



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-1711

Appeal MA-020403-2

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 access to all records relating to a report prepared by the City Auditor dated June 19, 2001 entitled "Selection and Hiring of Professional and Consulting Services". The City did not respond to the request within the 30-day period mandated by the *Act* and a "deemed refusal" appeal was initiated by the requester. The appeal was resolved by the issuance of a decision letter by the City.

In that decision, the City denied access to the requested records on the basis that they fall outside the scope of the *Act* due to the operation of sections 52(3)1 and/or 3 of the *Act*. The requester, now the appellant, appealed the City's decision to deny access to the records.

As mediation of the appeal was unsuccessful, it was moved to the adjudication stage of the process. I decided to seek the representations of the City, initially. The City provided me representations, the non-confidential portions of which were shared with the appellant, along with a copy of the Notice of Inquiry. The appellant also made representations, which were shared with the City, who then made additional representations by way of reply.

RECORDS:

The records consist of 877 pages of documentation relating to the "Selection and Hiring of Professional and Consulting Services Review" undertaken by the City Auditor for the Chief Administrative Officer.

DISCUSSION:

BACKGROUND TO THE CREATION OF THE RECORDS

The City provided me with additional background information to assist in understanding the context surrounding the creation of the records that are the subject of this request and the subsequent appeals. It indicates that in 2001, the City Auditor noted that a significant increase in expenditures for the provision of consulting services had taken place during the years following the amalgamation of the former municipalities into the new City of Toronto. As a result, the Auditor's work plan for 2001 included undertaking a review of "consulting expenses". The scope and objectives of this review were included in the work plan. As the review progressed, the City indicates that it became apparent that "there were serious implications and concerns related to specific staff members' handling of the hiring of consultants and the awarding of contracts that required the Auditor's further attention".

The records requested consist of a report to City Council's Administration Committee dated June 19, 2001, along with the supporting documentation relied upon in the creation of the Auditor's report. The records include not only the supporting information but also the reactions and responses from various departments within the City to the findings and recommendations of the Auditor. The City adds that:

Although the Auditor's report did not identify individual staff members by name, his recommendations were based on his investigation of specific

incidents/activities involving such employees and were made to ensure that staff mistakes and mismanagement would not reoccur.

...

During the time of the Auditor's review/investigation and his subsequent report, other events occurred giving rise to additional and related concerns regarding staff's handling of contracts, specifically the City's contract with MFP Financial Services for consultancy services and computer equipment.

The City takes the position that the report at issue and the supporting material may also be relevant to the two-stage inquiry currently underway under the direction of Madam Justice Denise Bellamy. The second stage of that inquiry is to examine the manner in which the City's staff handled contracts with two consultants, whose contracts are also referred to and examined in the record at issue in this appeal.

LABOUR RELATIONS AND EMPLOYMENT RECORDS

The City takes the position that the responsive records fall outside the scope of the *Act* as a result of the operation of sections 52(3)1 and 52(3)3. These sections 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.

General Principles

If section 52(3) applies to the record, and none of the exceptions found in section 52(4) applies, the record is excluded from the scope of the *Act*.

The term "in relation to" in section 52(3) means "for the purpose of, as a result of, or substantially connected to" [Order P-1223].

If section 52(3) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date [*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. 507].

Section 52(3)3: matters in which the institution has an interest

Introduction

For section 52(3)3 to apply, the City must establish that:

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

Representations of the City

The City submits that requirements 1 and 2 above have been satisfied because:

. . . the records were either ‘collected prepared maintained or used’ for the purpose of meetings, discussions, consultations or communications relating to or arising from the City Auditor’s audit/investigation of how specific employees handled the hiring of consultants and the awarding of contracts, more specifically it deals with possible staff misconduct, conflicts of interest or poor management including the failure to comply with City policies or to ensure that other staff were aware of and followed these policies.

With respect to requirement 3, the City submits that:

. . . these meetings, consultations, discussions or communications all relate to employment-related matters since they relate to the performances of certain employees, specifically with respect to the hiring of consultants. Recommendations were made not only for these employees but for all employees involved in such activities. In some cases, the senior employees involved in the hiring of consultants and or the procurement of computers and services were later dismissed or terminated.

The City further submits that it has an ‘interest’ in these employment-related matters that is not mere curiosity or concern. The City has an obligation to ensure that its employees are performing satisfactorily; that they not [be] involved in any misconduct, inappropriate behaviour or improprieties, be in a conflict of interest, etc.

The City relies on the decisions of the Commissioner's office in Orders M-1014, P-1543 and PO-1696 in which it was found that section 52(3) or its equivalent provision in the provincial *Act* applied to exclude "auditor's reports" from the scope of the *Act*. I note that while the audit undertaken in the present appeal related mainly to operational matters, the audits which formed the basis for the requests and appeals in the cases referred to by the City related more directly to the actions of individual employees.

