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

ORDER MO-1270

Appeal MA-990161-1

City of Toronto

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BACKGROUND:

The appellant is an employee of the City of Toronto (the City). In January 1999, the appellant attended a written examination for a promotional position along with 27 other candidates. Two candidates were selected from this competition. The appellant was not one of the successful candidates. Following the competition, the unsuccessful candidates were invited to attend debriefings with the Human Resources consultant involved in the competition.

During these debriefing sessions, the unsuccessful candidates were given a copy of their own examination sheets and were permitted to review the marking key and correct answers. They were then advised that any concerns they had would be forwarded to the individual who marked the examinations and they would be contacted further to discuss their concerns in detail.

The appellant attended his debriefing session on April 27, 1999 but then left the meeting upon being told the basis on which the debriefing session was to proceed.

NATURE OF THE APPEAL:

The appellant submitted a request to the City under the Municipal Freedom of Information and Protection of Privacy Act (the Act) on April 26, 1999, the day before his debriefing session for the following information:

> ... a photocopy of my examination papers ... and a photocopy of the model answers against which my papers were marked. The purpose of this request is to evaluate my own performance in that situation.

The City denied access to the requested records on the basis that they fall outside the scope of the Act by virtue of section 52(3)3 of the Act.

The appellant appealed the City's decision.

I sent a Notice of Inquiry to the appellant and the City. Representations were received from both parties.

RECORDS:

The records at issue consist of the appellant's written examination papers, the marking key and the correct answer sheets.

DISCUSSION:

JURISDICTION

Sections 52(3) and (4) read as follows:

(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.

Section 52(3)3

In order for the record to fall within the scope of paragraph 3 of section 52(3), the City must establish that:

1. it 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.

[Order P-1242]

Requirements 1 and 2

The City submits that the records at issue were all prepared, compiled and/or maintained for its use during the course of a job competition, including the interviewing, selection and debriefing of candidates and thus meet the first two requirements of section 52(3)3.

Previous orders of this office have found that in the context of a job competition, an employment interview is a "meeting" and deliberations about the results of a competition are meetings, discussions or communications (Orders M-861 and P-1242). In addition, previous orders of this office have found that records generated with respect to these activities would either be for the purpose of, or as a result of, or substantially connected to these communications and are, therefore, properly characterized as being "in relation to" them (Order P-1258).

I agree with this line of decisions and find that the records at issue were prepared, compiled and maintained for the City's use in relation to meetings, discussions and communications, thus meeting the first two requirements for section 52(3)3.

Requirement 3

Previous orders of this office have found that job competitions by their very nature are clearly employment-related matters (Orders P-1242, P-1258 and M-1127). I agree with these orders and find that the records pertaining to the examinations held as part of the interview process are about an employment-related matter and the first part of the third requirement has been met.

The only remaining issue is whether this is an employment-related matter in which the City "has an interest".

Previous orders have held that an interest is more than mere curiosity or concern. An "interest" for the purposes of section 52(3)3 must be a legal interest in the sense that the matter in which the City has an interest must have the capacity to affect the legal rights or obligations of the City (Orders P-1242 and M-1147).

Several subsequent orders of this office have considered the application of section 52(3)3 (and its provincial equivalent in section 65(6)3) in circumstances where there is no reasonable prospect of the institution's "legal interest" in the matter being engaged (Orders P-1575, P-1586, M-1128, P-1618 and M-1161). The conclusion of this line of orders has essentially been that an institution must establish an interest that has the capacity to affect its legal rights or obligations, and that there must be a reasonable prospect that this

interest will be engaged. The passage of time, inactivity by the parties, loss of forum or conclusion of a matter have all been considered in arriving at a determination of whether an institution has a "legal interest" in the records.

The City refers to Order PO-1649 in which I found that the following factors were relevant in determining that the institution had an on-going interest in the job recruitment process that had the capacity to affect its legal rights or obligations: continued dissatisfaction with the results of the competition expressed by the appellant; the institution's current involvement in on-going debriefing discussions with the appellant regarding the competition; and the possibility that the appellant, based on his actions, might pursue a complaint under the Ontario Human Rights Code (the Code).

The City submits that comparable factors exist in the present appeal. In particular, the City notes that although the appellant claims that he wishes access to this information in order to evaluate his own performance, when given the opportunity to attend a debriefing session he walked out indicating that he was dissatisfied with the process. The City states that an offer was made to the appellant again during mediation to attend a debriefing session, this time with the Human Resources Manager who was prepared to respond to any questions or concerns the appellant might have. The City indicates that the appellant declined this offer.

The City states that the appellant's refusal to attend the debriefing sessions raises a concern on its part that he is not motivated simply to evaluate his own performance. The City submits that based on his actions to date, it is reasonable to conclude that the appellant may be dissatisfied not only with the debriefing process but with other aspects of the competition as well. The City submits that it is reasonable to anticipate that the appellant may pursue this entire matter further.

