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

ORDER MO-1307

Appeal MA-990240-1

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) for a copy of all records, including handwritten notes, formal reports and notes of any conversations or discussions, in hard copy, electronic or any other form, of any staff or consultants respecting the job descriptions for Council Staff Members - Executive Assistant, Constituency Assistant and Councillor's Assistant.

The City identified 295 pages of responsive records, consisting of e-mails, job descriptions, correspondence, memoranda, handwritten notes, briefing notes, agreements and various other related documents, and denied access to them in their entirety claiming that they fell outside the scope of the Act pursuant to sections 52(3)2 and 3 of the Act.

The requester (now the appellant) appealed the City's decision.

During mediation, the City disclosed 110 pages of the records to the appellant that, according to the City, were either public records or records to which the appellant already had access. Consequently, 185 pages of records remain at issue in this appeal, consisting of e-mails, job descriptions, draft job descriptions, internal correspondence, memoranda, handwritten notes, briefing notes and agreements.

I sent a Notice of Inquiry initially to the City. After reviewing the representations provided by the City, I sent the Notice of Inquiry to the appellant, together with the non-confidential portions of the City's representations. The appellant submitted representations. I decided to provide the City with an opportunity to reply to some issues raised by the appellant in her representations, and sent the City a Supplementary Notice of Inquiry, together with the appellant's representations in their entirety. After reviewing the City's reply representations, I sent a Supplementary Notice and the City's non-confidential representations to the appellant, who provided further representations in response. Finally, I provided the City with an opportunity to reply.

DISCUSSION:

JURISDICTION

The City claims that the records fall within the scope of sections 52(3)2 and 3, and therefore are outside the jurisdiction of the Act.

Sections 52(3)2 and 3 and 52(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:
>
> 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) is present, then the section 4(1) right of access does not apply to the records.

In order for the records to fall within the scope of paragraph 2 of section 52(3) of the Act, the City must establish that:

1. the records were collected, prepared, maintained or used by the City or on its behalf; **and**

2. this collection, preparation, maintenance or usage was in relation to negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the City; **and**

3. these negotiations or anticipated negotiations took place or will take place between the City and a person, bargaining agent or party to a proceeding or anticipated proceeding.

[See Orders M-861 and PO-1648]

To qualify under section 52(3)3, the City must establish that:

1. the records were 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]

Requirement one - sections 52(3)2 and 3

The City submits that the records were collected, prepared, maintained and used by Human Resources staff, the Executive Director and/or committees in relation to the review and evaluation of job descriptions, salary levels, pensions, severance pay and other conditions of employment for Council staff. The appellant agrees with the City on this point.

I concur, and find that the first requirement of sections 52(3)2 and 3 has been established.

Requirement two - section 52(3)2

As far as the second requirement of section 52(3)2 is concerned, the City submits:

> ... that this collection, preparation, maintenance and usage of the records is in relation to negotiations and anticipated negotiations between the City and Council staff members and their representatives.
> ...
>
> In the circumstances of this appeal, as part of the overall labour relations process, the Executive Director and/or Human Resources staff met with Council staff to obtain their views and input with respect to the City's review of their job descriptions, salaries and other conditions of employment. The records at issue reflect these 'negotiations' between the City and Council staff.
>
> The City also submits that until City Council adopts recommended job descriptions and other conditions of employment, current and future meetings and discussions about these matters constitute ongoing negotiations.
>
> As stated above, the implementation of revised job descriptions and salary scales will collectively affect all Council staff. There is a reasonable expectation that this may impact

> on the City's obligations under collective agreements that apply to the Council staff and further negotiations may therefore take place.

In response, the appellant submits:

> The process of reviewing existing job descriptions, and drafting revised job descriptions was one of meetings and communications between human resources staff and Council staff (Executive Assistants) in order to collect information to assist with the revision.
>
> It did not involve 'negotiations' between the City and Council staff. The City met with Council staff to obtain their input relating to the revised job descriptions; no negotiations - that is, 'confer with others in order to reach a compromise or agreement' - occurred. No compromise or agreement was sought by the City, nor offered by the Council staff ...
>
> The process of forwarding the recommendations pertaining to the job descriptions to Committee is for deputations and consideration, and on to Council for approval or the Committee's recommendations; no negotiations occur at any level.
>
> The Management Association is not recognised by Council as an official negotiating body on behalf of bargaining unit excluded, i.e. management employees. It does not have the mandate to negotiate with the City, as Council has officially refused to recognise it as a legitimate representative of management staff (ie. Executive Assistants). Therefore, the second criterion has not been met.

