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

ORDER MO-1731

Appeal MA-020295-1

City of London

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NATURE OF THE APPEAL:

This appeal concerns a decision of the City of London (the City) made pursuant to the provisions of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The requester, a law firm representing a labour union (now the appellant), had sought access to the following records:

1. Records, including by-laws, which related to, or comprise, a decision made by the City's Council or its Board of Control, pursuant to section 98 of the *Municipal Act*, or other, to provide for a "retiring allowance" or any other payment of any sort, on, or in anticipation of the termination of employment of [named individual #1].

2. Records which relate to the contract or agreement entered into on or about [named individual #1] on the one hand and the City of London on the other hand which contract relates to the payment of money, and other consideration to [named individual #1], and for the termination of his employment.

3. Records which relate to or comprise the "17 point action plan" adopted by the City in the Fall of 2000 after an internal review, which "action plan" provided, in part, the City's response to the granting of a leave of absence to, and the termination of, [named individual #2].

4. All records which relate to the training, consultation, or advice, including "leadership training", provided to supervisors and/or managers of the City, and paid for by the City ("the training"), by anyone affiliated with, or employed by, the University of Western Ontario [(UWO)], including [named individual #3], in November and/or December 2001, including but not limited to all records relating to or comprising:

    a. Invoices related to the training submitted by the UWO, or any affiliated entity or employee of the UWO;
    b. Any records of documents or material provided to, or shown to participants in the training;
    c. All correspondence, notes, memoranda, or documents of any kind, related to such training, which were delivered between the UWO and the City; and
    d. The "Just Say No" component of the "leadership training" provided in November and/or December 2001.

The City granted partial access to records responsive to the appellant's request. The City agreed to disclose invoices relating to part 4 of the request. The City stated that additional records responsive to part 4 had not yet been obtained and that the City would contact the appellant once they had been located. The City stated that the records responsive to parts 1, 2 and 3 of the request were excluded from the *Act* on the basis of section 52(3). The City also set out its fee for search and photocopying costs.

The appellant appealed the City's decision. In the letter of appeal, the appellant stated that the City had misinterpreted section 52(3) of the *Act*, and that section 22(1)(b) (adequacy of decision letter) of the *Act* had been violated. The appellant also raised the application of section 16 (compelling public interest) to justify disclosure of the responsive records. While section 16 may override the application of certain exemptions, it cannot override the application of the section 52(3) exclusion, the only basis on which the City is withholding records at this time. Therefore, section 16 is not at issue in this appeal.

During the mediation stage, the appellant agreed to withdraw its appeal with respect to part 3 of the request, relating to the "17-point action plan" adopted by the City. With respect to part 4, the City advised that it did not locate further responsive records. However, the appellant maintains that additional responsive records exist for part 4 and so reasonable search is an issue in this inquiry. The appellant also takes the position that since the City, in its decision letter, acknowledged that additional records exist for part 4 of the request, the City should not be permitted to claim any exemption or exclusion once records are located.

No other issues were resolved during mediation and the file was referred to me for inquiry.

I first sought and received representations from the City, which were shared in their entirety with the appellant. I then sought and received representations from the appellant, which were shared in their entirety with the City. In its representations the appellant raised the application of section 52(4) in respect of an agreement between named individual #1 and the City. This agreement is responsive to part 2 of the appellant's request. The City submitted reply representations in which it indicated that the agreement may fall within the scope of the *Act*, pursuant to section 52(4). The City indicated that in the event section 52(4) does apply to the agreement, it is not able to disclose it due to the application of section 14 (invasion of privacy).

Subsequently, during the course of conducting my inquiry I learned that the records the City had provided to this office at the start of the appeal process did not include a copy of this agreement. Accordingly, I requested the City to provide this office with a copy of the agreement, which it did.

The adequacy of the City's decision letter [section 22(1)(b)], the non-application of the *Act* [section 52(3)] and reasonableness of search (section 17) remain at issue in this appeal.

RECORDS:

The following five records are at issue:

1. Action Plan Report submitted by named individual #1 to "Chair and Members - Board of Control" regarding a personnel matter involving named individual #2, dated February 18, 2002 (10 pages)

2. Action Plan Report submitted by named individual #1 to "Chair and Members - Board of Control" regarding a personnel matter involving named individual #2, dated February 13, 2002 (2 pages)

3. Agenda and "confidential" internal City report pertaining to a personnel matter involving named individual #2 and an unnamed individual, dated October 16, 2000; Status Report issued by named individual #1 pertaining "human resource management challenges"; materials for proposed management training programs (60 pages)

4. City Council resolution and news release, dated May 14, 2002, regarding the resignation of named individual #1; City Council resolutions regarding the suspension of named individual #1 together with news release; miscellaneous communication and correspondence regarding City Council matters (21 pages)

5. Agreement and Release between named individual #1 and the City, dated May 16, 2002 (5 pages)

DISCUSSION:

ADEQUACY OF THE DECISION LETTER

The appellant takes the position that the City's decision letter does not meet the requirements of section 22(1)(b). However, neither the appellant nor the City addresses this issue in their representations. In my review of the decision letter I note that the City has raised the application of section 52(3) but it has not provided any information regarding its reliance upon one or more of the specific provisions under section 52(3).

