



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER MO-1639

Appeal MA-020035-1

City of Niagara Falls



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

This appeal concerns a decision of the City of Niagara Falls (the City) made pursuant to the provisions of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The requester (now the appellant) had sought access to records pertaining to the City's hiring of a Clerk. In particular, the appellant requested the following information:

- List of competencies required for the Clerk's position;
- How many applicants interviewed had all of the competencies?
- How many applicants advanced through the selection process?
- How many applicants had second interviews?

The appellant is seeking this information to address questions regarding the process of hiring the Clerk.

In its decision letter the City identified the following records (the part of the appellant's request to which the record relates is indicated in brackets):

- position description (part 1);
- newspaper advertisement (part 1);
- applicant resumes (part 2);
- separate hand-written notes evaluating each candidate interviewed (part 2);
- document listing the names of candidates and times for interviews (part 2).

The City granted access to the records responsive to part 1 of the appellant's request, denied access to records responsive to part 2 of the appellant's request, pursuant to section 14 (personal privacy), citing sections 14(2)(f), 14(2)(h), 14(3)(d) and 14(3)(g) of the *Act* to support its claim, and stated that no records exist with respect to parts 3 and 4 of the appellant's request.

The appellant appealed the City's decision.

During the mediation stage of this appeal, the appellant clarified that she was not interested in the personal information of any of the applicants. She indicated that she wanted to know the qualifications of the 16 applicants, whether they have a clerk's certification, and their employment history with all personal identifiers removed [i.e. past employment position(s) without identifying employer name(s)]. The City stated that it could not sever the records at issue to provide the information sought by the appellant and still protect the confidentiality of the job applicants.

Through mediation the appellant learned that there were no second interviews for the Clerk's position. The appellant agreed to remove from the appeal the issue of whether or not records exist in respect of parts 3 and 4 of his request. The appellant also indicated that she was not interested in the records that contained the hand-written notes evaluating each candidate interviewed. These records are, therefore, not at issue in this appeal. Also during mediation, the City agreed to provide the appellant with a copy of the document listing the times for the

interviews with all candidate names severed. The document listing the names of candidates and times for interviews is no longer at issue in this appeal.

At the conclusion of the mediation stage the records that remained at issue were the resumes together with, in some cases, the covering letters for the 16 applicants.

I initially sought representations from the City. The City submitted representations and they were shared in their entirety with the appellant. I then sought representations from the appellant who submitted representations in response. The appellant agreed to share her representations with the City. As the appellant's representations raised issues in response to the City's representations, the City was given an opportunity to reply to the appellant's representations. The City responded with reply representations that raised, for the first time, the application of section 52(3)3 (application of the *Act*). I then sought reply representations from the appellant on the application of section 52(3)3. The appellant submitted representations; however, her representations were not relevant to the section 52(3)3 issue.

RECORDS:

There are 16 records at issue, comprised of the resumes and, in some cases, the accompanying cover letters of applicants for the Clerk's position with the City.

CONCLUSION

The *Act* does not apply to any of the records at issue by virtue of section 52(3)3.

DISCUSSION:

APPLICATION OF THE ACT

Introduction

As stated above, the Ministry has taken the position that section 52(3)(3) applies to the records. If section 52(3)3 applies to the records, and none of the exceptions found in section 52(4) applies, section 52(3)3 has the effect of excluding the records from the scope of the *Act*.

Section 52(3)3 of the *Act* states:

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:

Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

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

1. the records were collected, prepared, maintained or used by an 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

The City submits:

...[T]he City must establish that the records were at some point collected, prepared, maintained or used by the City. As decided in Order M-861, the records relating to a job competition are records that in many cases satisfy all four criteria and, therefore, requirement 1 would be satisfied. This was the case in this job competition.

Assistant Commissioner Tom Mitchinson originally articulated this office's approach to dealing with job competition records in Order P-1258. This approach has been followed in Order M-861.

I accept the City's interpretation of Order M-861. In that order Adjudicator Donald Hale found that job competition records were either collected, prepared, maintained or used by the Municipality in question. He also concluded that in many cases all four criteria under requirement 1 were satisfied.

On my review of the records and the surrounding circumstances, I find that all of the records were collected, maintained and used by the City to conduct and administer a job competition. Therefore, I find that the first requirement of section 52(3)3 has been satisfied.

Requirement 2

The City submits:

Adjudicator Hale in Order M-861 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." The job recruitment in the instant case was typical of most job competitions and would, therefore, have involved most, if not all, of the elements of requirement 2.

Assistant Commissioner Mitchinson, in Order P-1258, clearly stated this office's approach to requirement 2 in situations involving a job competition. He states:

I [...] find that in the context of a job recruitment process:

- an employment interview is a "meeting";
- deliberations about the results of a competition among the panel are "meetings, discussions or communications", and sometimes all three; and
- applications, reference letters and letters to the applicants are "communications".

Moreover, the records generated with respect to these activities would either be 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 (Order P-1242). Therefore, Requirement 2 has also been established.

I agree with the approach expressed by Assistant Commissioner Mitchinson.

Applied to this appeal, I find that the City collected, maintained and used the records in relation to undertaking, conducting and completing a job interview process. For the interview panel, this process necessarily involved the following three stages:

- discussing the screening of applications
- meeting with prospective candidates for interviews
- deliberating about the results of the job competition

I find that all three stages of this process constitute discussions, consultations, meetings and/or communications. Accordingly, I find that the second requirement of section 52(3)3 has been satisfied.

Requirement 3

To meet the third requirement the City must establish that the "communications" were "about labour relations or employment related matters" and that the City "has an interest" in these matters.

The City provided the following submissions on this third requirement:

...[T]he Court of Appeal in *Solicitor General et al. v. Mitchinson, Assistant Information and Privacy Commissioner of Ontario et al.* 55 O.R. (3d) 355, held,

inter alia, that an employer does not need to have a “legal” interest as set out in paragraph 3 of section 52(3) and the words “in which the institution has an interest” operate to restrict the categories of excluded records to “employment-related matters”. The records in question relate to employment-related matters as they exclusively involve applicants for a job. Therefore, the City did have an interest in an employment-related matter and requirement 3 is satisfied.

With respect to part 1 of the third requirement, I accept that the City engaged in meetings, consultations, discussions and/or communications about employment related matters. The City was engaged in administering a job competition process. In my view, reviewing job applications, conducting interviews and engaging in deliberations are all clearly employment-related matters. Each of these events would engage both the City and the applicant in transactions that are significant to determining a potential employment relationship. I find that the first part of the third requirement has been satisfied.

The Court of Appeal stated in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 509, that “interest” must be more than a “mere curiosity or concern”, though not necessarily a “legal” interest. In addition, the court stated that the “matter” must relate to an institution’s own workforce and that once records are excluded from the operation of the *Act*, they remain excluded.

In my view, the City clearly has more than a mere curiosity or concern about the hiring of a Clerk. This is a notable event impacting the City and its administration. In addition, it is clear to me that the records relate to the City’s management of its “own workforce”. In the circumstances, I find that the City has an “interest” in all of the information at issue, and that the second part of the third requirement has been met.

Conclusion

I find that the City has established all of the requirements of section 52(3)3. Also, it is clear that none of the exceptions in section 52(4) applies. I conclude that all of the records at issue are excluded from the scope of the *Act*.

ORDER:

I dismiss the appeal.

Original signed by: _____
Bernard Morrow
Adjudicator

April 28, 2003