In reply to the appellant's representations on this issue, the City submits:

> Some Council staff are members of the Canadian Union of Public Employees (CUPE) Local 79. The implementation of revised job descriptions and salary scales will collectively affect all Council staff and there is a reasonable expectation that this will impact on the City's obligations under the collective agreement. As further discussions take place, and if no agreement on the terms and conditions of employment is reached with Council staff, it is very likely that the union will get involved on behalf of the unionized employees and further negotiations will take place.
> ...
>
> Notwithstanding that the appellant herself is not part of a union, as stated above, there are Council staff who belong to CUPE Local 79. Whatever terms and conditions are negotiated with the union with respect to the job descriptions etc. will affect the terms and conditions of employment for all Council staff not just union members. Similarly, a grievance filed by a union member will affect the status of all Council staff regardless of their specific positions.

> In such circumstances, whether or not the City recognizes the Management Association as a bargaining agent for its membership has no bearing on the City's position that it is engaged in 'negotiations' or 'anticipated negotiations' as outlined above.

In response to these reply representations the appellant submits:

> The Executive and Constituency Assistants in Councillors' offices are not part of any organisation which has status with the City. In November 1998 Toronto City Council decided not to recognise the City of Toronto Administrative, Professional, Supervisory Association Inc. (COTAPSAI) as representative of management, supervisory, professional or excluded staff of the City. The Councillors' Executive and Constituency Assistants are included in this category. A copy of a report to City Council from the City Solicitor, dated November 18, 1998, which was on a public agenda, is attached.
>
> Respecting the City's reference to some Council staff being members of CUPE Local 79, yes a few of the Councillors' offices Administrative Assistants (AAs), are members of CUPE Local 79. However, my request does not include anything to do with AAs ...
>
> With no organisation such as COTAPSAI to represent Executive Assistants, there are no 'negotiations', anticipated or otherwise, therefore the City's reliance on 52(3)2 is invalid.
>
> Also, the status of the Administrative Assistants' and their job descriptions, when this work happens, will have nothing to do with the Executive Assistants' position descriptions, therefore, there is no impact of the status of the few CUPE Local 79 members on my request.

In its final submissions, the City states:

> ... the job evaluation of each Council staff position is not being conducted totally independent of the other positions. What is finally agreed upon with respect to one position, unionized or not, will have some bearing on what is agreed upon with respect to the other position(s).
>
> The Director of Council and Support Services, Clerk's Department has advised that any settlements reached with relevant unions will have some impact on the final terms and conditions of employment related to non-union, excluded positions.

I do not accept the City's position on this issue. As the appellant states, and the City does not dispute, there is no collective relationship between the City and the Executive Assistants. In fact, the association to which the appellant belongs is not recognized by the City as a bargaining agent. In my view, the fact that the job evaluation process involving all Councillors' staff positions includes some positions that are unionized (ie. some Administrative Assistants) has no bearing on issues involving the Executive Assistants who have no collective relationship with the City. The appellant's request deals exclusively with records involving the Executive Assistant position, which appear to be separate and distinct from records involving the

Administrative Assistant position. I accept the appellant's submission that Council asked for consultation on the job descriptions relating to the Executive Assistants, but that this process did not and could not involve 'negotiations' as that term is used in section 52(3)2.

Therefore, I find that the collection, preparation, maintenance or usage of the records by the City was not in relation to negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the City, and the second requirement of section 52(3)2 has not been established.

Requirement two - section 52(3)3

The City submits:

> As part of the evaluation and review process, Human Resources staff and/or the Executive Director met with or communicated with Council staff to solicit their views and to apprise them of developments. Human Resources staff also met to discuss and/or communicated with each other on this matter. They also provided updates directly to the Executive Director who in turn reported to the Personnel Sub-committee and the Policy and Finance Committee.
> ...
>
> The City submits, therefore, that the City has collected, prepared, maintained and used the records at issue in relation to meetings, consultations, discussions or communications.

The appellant's representations do not specifically address this particular issue. However, as noted above, in her representations respecting section 52(3)2, the appellant acknowledges that the 'process of reviewing existing job descriptions, and drafting revised job descriptions was one of meetings and communications between human resources staff and Council staff'.

Therefore, based on the evidence provided to me by both parties and the contents of the records themselves, I find that the collection, preparation, maintenance or usage of the records by the City were clearly in relation to meetings, consultations, discussions and communications and the second requirement of section 52(3)3 has been established.

Requirement three - section 52(3)3

Section 52(3)3, requires that the activities listed in this section must be 'about labour relations or employment-related matters'.

The City submits that 'information relating to employees' conditions of employment such as salaries, pay-equity plans, pensions benefits, job descriptions and evaluations is clearly employment-related information.'

The appellant does not dispute this claim in any of her representations.

I accept the City's position on this issue, and find that the meetings, consultations, discussions and communications held by the City relating to the review of existing job descriptions pertain to 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'.