Section 22(1)(b) of the *Act* reads:

> Notice of refusal to give access to a record or part under section 19 shall set out,
>
> where there is such a record,
>
> (i) the specific provision of this Act under which access is refused,
>
> (ii) the reason the provision applies to the record,
>
> (iii) the name and position of the person responsible for making the decision, and
>
> (iv) that the person who made the request may appeal to the Commissioner for a review of the decision.

In Order M-913, former Adjudicator Anita Fineberg stated:

> The appellant submits that the decision letter of the Police was inadequate in that it failed to provide any reasons for denying access to the requested information. He states that the decision merely refers to sections of the *Act* and that it is

> insufficient "... to allow our client to make informed decisions and meaningful representations in this appeal".
>
> The decision letter issued by the Police stated that access was being denied to the listing of police officers pursuant to sections 13, 14(1)(f) and 14(3)(d) of the *Act*. The letter went on to note that "... These sections apply because ..." followed by a paragraph setting out the language of these sections.
>
> In my view, the purpose of the inclusion of the above information in a notice of refusal is to put the requester in a position to make a reasonably informed decision on whether to seek a review of the head's decision (Orders 158, P-235 and P-324). In this case, I agree with the appellant that the decision letter of the Police should have provided him with reasons for the denial of access. A restatement of the language of the legislation is not sufficient to satisfy the requirement in section 29(1)(b)(ii) of the *Act*. It does not provide an explanation of why the exemptions claimed by the Police apply to the record. Section 29(1)(b)(i) already requires that the notice contain the provision of the *Act* under which access is refused.
>
> Notwithstanding the inadequacy of the decision letter, the appellant has exercised his right of appeal and provided extensive representations, which I have referred to in my disposition of all the issues relating to the information in this order. In these circumstances, there would be no useful purpose served in requiring the Police to provide a new decision letter to the appellant.

Former Adjudicator Fineberg's statements are applicable here. The City's decision makes only general reference to the application of section 52(3). It does not fully comply with the requirements in paragraphs (i) and (ii) of section 22(1)(b).

I agree with the appellant's position that the City's decision was inadequate, in light of section 22(1)(b) and the principles expressed in Order M-913. However, I also see no useful purpose in requiring the City to provide a new decision letter to the appellant to address this inadequacy, or in providing any other remedy [*Gravenhurst (Town) v. Ontario (Information and Privacy Commissioner)*, [1994] O.J. No. 2782 (Div. Ct.); *Brown v. Troia Investments Inc.* (1995), 22 O.R. (3d) 637 (Div. Ct.)]. The appellant has been given a full and fair opportunity to argue the issues in this appeal. I would urge the City to be mindful of its responsibilities under the *Act*, in this case to provide more detailed reasons for withholding information, in accordance with section 22(1)(b).

LABOUR RELATIONS AND EMPLOYMENT RECORDS

Introduction

As stated above, the City has taken the position that section 52(3) applies to the records. While it has not expressly cited the particular provision of section 52(3) that it feels applies, based on my review of its representations it would appear that it is relying upon section 52(3)1 and/or 3. If

section 52(3)1 or 3 applies to the records, and none of the exceptions found in section 52(4) applies, section 52(3)1 or 3 has the effect of excluding the records from the scope of the *Act*.

Sections 52(3)1 and 3 state:

> 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.
>
> 3. Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

In order for a record to fall within the scope of paragraph 1 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 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 institution.

In order for a record 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.

Section 52(4) states:

> 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.

Representations

The City's representations are very brief. The City states in its initial representations:

> The subject records were collected by the City and the collection of this information was utilized in regards to an employment related matter – tribunal hearing under the Municipal Act for [named individual #1]. The purpose of the hearing was to determine if the employee would remain employed with the City or not. The tribunal hearing was conducted on May 13, 2002 and as a result of this hearing, the employee resigned.

In response, the appellant submits:

> The appellant is prepared to concede that the documents fall within the meaning of section 52(3), and thus are exempted from the application of the [*Act*], unless section 52(4) applies. In this case section 52(4) is clearly applicable.

The appellant goes on to state that it feels paragraph 3 of section 52(4) is applicable and reiterates that it seeks the production of the agreement between the City and named individual #1. The appellant states that "[t]he agreement was the culmination of extended negotiations between [named individual #1] and the City. Thus, it is a record to which the *Act*, undoubtedly applies."

In reply, the City concedes that the agreement may be within the scope of the *Act*. However, the City indicates that the remaining records at issue are not agreements and, therefore, do not fall under section 52(4).