Representations of the Appellant

The appellant argues that the City "misleadingly" characterizes the nature and purpose of the June 19, 2001 audit as an "audit/investigation" which is not a term found in its Audit Services Manual. Rather, the appellant submits that the audit's objectives "fit the definition in the Manual of another type of audit – the operational/value for money audit". He further submits that the objectives of the audit in question were not as stated in the City's representations but instead were to "review the use of consultants as reported to Council" to provide it with certain assurances and to determine whether the City "received significant benefit from the consulting expenditures".

For this reason, the appellant submits that the City has failed to demonstrate the application of sections 52(3)1 or 3 to the audit reports which are the subject of the records.

Reply representations of the City

In response to the submissions of the appellant, the City argues that:

. . . the City Auditor examined contracts for specific projects and his assessment of such contracts was not just limited to broad operational/value for money issues but also to specific matters involving certain staff with respect to these projects.

As previously stated, as his audit proceeded, it became clear to the Auditor that the whole matter of how certain staff were handling the hiring of consultants and the awarding of contracts required further 'investigation' on his part. His recommendations were based on his observations of particular incidents and were made to ensure that in future similar staff mistakes and mismanagement would not reoccur.

. . .

The City submits that therefore notwithstanding the original intent of the audit, the report touched upon specific employment-related issues involving City employees in which the City has an interest.

The City further submits that even if some of the records in the Auditor's files were not originally created or prepared in respect of employment-related matters, they were subsequently collected, maintained and/or used by the City in relation

to meetings, consultations etc. about such issues and further that all records are being maintained in anticipation of their relevance to Justice Bellamy's inquiry into possible malfeasance, breach of trust or other misconduct on the part of an officer or employee of the City.

Findings

Requirements 1 and 2 of section 52(3)3

I have reviewed the contents of the records at issue and find that they were collected, prepared, maintained and used by the City and that this collection, preparation, maintenance and usage of the records was in relation to meetings, consultations, discussions and communications within the City's administration on the subject matter of the Auditor's report. As a result, I find that the first two requirements of section 52(3)3 have been satisfied.

Requirement 3 of section 52(3)3

In order to meet the third requirement of section 52(3)3, the City must establish that the meetings, consultations, discussions and communications are about labour relations or employment-related matters in which it has an interest.

In Order P-1369, former Adjudicator John Higgins adopted the requirement articulated in Order P-1223 that the collection, preparation, maintenance or use of a record must have a "fairly substantial" connection to an activity listed in section 65(6) in order for it to be "about" that activity. In Order P-1369, the former Adjudicator described the record at issue as a review of the Liquor Control Board of Ontario (LCBO) whose purpose was to set "the policy and direction for the future management of the LCBO". As a "broadly-based organizational review which touches occasionally, and in an extremely general way, on staffing and salary issues", the review was found to have too remote a connection to labour relations negotiations for section 65(6) to apply. As section 65(6) did not apply, the review was subject to the *Act*.

In Order MO-1654-I, Assistant Commissioner Tom Mitchinson examined the treatment of records which are similar in nature to those under consideration in this appeal to determine whether they contain information which fits within the ambit of the term "employment-related matters" for the purposes of section 52(3)3. He found that:

This office has considered the application of section 52(3) to records such as organizational or operational reviews on a number of occasions. These cases have turned on the issue of whether the preparation, collection, maintenance or use of a records is "in relation to" a labour relations or employment-related matter.

In Order M-941, former Adjudicator Mumtaz Jiwan found that section 52(3)3 did not apply to a Town of Oakville report entitled "Department of Public Works Operational Review". She stated:

The Town submits that the report relates to the "short term and the long term planning for the Department... and focused on the staffing levels and staff functions" and therefore, was directly related to labour relations and employment related matters in which the Town has an interest.

I have carefully reviewed the record. While the report includes suggestions for the elimination of certain positions and the creation of others, in my view, it is primarily an organizational review of the department and contains summaries of management's areas of concerns, employees' concerns, department goals, and a summary of a survey conducted of the local residents on the efficiency of the service delivery mechanisms of the department. In my view, the report is more appropriately characterized as relating to the "efficiency and effectiveness of the operation" than to labour-relations or employment-related matters. I find, therefore, that the third requirement has not been met and section 52(3)3 does not apply.

Accordingly, I conclude that the report is subject to the *Act* and as a consequence, it falls under the jurisdiction of the Commissioner's office. Accordingly, I will proceed to consider whether any of the claimed exemptions apply.