In this regard, the City submits:

> It is the City's position that a failure to adequately evaluate the job positions, salaries etc. of Council staff in accordance with its legal obligations under the various collective agreements could reasonably lead to Council staff filing a grievance or taking legal action.
> ...
>
> The City will be collecting, maintaining and using the records at issue in any grievance proceedings or other proceedings that may be initiated against it as a result of the final recommendations on the conditions of employment for Council staff.

On the other hand, the appellant submits:

> ... The Executive Assistants are not in any way permitted to grieve; there is no process or body that can provide this opportunity. The Executive Assistants (and Constituency Assistants) are management and can belong to the Management Association, however, as Council has decided not to recognise the Association, we are not, accordingly, subject to any collective agreements and grievance processes.

When I sent the appellant's representations to the City for reply, I specifically asked the City to address the issues of whether the appellant has a right to grieve a decision made by the City with respect to the job description, and if not, whether this has any bearing on the City's position that it "has an interest" as the term is used in section 52(3)3 and applied in previous orders of this Office.

The City responded to these issues and the appellant's representations as follows:

> As part of the Management Association, the appellant does not have the right to grieve a decision made by the City with respect to Council staff job positions. However, if the appellant is dissatisfied with the terms and conditions of employment that are eventually agreed upon, there are other legal remedies available to her.
> ...
>
> As previously stated, there are Council staff who belong to CUPE Local 79. A grievance filed by a union member with respect to their job descriptions, salary etc. would collectively affect all other Council staff members since they must all be employed under the same terms and conditions.
> ...

> In summary, the fact the appellant does not have the right to grieve does not affect the City's position that it has an interest in an employment-related matter ...

According to the appellant:

> The only other legal remedies that I might have available to me would be the same as any other employee in Ontario subject to its labour and employment laws. I would have to hire a lawyer and use those laws to seek remedy. There appears to be no relevance of my general employment right to this FOI request.
>
> Should a member of the Union (presumably working in a Councillor's office) file a grievance in respect of his/her job descriptions, the City would, of course, have 'an interest' and deal with it in the normal way. To say that my request for information on my job description and its process, would have any impact on an employee's grievance about their job description and the City's 'interest', has the same relevance as it would if an employee working in another office of the City - none.
>
> The Executive Assistants have made many attempts to have our new position description implemented, however the City has insisted that doing so could have an impact on, first the negotiations last fall with Local 416 and presently with Local 79. Both of these Unions have stated to us and the City representatives that whatever the City does with us, at whatever time, has no bearing on their discussions or negotiations with the City.
> ...
>
> Throwing anything to do with Administrative Assistants and the few CUPE 79 members, into this equation is a red herring; these are separate jobs, the same as in many offices where union, excluded and management work side-by-side.

In Order P-1242, I stated the following regarding the meaning of the term "has an interest":

> 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.

A number of orders 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" being engaged (see, for example, Orders P-1575, P-1586, M-1128 and M-1161). Specifically, this line of orders has held that an institution must establish an interest, in the sense that the matter 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 the requisite interest. Orders P-1618, P-1627 and PO-1658, all of which applied this reasoning, were the subject of judicial review by the Divisional Court and were upheld in Ontario (Solicitor General and Minister of Correctional Services) v.

Ontario (Information and Privacy Commissioner) (March 21, 2000), Toronto Docs. 681/98, 698/98, 209/99.

In my discussion under section 52(3)2, I found that there is no collective relationship between the City and the Executive Assistants, and that linking the job evaluation process involving the unionized Administrative Assistants to that of the non-unionized Executive Assistants was not supportable. Accordingly, I find that any grievance that may be filed by the union has no bearing on records relating to the Executive Assistants for the purpose of section 52(3)3.

The City acknowledges that the Executive Assistants have no right to file a grievance. Although, as the appellant states, other legal remedies may be available to employees regardless of whether they are members of a bargaining unit, the appellant has not initiated any legal action and the City has not provided evidence sufficient to establish that one is pending or reasonably foreseeable. Accordingly, in my view, there is no reasonable prospect that any legal interest with the capacity to affect the City's legal rights or obligations is present in the circumstances of this appeal, and I find that the City has not demonstrated that it has sufficient legal interest in the records to bring them within the ambit of section 52(3)3 of the Act.

Therefore, I find that requirement three of section 52(3)3 also does not apply, and the records are subject to the provisions of the Act.

ORDER:

1. I order the City to issue an access decision to the requester concerning the records, in accordance with the provisions of sections 19, 21 and 22 of the Act, treating the date of this order as the date of the request.

2. I order the City to provide me with a copy of the decision letter referred to in Provision 1 by sending it to my attention c/o Information and Privacy Commissioner/ Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario M5S 2V1.

Original signed by: June 7, 2000
Tom Mitchinson
Assistant Commissioner