Analysis

I will first consider the application of paragraph 3 of section 52(3).

Requirements 1 and 2

Records 1 and 2 are two action plans prepared by named individual #1 in regard to a personnel matter involving named individual #2. A portion of record 3 contains an internal City report that also deals with this personnel mater. The balance of the information in record 3 contains a report prepared by named individual #1 pertaining to "human resource management challenges" and materials collected by the City for proposed management training programs. Record 4 contains resolutions passed by City Council and news releases prepared by the City in regard to the suspension and resignation of named individual #1. Record 4 also contains miscellaneous communication and correspondence collected by the City pertaining to matters before City Council. Record 5 comprises an Agreement and Release prepared and used by the City in regard to the resignation of named individual #1. I find that all of these records were collected, prepared, maintained or used by the City. Therefore, I find that requirement 1 for section 52(3)3 has been met.

With respect to requirement 2 under section 52(3)3, I am satisfied that all of the records were collected prepared and used in relation to meetings, consultations, discussions or communications.

Therefore, I find that requirement 2 has been satisfied for all of the records under section 52(3)3.

Requirement 3

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

Based on my review of the records and the surrounding circumstances, I am satisfied that the activities revealed in all of the records are "about labour relations or employment-related matters". Therefore, I conclude that requirement 3 for all of the records has been established under section 52(3)3.

Exception under section 52(4)

With respect to record 5, I concur with the appellant's interpretation that it falls into the exception under section 52(4)3. Record 5 is clearly "an agreement" between the City and named individual #1 "resulting from negotiations" about an employment-related matter between the City and this named individual. Pursuant to section 52(4) I find that the *Act* applies to record 5. Accordingly, I will order the City to issue a new decision letter in accordance with the provisions of the *Act*.

Conclusion

I find that section 52(3) applies to exclude records 1 to 4 from the scope of the *Act* and that the exception in section 52(4) applies to include record 5 within the scope of the *Act*.

REASONABLE SEARCH

Introduction

In appeals involving a claim that responsive records exist, as is the case in this appeal, the issue to be decided is whether the City has conducted a reasonable search for the records as required by section 17 of the *Act* (Orders P-85, P-221, PO-1954-I). If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the City's decision. If I am not satisfied, I may order further searches.

A number of previous orders have identified what the institution must demonstrate in order to meet its onus in a reasonable search appeal (see, for example, Orders M-282, P-458, P-535, M-909, PO-1744 and PO-1920). In Order PO-1744, acting-Adjudicator Mumtaz Jiwan stated:

> … the *Act* does not require the Ministry to prove with absolute certainty that records do not exist. The Ministry must, however, provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate responsive records. A reasonable search is one in which an experienced employee expends a reasonable effort to locate records which are reasonably related to the request (Order M-909).

I agree with acting-Adjudicator Jiwan's statements.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist.

In this case, the appellant claims that further records exist that are responsive to part 4 of the request.

Parties' representations

The City's representations are provided in letter form by its Freedom of Information Co-ordinator (the Co-ordinator). She states that when the appellant's request was received the City Clerk and Director of Human Resources were contacted to perform a search for responsive records. The Co-ordinator submits that it did not receive any information dealing with part 4 of the appellant's request. As a result, she contacted the City's Human Resources Department and it suggested that she contact the Facilities Department. The Co-ordinator states that the Facilities Department provided her with a file relating to some training received but that it did not relate to the request. The Co-ordinator also indicates that she contacted named individual #3 at UWO about this matter and he advised her that he had no information. The Co-ordinator indicates that the City staff that she contacted had not heard of the "Just Say No" component of any leadership training program.

The appellant did not submit representations on the reasonable search issue.

Analysis

In my view, the City has provided a sufficiently detailed and credible explanation of the efforts it took to locate records responsive to part 4 of the appellant's request. (I note that the City located invoices that were responsive to part 4 of the appellant's request. I am assuming that the City's position is that there are no records responsive to part 4, apart from the invoices.) On the other hand, the appellant has failed to provide any evidence of the existence of further responsive records. The appellant's bare assertions during the mediation stage that more records must exist do not constitute a reasonable basis for believing additional responsive records may exist or that the City failed to conduct a reasonable search for relevant records. In addition, even if I were to find the City's search deficient, any order that I might make in regard to this issue would, in all likelihood, be moot since any records responsive to part 4 would be caught by section 52(3). Accordingly, I find that the City has discharged its obligations under section 17 of the *Act*.

ORDER:

1. I uphold the City's decision under section 52(3) with regard to records 1, 2, 3 and 4.

2. I uphold the City's search for responsive records.

3. I order the City to issue a new decision letter in respect of record 5 in accordance with the *Act* and to provide me with a copy of it.

Original Signed By: December 19, 2003
Bernard Morrow
Adjudicator