



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

ORDER MO-1910

Appeal MA-030425-1

The Corporation of the City of London



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NATURE OF THE APPEAL:

The City of London (the City) received a request from a member of the media seeking access under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to records relating to certain reports prepared following an internal investigation into a specific incident involving a sexual assault between City employees. The requester also sought access to “all records made during the investigation” of the case, the responses from City managers and any records relating to the discipline of staff following the conclusion of the investigation.

The City identified some 480 responsive records and issued a decision denying access to them on the basis that they are excluded from the operation of the *Act* by virtue of section 52(3)3 of the *Act*.

The requester, now the appellant, appealed the City’s decision. During the mediation stage of the appeal, the City advised the appellant that it had located an additional record, relating to a specific portion of the request. The City denied access to this record under the discretionary exemption in section 6(1)(b) of the *Act* (closed meetings). This record is a letter dated April 17, 2003 from the City’s Acting Secretary of the Board of Control to the City Manager.

Mediation was not successful in resolving the remaining issues and the appeal was moved to the adjudication stage of the process. This office initially sought and received representations from the City, the non-confidential portions of which were shared with the appellant, along with a Notice of Inquiry. The appellant also provided this office with his representations.

RECORDS

There are approximately 480 records at issue in this appeal, based on an index the City provided to this office, but not to the appellant. I have carefully reviewed each of the 480 records identified as being at issue in order to assist me in making a determination as to whether they fall within the ambit of the exclusionary provision in section 52(3)3 or the exemption in section 6(1)(b).

DISCUSSION:

CLOSED MEETINGS

The City submits that a letter dated April 17, 2003 addressed to the City Manager from the Acting Secretary of the Board of Control is exempt from disclosure under the discretionary exemption in section 6(1)(b), which reads:

A head may refuse to disclose a record,

that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public.

For this exemption to apply, the City must establish that

1. a council, board, commission or other body, or a committee of one of them, held a meeting
2. a statute authorizes the holding of the meeting in the absence of the public, and
3. disclosure of the record would reveal the actual substance of the deliberations of the meeting

[Orders M-64, M-102, MO-1248]

Parts 1 and 2 of the test

The City submits that its Board of Control held a regularly-scheduled meeting on April 16, 2003 and that a portion of that meeting was held “in camera”, in the absence of the public, pursuant to section 239(2) of the *Municipal Act, 2001*. The City relies on this section, that permits a meeting or part of a meeting to be closed to the public if the subject matter being considered is:

1. the security of the property of the municipality; or
2. personal matters about an identifiable individual, including municipal employees.

I am satisfied that a meeting of the Board of Control took place on April 16, 2003 and that a portion of that meeting was held in the absence of the public. I also find that section 239(2) of the *Municipal Act, 2001* authorizes the holding of the meeting, or part of the meeting, in camera. Accordingly, parts 1 and 2 of the test under section 6(1)(b) have been met.

Part 3 of the test

Under part 3 of the test:

- “deliberations” refer to discussions conducted with a view towards making a decision [Order M-184]
- “substance” generally means more than just the subject of the meeting [Orders M-703, MO-1344]

Section 6(1)(b) is not intended to protect records merely because they refer to matters discussed at a closed meeting. For example, it has been found not to apply to the names of individuals attending meetings, and the dates, times and locations of meetings [Order MO-1344].

With respect to part 3 of the test under section 6(1)(b), the City submits that:

The disclosure of the record would reveal the actual substance of the deliberations of the meeting as the record contains information revealing the nature of the issue discussed and sets out the action in the form of a resolution that the Board of Control agreed to take as a result of its deliberations. The record clearly reveals that discussions took place at the Board of Control meeting which were ‘conducted with a view towards’, and actually resulted in, the making of a decision [Orders M-184, MO-1344, MO-1248].

The appellant argues that the City “failed to meet the burden of overcoming the presumption of open meetings” set forth in section 239(1) of the *Municipal Act, 2001* in its representations because it has failed to describe which of the listed exceptions from section 239(2) it is relying on.