In particular, the City states that the appellant may file a complaint under either its human rights policy or under the Code, and is still in a position to file a grievance.

In this regard, the City indicates that under its policy an employee may file a grievance relating to a promotional job competition up to six months following the competition. However, in unusual or special circumstances, the time for filing a grievance may be extended. The City does not indicate how long an extension might be considered, however, it does note that protracted discussions between it and the employee relating to the particular competition and the request and appeals process under the Act are both considered to be "special" circumstances which could result in an extension of the grievance period.

The City states further that under its policy, a grievance may be filed at any time if the matter relates to harassment or discrimination.

The appellant makes the following statement in response to the City's position regarding his attendance at the debriefing session held on April 27, 1999:

> [T]he City did not fully disclose the conditions under which the debriefing session was given and arbitrarily assumed that I was not willing to participate fully in that session. During that

> session held on April 27, 1999 ... I was only with [the consultant] who informed me that I was not allowed to copy anything or record any minutes in writing but only allowed to make oral comments if I had to. As I found it was impossible for me to commit everything of the meeting to my memory ... I therefore discontinued the meeting and requested access to the records under the [Act].
>
> Had I been given the right to make minutes in writing in that debriefing session I would not have to invoke provisions of the [Act] to request access to the said records.

Further, the appellant submits that the City's legal interest in the employment-related matter expired once the papers were marked and ranking determined. Moreover, the appellant states that he has not commenced any litigation or grievance relating to this matter, therefore, there is no reasonable prospect that the City's legal interest in the circumstances of this competition would be engaged in the future.

I have carefully considered my reasons in Order PO-1649 and the circumstances of that appeal. In my view, the facts in that case are distinguishable from the present case in that the competition and debriefings in Order PO-1649 had very recently occurred, in fact, a debriefing session had yet to take place. Further, in Order PO-1649, there was evidence that the appellant was extremely displeased with the competition process itself, that he had already filed a grievance in another competition, and that materials he had written to various individuals supported a finding that he might have pursued the matter further.

In my view, the specific facts in Order PO-1649 suggested that there was a more than reasonable prospect that the appellant in that case would pursue the matter in such a way as to engage the institution's legal interests. The circumstances of the present case do not present as clear a picture of the appellant's intentions in this regard.

In particular, the City has not provided direct evidence that the appellant has expressed dissatisfaction with the manner in which the competition itself was held or the results of it or that he intends to pursue the results of the competition through the grievance process. Rather, the City's concern arises from his attitude toward the manner in which it deals with unsuccessful candidates. The appellant fully admits that he is unhappy with this process. However, even if he were to pursue this procedural matter, the records at issue, in my view, have no bearing on this part of the City's competition process.

Further, apart from stating that the possibility of a complaint under its human rights policy or under the Code exists, the City has provided no evidence that there is any reasonable prospect that such an issue might arise. Similarly, the City has provided no evidence that there exist any issues relating to either harassment or discrimination which could reasonably be expected to bring its grievance policies in this regard into play.

That being said, however, there are considerations in the current appeal which go to the issue of whether there is a reasonable prospect that the City's legal interests will be engaged in the future. In this regard, I note that the appellant claims that had the City provided what he considers a "fair process" in debriefing unsuccessful candidates, he would not have initiated and pursued the access request, and that he only did so after being advised of the conditions of the debriefing session. However, as I indicated above, he actually

submitted his access request one day before the debriefing session. In Order MO-1267, I stated that the filing of an access request is not, in and of itself, sufficient to automatically trigger a "legal interest" on the part of an institution, although in the context of a particular appeal, it may be relevant.

In terms of timing, there is, in my view, a very close connection to the access request and the results of the competition. It may be surmised that the appellant knew what would happen at the debriefing session prior to attending and was simply initiating the process on that basis. However, in the circumstances, it is not unreasonable for the City to anticipate that the appellant may have additional motives in seeking this information given the timing of his request.

The competition was held in January 1999 and the results were made known in March 1999. Almost a full year has passed since the competition was decided and the appellant was notified of the results. The appellant has passed the six month deadline for filing a grievance, however, as the City notes, participation in the access process is viewed as a special circumstance which may allow for an extension of this deadline. On this basis, I find that there is a forum currently available to the appellant should he wish to grieve the results of the competition. The appellant is clearly not happy with at least part of the competition process, and I am satisfied that there is a reasonable prospect that he may pursue the competition process as a whole. Therefore, the City has established a current legal interest in the employment-related matter to which the records relate and the third part of the section 52(3)3 test has been established. In arriving at this conclusion, however, it is important to note that my decision is based on the limited availability of the grievance process as it relates to the promotional job competition.

I find that section 52(4) does not apply to the records in the circumstances of this appeal.

As a result, the records fall outside the jurisdiction of the Act.

ORDER:

I uphold the City's decision.

Original signed by: January 24, 2000
Laurel Cropley
Adjudicator