Therefore, Requirement 2 has been met.

Requirement 3

I find that a job competition is an employment-related or labour relations matter.

In Order M-830, Assistant Commissioner Mitchinson found that job competitions are matters in which an institution "has an interest" because the job competition process involves certain legal obligations which an employer must meet under the Ontario Human Rights Code, for example, a duty not to discriminate in selecting an employee in a job competition.

I agree with this conclusion and find that in the circumstances of this appeal, the Town has "an interest" in the job competition which is the subject of the records in this appeal. Therefore, Requirement 3 has been established.

Accordingly, all of the requirements of section 52(3)3 of the Act have been established by the Town. Since none of the exceptions contained in section 52(4) are present in the circumstances of this appeal, I find that the records fall within the parameters of section 52(3)3. Therefore, they are excluded from the scope of the Act.

Because I have found that the records are excluded from the scope of the Act, I need not consider the issue of the late raising of section 11 by the Town.

ORDER:

I uphold the decision of the Town.

Original signed by: November 17, 1997
Marianne Miller
Inquiry Officer