The appellant also submits that the agenda for the April 16, 2003 Board of Control meeting indicates only that the meeting will go “in camera” for the discussion of a “personnel matter” rather than providing what the appellant describes as the requisite degree of specificity. For these reasons, the appellant argues that the Board of Control was not authorized to “go behind closed doors” for this portion of their meeting on April 16, 2003. The appellant notes that following an admonition from Justice D.R. McDermid in *RSJ Holdings Ltd. v London* [2004] O.J. No. 2700 Court File No. 33277, the City now provides a greater degree of specificity in its Board of Control agendas.

In my view, the disclosure of the contents of the April 17, 2003 letter would reveal the substance of the deliberations of the in camera portion of the Board of Control’s meeting of April 16, 2003. The record describes the Board’s discussion of an issue involving not only a personnel matter but also an issue surrounding the security of City property. I cannot agree with the position of the appellant that the City ought not to be entitled to rely on section 6(1)(b) because it has not described the nature of the matter in its representations to this office or in the Board of Control’s April 16, 2003 Agenda to his satisfaction. While the Board’s more recent practice of describing the item under discussion with a greater degree of specificity is to be applauded, I cannot agree that it ought to be denied the ability to rely on the section 6(1)(b) exemption in the circumstances.

Because I have found that all three parts of the test under section 6(1)(b) have been satisfied, I find that the April 17, 2003 letter is exempt from disclosure under this exemption. I have not been provided with any evidence to indicate that the mandatory exception in section 6(2)(b) applies to this document. The City has also provided me with submissions respecting the manner in which it exercised its discretion to deny access to this record. Based upon those representations, I find no reason to review the exercise of discretion by the City in this case.

The appellant refers to the possible application of the “public interest override” provision in section 16 of the *Act*. I note, however, that section 16 does not apply to override the application

of the exemption in section 6(1)(b). I am unable, therefore, to consider its application in the circumstances of this appeal.

LABOUR RELATIONS AND EMPLOYMENT RECORDS

General principles

The City claims that because of the operation of the exclusionary provision in section 52(3)3, the remaining 480 records at issue fall outside the ambit of the *Act*. Section 52(3)3 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.

If section 52(3) applies to the records, and none of the exceptions found in section 52(4) applies, the records are 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].

The term “labour relations” refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships [Order PO-2157, *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.)]. The term “employment of a person” refers to the relationship between an employer and an employee. The term “employment-related matters” refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship [Order PO-2157].

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

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

The phrase “labour relations or employment-related matters” in section 52(3)3 has been found to apply in the context of:

- a job competition [Orders M-830, PO-2123]
- an employee’s dismissal [Order MO-1654-I]
- a grievance under a collective agreement [Orders M-832, PO-1769]
- disciplinary proceedings under the *Police Services Act* [Order MO-1433-F]
- a “voluntary exit program” [Order M-1074]
- a review of “workload and working relationships” [Order PO-2057]
- the work of an advisory committee regarding the relationship between the government and physicians represented under the *Health Care Accessibility Act* [*Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.)]

The phrase “labour relations or employment-related matters” has been found *not* to apply in the context of:

- an organizational or operational review [Orders M-941, P-1369]
- litigation in which the institution may be found vicariously liable for the actions of its employee [Orders PO-1722, PO-1905]

The phrase “in which the institution has an interest” means more than a “mere curiosity or concern”, and refers to matters involving the institution’s own workforce [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*].

Representations of the parties

The City submits that the records at issue in this appeal relate to an aggravated sexual assault that took place in 1999 involving two City employees. Immediately following the incident, the City began preparing, collecting, maintaining and using the records which comprise those at issue in the appeal. One of the individuals was tried and convicted of the crime. The City terminated the employment of this individual following a leave of absence. Records pertaining to these actions by the City and, later, its efforts to ameliorate the effect of the assault on the victim and re-integrate her into its work force were also prepared, collected, maintained and used by the City.

Because all of this activity on the City’s part included the involvement of managers from a number of different City Departments, there is much duplication in the records identified. In

addition, since the records document the City's response to this situation over a long period of time the records are voluminous in nature.

