



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

# **ORDER MO-1218**

**Appeal MA-980239-1**

**City of Orillia**



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## **NATURE OF THE APPEAL:**

The appellant submitted a request to the City of Orillia (the City) under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to “the correspondence or documentation dated March 30th, 1998, entitled ‘Statement of[a named individual], 1998 Chair - Economic Development Commission (EDC)’”.

In its reply to the request, the City stated that this record falls outside the scope of the Act by virtue of section 52(3).

The appellant appealed the City’s decision to this office.

I sent a Notice of Inquiry setting out the issues in the appeal to the appellant and the City. I received representations from both parties.

## **DISCUSSION:**

### **JURISDICTION**

#### **Introduction**

The City has claimed that section 52(3) applies to the record. If section 52(3) applies, the record falls outside the scope of the right of access under section 4(1) of the Act, unless it is a record described in section 52(4). Section 52(4) lists exceptions to the exclusions established in section 52(3). Those sections 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.

Sections 52(3) and (4) are record-specific and fact-specific. If a record which would otherwise qualify under any of the listed paragraphs of section 52(3) falls within one of the exceptions enumerated in section 52(4), then the Act applies.

### **Section 52(3)1**

In order for a record to fall within the scope of section 52(3)1, it must be established 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 proceedings or anticipated proceedings before a court, tribunal or other entity; **and**
3. these proceedings or anticipated proceedings relate to labour relations or to the employment of a person by the City.

### ***Requirement 1***

The City submits:

The City at its April 20, 1998 Committee of the Whole Council (COW) meeting (in-camera) received the record. It has been in the control and custody of the City since that time.

The record is also part of the background documentation assembled in preparation for the defence of a Statement of Claim launched by [the author of the record] against a Council member.

The appellant submits:

The document prepared by [the author] was a voluntary statement submitted by him to the [City Council] and was not as a result of any mandate or direction received by [the author] . . . this appears to be the case in that there appears not to be any established evidence that there was a direction issued to [the author] for the purpose of creating [the record]. The issue in this appeal is whether or not [the record] was used by the [City] for any specific purpose, either directly or on its behalf. The document was merely reviewed and not used as an instrument for any action on the part of the [City] and no specific action, direction or undertaking was ever contemplated or completed in direct response to the creation of this document. The [City] did not undertake any active part to collect the document, prepare the document, maintain the document or use the document on its behalf. A mere review of the document by the [City] in the form of its City Council does not constitute a record which was used by the City or on its behalf for any specific purpose . . .

In my view, by receiving the record through its Council, and subsequently retaining it, the City has “collected” the record for the purpose of section 52(3)1 of the Act. For the purposes of Requirement 1, it is not necessary for me to determine whether the City used the record “as an instrument for any action”, or was “active” in collecting the document. Requirement 1 of section 52(3)1 applies where the record has been collected, and the extent to which the institution was “active” in collecting the record is not relevant to the “collection” determination under Requirement 1.

In addition, I am satisfied that the City has been maintaining the record since it was collected.

I find that Requirement 1 of section 52(3)1 has been met.

***Requirement 2***

In its submissions, the City concedes that at the time the record was collected, specific proceedings were not anticipated. However, the City submits that subsequent events have led the City to, in effect, maintain and use the record for the purpose of either existing or reasonably anticipated court proceedings. In particular, the City refers to civil proceedings commenced against a City Councillor resulting from a motion by City Council in relation to membership of the EDC and subsequent defamatory statements allegedly made by the Councillor. The City submits that these proceedings are currently continuing. The City also refers to an application to the court stemming from EDC matters that has since been withdrawn. In addition, the City submits that additional proceedings are anticipated to arise from the controversy surrounding the EDC, its members and employees, and other related issues, and gives specific examples drawn from the record and from other sources to support its assertion of anticipated litigation.

The appellant submits that at the time of the request, there were no proceedings or anticipated proceedings before a court, tribunal or other entity, and that this state of affairs continues to exist at the time of the appeal.

The City may not have anticipated proceedings at the time the record was collected. However, I am satisfied that subsequent events have led to circumstances where litigation surrounding the EDC controversy has arisen, and it is reasonable to conclude, given the relatively short passage of time, that future litigation could arise from these events. Therefore, I conclude that this record is being maintained by the City “in relation to” both current and anticipated litigation connected to the subject matter of the record.

***Requirement 3***

The City submits that the current and anticipated proceedings relate to the employment of an individual or individuals. The City cites specific examples in the record to support its view.

The appellant submits that the record relates to general issues regarding the operations of the EDC and thus was not directed to the employment of any individual.

In my view, it is reasonable to conclude that at least some of the anticipated proceedings referred to above would relate to the employment of a person or persons by the City. Therefore, I am satisfied that the City has met Requirement 3.

In the circumstances, the City has established all three parts of the three part test for exclusion under section 52(3)1. Since the exception at section 52(4) clearly does not apply here, the record is not subject to the right of access under section 4(1) of the Act.

**ORDER:**

I uphold the decision of the City.

Original signed by: \_\_\_\_\_  
David Goodis  
Senior Adjudicator

\_\_\_\_\_ June 17, 1999