Similarly, in Order P-1369, former Adjudicator John Higgins dealt with a report on the review of the Liquor Control Board of Ontario (LCBO) that had been conducted by the Ministry of Consumer and Commercial Relations. The Ministry had relied on the equivalent exclusionary provision to section 52(3) contained in the provincial *Freedom of Information and Protection of Privacy Act* (section 65(6)) as the basis for denying access. In rejecting the Ministry's position, he stated:

With regard to section 65(6)3, the Ministry submits that:

... the record in question was prepared by or on behalf of the Ministry in relation to meetings, consultations, discussions or communications about labour relations matters in which the Ministry has an interest. The document in question is in fact a consultation or discussion about labour relations

and employment-related matters involving the LCBO.

In order to qualify under either section 65(6)2 or 3, a record must have been collected, prepared, maintained or used by or on behalf of an institution "in relation to" the subjects referred to in those sections. In Order P-1223, ... Assistant Commissioner Tom Mitchinson indicated that the collection, preparation, maintenance or use of a record must have a "fairly substantial" connection with an activity listed in sections 65(6)1, 2 or 3 in order to meet this requirement. He went on to state:

In the context of section 65(6), I am of the view that if the preparation (or collection, maintenance, or use) of a record was for the purpose of, as a result of, or substantially connected to an activity listed in sections 65(6)1, 2, or 3, it would be "in relation to" that activity.

I agree with these views of the ... Assistant Commissioner and I adopt them for the purposes of this order.

I have reviewed the record in its entirety, including the portions indicated by the Ministry in its representations as supporting its section 65(6) arguments. In my view, the purpose of the record described in the first quote from the Ministry's submissions, above (i.e. "setting the policy and direction for the future management of the LCBO"), is an accurate characterization.

Although the record may have an impact on future labour relations negotiations, I have concluded that the relationship between its contents and any such negotiations is too remote to allow me to find that the collection, preparation, maintenance or use of the record was "in relation to" the negotiations. Therefore, I find that section 65(6)2 does not apply.

Similarly, in my view, the connection between the contents of the record and "meetings, consultations, discussions or communications about labour relations or employment-related matters" is too remote to allow me to find that the collection, preparation, maintenance or use of the record was "in relation to" such meetings, consultations, discussions or communications. In addition, I am not persuaded that the record itself represents a consultation or discussion "about" labour relations or employment-related matters; rather, it is a broadly-based organizational review

which touches occasionally, and in an extremely general way, on staffing and salary issues. For these reasons, I find that section 65(6)3 does not apply.

Therefore, my conclusion is that this record is subject to the *Act* and as a consequence, it falls under the jurisdiction of the Commissioner's office. Accordingly, I will proceed to consider whether any of the claimed exemptions applies.

...

Having reviewed the terms of reference for the consultant's assignment, as described in the City's representations, I find that records produced in this context were not created or prepared for "the purpose of" or "as a result of" an employment-related matter. The consultant was hired to conduct a review of the newly-established EMS organization that was put in place at the time of the amalgamation of various municipalities into the new City of Hamilton. The mandate, as described by the City, was to "review the EMS organizational structure and develop recommendations for an effective and efficient EMS operation", not to investigate the performance of a particular employee. In this regard, it closely resembles the situation in Order M-941. The fact that a review of this nature involves organizational issues and job design is not, in my view, sufficient to alter the purpose of the review and the nature of the records produced in that context.

The question of whether any of the records stemming from the consultant's review are "substantially connected to" an employment-related matter turns on the question of how the records were maintained or used by the City outside the primary purpose of assessing the effective and efficient operation of the EMS. In my view, if the City were able to establish that records were maintained or used in relation to a labour relations or employment-related matter, that would satisfy the "substantially connected to" component of the test, regardless of whether they were created or prepared by the consultant for this purpose.

I adopt the reasoning in the orders cited above for the purpose of the present appeal. The objectives of the Auditor's review and the "fallout" from it, which is reflected in the records created following its release, focus primarily on the systemic issues surrounding the City's use of outside consultants rather than on employment-related matters. While many of the records touch peripherally on matters relating to the interrelationship between the consultants and City staff, I find that the records are not "about" employment-related matters as that term has been interpreted in the orders referred to above.

As the City notes in its representations, the Auditor's report "did not identify individual staff members by name". In my view, the report, the accompanying documentation relied upon by the Auditor, as well as the records reflecting the reaction of City staff address certain systemic

deficiencies in the manner in which the City retained the services of outside consultants. The review and the comments which followed were designed to shed light on problems identified by the Auditor with the policies and procedures surrounding the retention of consultants, rather than the performance of any individuals within the City's own staff. I find that the circumstances surrounding the creation and later use of the records by the City are substantially similar to those existing in the reviews that were the subject of Orders M-941 and P-1369 and MO-1654.