The City further submits that various litigation arising out these events has been commenced including:

- a grievance filed by the fired employee alleging that he was improperly terminated;
- an application brought by the terminated employee to the Ontario Labour Relations Board alleging a breach by his Union of its duty of fair representation under section 74 of the *Labour Relations Act, 1995*. The City was named as an Intervenor in this proceeding;
- a complaint by the victim pursuant to the *Ontario Human Rights Code*; and
- an application by the victim for compensation from the Criminal Injuries Compensation Board

The City indicates that in the fall of 2002, its City Manager initiated a review of the Corporation's Human Rights Program, including labour relations and employment-related issues arising out of these events. An external lawyer was retained by the City and he provided a report to the City Manager on June 25, 2003 relating to these matters.

The City takes the position that the records identified as responsive to the request relate directly to labour relations or employment-related matters. They submit that the subject matter of the records is directly connected to the management of its workforce and its relationship with its employees. The City also submits that its interest in the subject matter of the records extends far beyond a mere "curiosity" and refers to matters involving a former City employee and its potential liability for the actions of that individual.

The appellant argues that the events which gave rise to the creation of the records, the sexual assault of one City employee by another, "did not occur at work" and is not, accordingly, an employment-related matter for the purposes of section 52(3)3.

The appellant also indicates that he has received information that the reports prepared by the former City Manager and an outside legal advisor focus not on the individual employment-related matter referred to above but rather on "the lack of process or protocol . . . for managers to follow when investigating complaints". As a result, he argues that section 52(3)3 can have no application to information of this sort as it is not "related to labour relations or employment". Specifically, the appellant relies on the reasoning of Adjudicator Mumtaz Jiwan in Order M-941 in which she concluded that records relating to an organizational review by an institution were not excluded from the *Act* due to the operation of section 52(3)3.

Alternatively, the appellant argues that at least some portions of the records fall outside the scope of section 52(3)3 and ought to be disclosed. He takes issue with the City's refusal to provide him with an Index of the records and argues that the representations of the City lack the required degree of specificity. Finally, the appellant suggests that the exception in section 52(4)1 respecting agreements between a trade union and an institution applies to at least some of the records at issue.

Findings

As indicated above, I carefully reviewed each of the records identified by the City as responsive to the request. Immediately following the events that gave rise to charges being laid against the former City employee in 1999, the City became involved in the management of the labour relations issues surrounding the employment consequences for the employee and his victim. Decisions were made and records were created outlining the steps the City intended to take in its management of these events. These actions, and the creation of records documenting them, continued for several years as the circumstances surrounding these events unfolded. The City undertook at least three separate reviews of the manner in which it responded to the challenges it faced as a result of these events. Each of these reviews resulted in the creation of a large number of records that found their way into the record-holdings of a number of individuals employed by or working on behalf of the City.

In my view, the records which are responsive to the request were collected, prepared, maintained and used by or on behalf of the City in relation to a large number of meetings, consultations, discussions or communications both within the City's management and beyond. As a result, I find that parts 1 and 2 of the three-part test under section 52(3)3 has been satisfied.

I find that the records deal exclusively with the fall-out that resulted from the incident involving two of its employees. The records document the City's response to the changing events over several years including its handling of the accused employee, the position taken by the Union representing both employees and, in even greater detail, the City's position respecting the treatment of the victim of the crime. In my view, these qualify as employment-related matters and, because they address the treatment of members of the City's own workforce, the City has the requisite degree of interest in them.

Those records that address the City's position with respect to the actions taken by or against the Union representing the two employees are "about" labour relations within the meaning of section 52(3)3 as they refer to the collective relationship between the City and its unionized employees. I find a portion of the records, particularly those that document the City's involvement in various proceedings before the Ontario Labour Relations Board, fall within the definition of "labour relations" for the purposes of section 52(3)3. Again, because of the nature of the City's involvement in these proceedings, I find that it has the requisite degree of interest in these matters.

I further find that none of the records fall within the ambit of the exceptions to section 52(3) that are listed in section 52(4). In particular, contrary to the suggestion of the appellant, I find that none of the records represents “an agreement between an institution and a trade union” as contemplated by section 52(4)1.

As all three parts of the test under section 52(3)3 have been satisfied by the City, I find that the records identified as responsive to the request by the City fall outside the ambit of the *Act* and I uphold the City’s decision to deny access to them.

ORDER:

I uphold the City’s decision to deny access to the records.

Original Signed by: _____
Donald Hale
Adjudicator

_____ March 16, 2005