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

ORDER MO-1710

Appeal MA-030109-1

City of Toronto

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NATURE OF THE APPEAL:

Under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), an individual asked the City of Toronto (the City) for records relating to his oral examination (interview) for the position of Case Worker with the City's Social Services Division.

The City provided the individual with his total score but refused to give him the examination questions and notes and the individual question scores. The City denied access to this information on the basis that it fell outside the scope of the *Act* by virtue of sections 52(3)1 and 3 of the *Act*.

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

As the appellant refused to engage in mediation, the matter was moved directly to adjudication.

I sought and received representations from the City, which I shared in their entirety with the appellant. The appellant then submitted representations in response.

I have carefully considered all of the representations before me.

RECORD:

The record contains the written notes of the two interviewers who comprised the panel. Each set of notes is 16 pages long and contains an introduction, a series of examination questions with handwritten notes, and a summary of scores per examination question.

CONCLUSION:

I find that section 52(3)3 of the *Act* excludes all of these records from the scope of the *Act*.

DISCUSSION:

APPLICATION OF THE *ACT*

Introduction

Section 52(3) is record-specific and fact-specific. If section 52(3) applies to the record, and none of the exceptions found in section 52(4) applies, then the record falls outside the scope of the *Act*.

The City asserts that sections 52(3)1 and 52(3)3 apply to the record such that it is excluded from the scope of the *Act*. If I find that one of these sections applies to exclude the record, I need not consider the other. I begin with an analysis of the application of section 52(3)3.

Section 52(3)3

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

> Subject to subsection (4), this *Act* does not apply to records collected, 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 these three requirements:

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.

Representations

The City submits that the records at issue were prepared, created, compiled and/or maintained for its use during the course of a job competition.

The City further submits that the meetings, consultations, discussions or communications all related to employment-related matters since they relate to the job competition process, specifically the oral interview to select candidates for further consideration.

The City also submits that its "interest" in these employment-related matters is significant.

> …Although a legal interest is not a requirement, the City submits that the job competition involves certain legal obligations that an employer must meet under the Ontario Human Rights Code, for example, a duty not to discriminate in selecting an employee in a job competition. Accordingly, as a result if its statutory (and common law) rights and obligations as an employer, the City has a legal interest in the job competition that is the "subject" of the records in this appeal.

The appellant's representations about section 52(3)3 are more general and brief:

> Although previous orders of the Commissioner have declared job competitions as employment-related matters, a science-based viewpoint in this matter offers a different perspective. E.g., professor Monica Belcour in her "Human Resources", ed. 1997 and on, established that the recruitment and selection process is unequivocally a pre-employment phase in the human resources protocol, and merely procedurally, not *de facto*, related to employment of persons. Consequently, the terms "employment" and "employment-related" denote a reality *a posteriori*, not *a priori*. This viewpoint in the matter is uniformly shared among the academic research body.

Analysis

Requirements One and Two

Orders of this office have established that records, such as tests and test results, meet the first two requirements of section 52(3)3 where those records document the recruitment or job competition process. In my view, the reason is clear: where there is an application for employment, an institution *collects, prepares or uses* these kinds of records *in relation to meetings, discussions or communications* about that application. (Orders MO-1236 and MO-1632).

Similarly, the record the appellant seeks in this appeal is the actual test administered to him during the course of his oral interview for the job of Case Worker. The City collected, prepared or used this record in relation to meetings or discussions about his application for employment.

Requirement Three

The first part of Requirement 3 of section 52(3)3 refers to *employment-related matters*.

Previous orders of this office have held that job competitions or recruitment processes are indeed employment-related matters (see Orders M-1127, MO-1193, MO-1236 and MO-1632). The appellant disagrees arguing, "the recruitment and selection process is unequivocally a pre-employment phase". While it is true that a job interview generally occurs *before* employment, it does not follow from there that a job interview is not *employment-related*. I find as did Adjudicator Liang in Order MO-1632:

> The requirement that the matter be employment-related does not depend on the existence of an employment relationship between a candidate for employment and the institution at the time the records are created. The purpose of a job competition or recruitment process is to select candidates for employment, and this is sufficient to characterize the meetings, discussions or communications in those processes as "employment-related."

Whether the City "has an interest" in this employment-related matter is the final component of the test. In *Ontario (Solicitor General) v. Ontario (Information and Privacy Commissioner)*

(2001), 55 O.R. (3d) 355 (C.A.), leave to appeal [2001] S.C.C.A. No. 509, the Ontario Court of Appeal found as follows in applying section 65(2)3 of the provincial *Act* (the equivalent of section 52(3)3):

> As already noted, section 65 of the *Act* contains a miscellaneous list of records to which the *Act* does not apply. Subsection 6 deals exclusively with labour relations and employment related matters. Subsection 7 provides certain exceptions to the exclusions set out in subsection 6. Examined in the general context of subsection 6, the words "in which the institution has an interest" appear on their face to relate simply to matters involving the institution's own workforce. Sub clause 1 deals with records relating to "proceedings or anticipated proceedings relating to labour relations or to the employment of a person **by the institution**" [emphasis added]. Sub clause 2 deals with records relating to "negotiations or anticipated negotiations relating to labour relations or to the employment of a person **by the institution**" [emphasis added]. Sub clause 3 deals with records relating to a miscellaneous category of events "about labour-relations or employment related matters in which the institution has an interest". Having regard to the purpose for which the section was enacted, and the wording of the subsection as a whole, the words "in which the institution has an interest" in sub clause 3 operate simply to restrict the categories of excluded records to those records relating to the institutions' own workforce where the focus has shifted from "employment of a person" to "employment-related matters". To import the word "legal" into the sub clause when it does not appear, introduces a concept there is no indication the legislature intended.

Applying the above, and having regard to the representations of the City on this issue, I find that the City has the requisite degree of interest in the subject matter of the record at issue given that the record pertains to the City's interests as an employer in the selection of its own workforce.

I find, therefore, that the City has established all three requirements of the test under section 52(3)3. I also find that none of the exceptions in section 52(3)4 are present in the circumstances. Accordingly, I conclude that section 52(3)3 applies to the record at issue in this appeal and it is excluded from the scope of the *Act*.

ORDER:

I uphold the City's decision that the *Act* does not apply to the record.

Original Signed By: November 18, 2003
Rosemary Muzzi
Adjudicator