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

ORDER M-1105

Appeal M-9800020

City of Toronto

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NATURE OF THE APPEAL:

The City of Toronto (the City) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The request, made by a representative of the Toronto Fire Fighters Association (the Association), was for access to "the written, practical and oral examinations for the rank of Captain in Fire Suppression" job competition which was held in 1997. The City located and identified records responsive to the request and denied access to them, in their entirety, on the basis that under section 52(3) of the Act, they fall outside the ambit of the Act.

The requester, now the appellant, appealed this decision. A Notice of Inquiry was provided to the City and the appellant. Representations were received from both parties.

The records at issue consist of a 59-page document entitled "1997 Written Examination for the Position of Captain", 14 one-page documents entitled "Practical Examinations - Minor Evolutions", two two-page "Scenario" Examinations and 14 one and two-page documents entitled "Practical Examinations - Major Evolutions".

DISCUSSION:

JURISDICTION

The sole issue to be addressed in this appeal is whether the records fall within the scope of sections 52(3) and (4) of the Act. These provisions 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.

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. Accordingly, it argues that the records fall outside the jurisdiction of the Act under section 52(3)3.

The appellant submits that the records at issue are examination materials and that the correct exemption which should have been applied to them by the City is that contained in section 11(h) of the Act. However, if I find that the records fall outside the ambit of the Act under section 52(3)3, which is a jurisdiction-limiting provision rather than an exemption, the records are not subject to the Act and I am unable to consider whether an exemption such as section 11(h) would apply to them.

Section 52(3)3

In Order P-1242, Assistant Commissioner Tom Mitchinson found that in order for a record to fall within the scope of paragraph 3 of section 65(6) (which is 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

The City submits that all of the records relate to the same job competition, and all were collected, prepared, maintained and used by the City. In my view, it is clear that the records at issue, which relate solely to the job competition for the position of Captain, were prepared, maintained and used by the City. Therefore, Requirement 1 has been established.

The City submits that in Orders P-1242 and M-830, Assistant Commissioner Mitchinson found 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;

and that "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." I agree with the analysis of Assistant Commissioner Mitchinson in this regard. In my view, the records created for the purpose of examining candidates in this job competition were used by the City in relation to meetings, discussions or communications within the meaning of section 52(3)3. Therefore Requirement 2 has also been established

Requirement 3

The City again refers to the findings of Assistant Commissioner Mitchinson in Order M-830 where he held that "it is self-evident that a job competition is an employment-related matter". I agree with this finding by the Assistant Commissioner. Accordingly, the only remaining issue is whether or not a job competition is a matter in which the City "has an interest".

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

The City submits that it has an obligation under section 14 of its collective agreement with the Association to hold competitions for promotion to the rank of Captain every three years. The collective agreement also imposes the requirement that the competitions take the form of written, practical and oral examinations and evaluations. The City indicates that a failure to meet these legal obligations may result in a successful grievance by the Association.

The City again relies on the decision in Order M-830 where Assistant Commissioner Mitchinson found that:

> if the employer conducts a proper job competition and avoids discriminatory practices, it could avoid liability under the Ontario Human Rights Code, and therefore, on this basis, the competition is properly characterized as a matter "in which the institution has an interest".

The City submits that these principles apply equally to the present case.

I find that the terms of the collective agreement between the City and the Association create a legal obligation on the part of the City. Failure to comply with the terms of the collective agreement with respect to job competitions would likely result in a successful grievance by the Association. In my view, this clearly means that the City "has an interest" in the job competition process, which leads me to a finding that Requirement 3 has been met in this appeal.

In addition, I adopt the findings of Assistant Commissioner Mitchinson with respect to an institution's legal obligations under the Ontario Human Rights Code in the context of a job competition. I find that, in the circumstances of this appeal, the job competition which is the subject of the records is a matter in which the City "has an interest" for the purposes of the third requirement of section 52(3)3.

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.

ORDER:

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

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Original signed by: June 2, 1998
Donald Hale
Adjudicator
(formerly Inquiry Officer)