Accordingly, I find that the records relating to the Auditor's report, including those relied upon by the Auditor and those prepared following the release of his report, are not subject to the exclusionary provision in section 52(3)3.

Another issue addressed in the Auditor's report was the propriety of the City retaining the services of former City staff members in an arms-length consulting capacity after the termination of their employment. Included in the records identified as responsive by the City are documents outlining the terms negotiated as a severance package for one such employee. These documents, listed as Records 764 to 776, clearly address an "employment-related matter" in which the City has an interest. In my view, these records fall within the ambit of the exclusionary provision in section 52(3)3. However, I also find that the exception to section 52(3)3 contained in section 52(4)3 applies to several of these records. The exception in section 52(4)3 reads:

This Act applies to the following records:

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.

In Orders MO-1622 and MO-1676 I found that termination agreements entered into between municipal institutions and an employee constituted "an agreement between an institution and one or more of its employees resulting from negotiations about employment-related matters" and that the exception in section 52(4)3 to the exclusionary provision in section 52(3)3 applied to these records. Applying the same reasoning to Records 764 to 767, I find that the exception in section 52(4)3 also operates to bring these records within the ambit of the operation of the *Act*. Records 768 to 776 are not, however, subject to the exception in section 52(4)3 and remain outside the scope of the *Act*.

Section 52(3)1: proceedings or anticipated proceedings

Introduction

In order for a record to fall within the scope of section 52(3)1, the City must establish 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.

Representations of the City

The City relies on its submissions under section 52(3)3 with respect to the first component of the test under section 52(3)1. With regard to the second and third requirements, the City submits that:

. . . this maintenance and usage of the records is in relation to anticipated proceedings before a court, tribunal or other entity and that these proceedings related to the employment of persons by the City.

It is the City's view that the hearings before Justice Bellamy are proceedings before another entity, i.e., a commission under the *Public Inquiries Act* with all the powers of such a commission. Justice Bellamy is empowered to request whatever she feels is relevant to the inquiry and to inquire into any matters related to a supposed malfeasance, breach of trust or other misconduct on the part of an officer or employee of the City. Her report will, no doubt, include recommendations which will have primary implications for City staff.

Pursuant to section 5(2) of the *Public Inquiries Act*, it is common for commission counsel to issue notices in order to alert individuals that the Commissioner may criticize an individual or make a finding of misconduct against an individual in its report. The City believes that a number of current and former employees, including some identified in the Auditor's files, have received these notices and will be called as witnesses. As the Inquiry proceeds, other employees may be called as witnesses.

The City also indicates that the records may be relevant to other proceedings involving actions for unfair dismissal brought by former City employees. It argues that it is maintaining and will be using the records at issue for anticipated proceedings in its defence of any such action and that these proceedings relate to the employment of an individual.

Findings under section 52(3)1

I agree that the records at issue were collected, prepared, maintained and used by the City, thereby satisfying the first requirement of section 52(3)1.

Based on my review of the representations of the City, the contents of the records and the mandate of the inquiries currently underway before Madam Justice Bellamy, I find that the maintenance and usage of the records is in relation to a proceeding before an "other entity", in

this case the Bellamy inquiry under the *Public Inquiries Act*. I accept that much of the information contained in the records relied upon by the City Auditor in the preparation of his report and the comments provided after its release by various City departments may be included in the material to be examined as part of that public inquiry. Accordingly, I find that the second part of the test under section 52(3)1 has also been met.

I cannot accept the City's contention that the proceedings for which the vast majority of the records are to be used relate to "labour relations or to the employment of a person" by the City. I find that the proceedings before Madam Justice Bellamy do not relate to labour relations or to the employment of a person by the City. While her inquiry may examine matters relating to the activities of certain City employees, in my view the issues under consideration in both phases of the Bellamy inquiry relate primarily to an examination of systemic problems within the City's administration and not specifically to issues pertaining to "labour relations or the employment of a person".

As a result, I find that the City has failed to establish the third part of the test under section 52(3)1 and this section has no application to the records under consideration in this appeal.

As I have concluded that the exclusionary provisions in sections 52(3)1 and 3 do not apply to the other majority of the records at issue, I will order the City to provide the appellant with a decision letter respecting access to them in accordance with sections 19 and 22 of the *Act*.

ORDER:

1. I order the City to provide the appellant with a decision letter respecting access to the records at issue, with the exception of Records 768-776, in accordance with sections 19 and 22 of the *Act* using the date of this order as the date the request was received.
2. I uphold the City's decision to deny access to Records 768-776 on the basis that they fall outside the scope of the *Act* due to the operation of section 52(3)3.

Original signed by: _____
Donald Hale
Adjudicator

November 18, 2003