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

ORDER MO-2024-I

Appeal MA-050186-1

City of Toronto

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NATURE OF THE APPEAL:

The requester filed a freedom-of-information (FOI) request with the City of Toronto under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), asking a series of questions relating to payments made by the City to a named law firm. In response, the City sent the requester a decision letter that provided answers to the requester's questions.

One of the questions posed by the requester was: "What was the total amount paid [to a named law firm] with respect to [a former named City employee] from May 26, 2003 to Dec. 31, 2004? The former employee had commenced an action against the City. In its response to this question, the City cited the labour relations/employment records exclusion in the *Act* and stated, "Following a review of the requested records, it has been determined that sections 52(3)1 and 52(3)3 apply to the records in their entirety. Access is therefore denied in full to the records that are responsive to this question."

The requester (now the appellant) appealed the City's decision to this office. During the mediation process, the IPC's mediator clarified that the only issue for appeal was whether or not the record that set out the amounts paid to the law firm was excluded from the *Act* under those sections. No further mediation was possible and the file was transferred to the adjudication stage.

I sent a Notice of Inquiry to the City, initially, setting out the issues and seeking their representations. The City responded with representations. A Notice of Inquiry was then sent to the appellant along with a severed copy of the representations of the City. The appellant responded with representations.

DISCUSSION:

RECORDS:

The request is for the "total amount paid" to a law firm "with respect to" the former employee during a particular period. However, the record at issue has been identified as a two-page document containing payments made regarding the City's former employee on a series of dates, including a total amount. I note that while the total figure here includes a billing outside the specified period, the requester asked for a total amount of fees and accordingly, in my view, only the total figure is responsive. I will therefore treat the record at issue as comprising only the total dollar figure.

LABOUR RELATIONS AND EMPLOYMENT RECORDS

General Principles

Section 52(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:

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.

2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.

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

If section 52(3)1, 2 or 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].

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].

The City relies on the application of sections 52(3)1 and 52(3)3 of the *Act* to deny access to the records.

Section 52(3)1: proceedings or anticipated proceedings

For section 52(3)1 to apply, the institution must establish that:

1. the record was collected, prepared, maintained or used by an institution or on its behalf;

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.

I am satisfied that the record was prepared and maintained by the City, meeting requirement 1. I am also satisfied that the Court action instituted against the City by its former employee are "proceedings", and that they relate to the employment of a person by the City, meeting requirement 3.

However, all three requirements must be met for section 52(3)1 to apply. Turning to requirement 2, the City submits only that "the records … are currently being maintained with other relevant records with respect to the ongoing legal proceedings involving the termination of the employment of the former [employee]". The matter has not yet been settled. The City submits that this … maintenance is in relation to proceedings or anticipated proceedings...."

The appellant submits:

> I did not ask for access to employment files. It is bizarre for the City to claim that access legislation does not apply to accounts of taxpayer's dollars paid to [the named law firm]. Payments to lawyers are accounting records first and foremost.…
>
> It is a disgrace to accountable government for the City to have frustrated the public's right to know for almost a year by claiming that legal fees are employment records.…

The question I must decide under requirement 2 is whether the connection between the record and the proceedings is strong enough to mean that the preparation or maintenance of the record was "in relation to" to the proceedings, which clearly hinges on the meaning of "in relation to".

The consequence of a finding that section 52(3)1 applies is a serious one – the total exclusion of the record from the scope of the access and privacy provisions of the *Act*. In this case, as the appellant points out, the record relates to the expenditure of public funds to defend a legal action. This type of information has a strong connection to government accountability, which the Supreme Court of Canada refers to as an "overarching" purpose of access legislation (see *Dagg v. Canada (Minister of Finance)* (1997), 148 D.L.R. (4th) 385 (S.C.C.)). In my view, this purpose, which relates to the right of public access to government-held records identified in sections 1 and 4 of the *Act*, must be kept in mind in assessing the proper meaning of "in relation to" in this case.

Another relevant factor to consider in assessing the meaning of "in relation to" is the stated intent and goal of the *Labour Relations and Employment Statute Law Amendment Act*, which added section 52(3) to the *Act*. The long title of this Bill identified this goal as to "restore balance and stability to labour relations and to promote economic prosperity".

As noted above, the term "in relation to" in section 52(3) has previously been defined as "for the purpose of, as a result of, or substantially connected to" [Order P-1223]. In my view, meeting this definition requires more than a superficial connection between the creation, preparation, maintenance and/or use of the records and the labour relations or employment-related proceedings or anticipated proceedings. For example, the preparation of the record would have to be more than an incidental result of the proceedings, and would have to have some substantive connection to the actual conduct of the proceedings in order to meet the requirement that preparation (or, for that matter, collection, maintenance and/or use) be "in relation to" proceedings. This interpretation would also apply under sections 52(3)2 and 3, which require that the collection, preparation, maintenance and/or use of the records be "in relation to" either negotiations or anticipated negotiations, or to meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

In this case, I acknowledge that, but for the proceedings, this record would never have been created. However, in my view, the City's record of payments to a law firm, and particularly the total amount paid, is too remote to qualify as being "in relation" to proceedings for which the law firm was retained by the City. This record, which the City states was prepared by its Clerk, appears to be extracts from the City's accounting records, which were created and maintained for accounting reasons that have nothing to do with the proceedings. Based on my examination of the record, there is no obvious relationship between it and the actual conduct of the proceedings, nor is any such relationship explained by the City in its representations.

I therefore find that requirement 2 is not met, and section 52(3)1 does not apply.

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

For section 52(3)3 to apply, the institution 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 City states that it:

> …prepared, collected and maintained the records at issue together with other relevant documents during the course of dealing with the legal action initiated by [a former employee] against the City with respect to the termination of her employment.
>
> The City also submits that the collection, preparation, maintenance and usage of the records was in relations to meetings, consultations, discussions or communications about the employee, more specifically about her legal proceedings against the City, the services being provided by its legal advisors in advising and representing the City, as well as the actual costs of these services.
>
> …
>
> Clearly the termination of employment of the former [employee] and her subsequent legal proceedings against the City are employment-related matters in which the City has an interest.

The appellant submits that payments to lawyers are "… not records collected for a meeting about employment". He also disputes the City's claim that "legal fees are employment records in which they have an interest".

As with section 52(3)1, I am satisfied that the record was prepared by the City, meeting requirement 1. I also accept that the City consulted its lawyers about the action by the former employee, a matter in which the City "has an interest", meeting requirement 3.

Turning to requirement 2, the issue here, as it was under section 52(3)1, is whether the preparation or maintenance of the record was "in relation to" the consultations with the City's lawyers about the action. For substantially the reasons outlined above under section 52(3)1, I find that this requirement is not satisfied. In my view, the City's record of payments to a law firm, and particularly the total amount paid, is too remote to qualify as being "in relation to" actual consultations with that law firm. As noted above, the record appears to be extracts from the City's accounting records, which were created and maintained for accounting reasons that have nothing to do with the actual substance of any meetings, consultations, discussions or communications with legal advisers. Based on my examination of the record, there is no obvious relationship between it and the actual substance of the meetings, consultations, etc., nor is any such relationship explained by the City in its representations.

I therefore find that requirement 2 is not met, and section 52(3)3 does not apply.

Conclusions re sections 52(3)1 and 3

To conclude, I find that sections 52(3)1 and 3 do not apply in this case. The records are therefore subject to the *Act*.

OTHER ISSUES

Order MO-1947

The appellant's representations refer to Order MO-1947 and suggest that this case is similar. Order MO-1947 required the City to reveal information about lawsuits between the City and third parties during a specified time frame, and in particular, the number of lawsuits, dates settled, and dollar amounts. The issue in MO-1947 was whether the exemptions in sections 11(c) and (d) (economic interest) applied. The Commissioner found that the City had not provided detailed and convincing evidence to show that disclosure could reasonably be expected to prejudice the economic interests of the City or be injurious to its financial interests. She ordered the information disclosed.

This situation here is different. In this interim order, I am not dealing with an exemption claim under the *Act*, but with the quite different and preliminary question of whether the *Act* applies at all.

Further Process for this Appeal

In his representations, the appellant expresses frustration about the time required to resolve this appeal. In that regard, although I have ruled that sections 52(3)1 and 3 do not apply, and the records are subject to the *Act*, that is not a final determination of the access issue. I understand that this is frustrating for the appellant, but the rights of all parties, including the appellant, the City and others, must be respected.

To expedite matters, the Notice of Inquiry asked the City to indicate which exemptions in the *Act* (if any) it would rely on to deny access in the event that I rejected its section 52(3) claim and found that the record is subject to the *Act*. The City replied that it relies on the discretionary exemption at section 12 (solicitor-client privilege). The City also submits that this is not a new discretionary exemption claim that would invoke section 11.01 of the IPC's *Code of Procedure* (which provides that new discretionary exemptions should generally be claimed within 35 days after an appeal is filed). The appellant did not comment on this issue. I agree with the City that an access decision, made on the basis that the *Act* applies, is a new access decision, and I find that the City's section 12 claim does not infringe section 11.01 of the *Code*. This is consistent with many orders in which section 52(3) has been found not to apply, and the institution has therefore been ordered to issue an access decision under the *Act* (e.g. Order MO-1954).

Since the City has decided to claim section 12, I have decided to invite the law firm in question, as well as the City, to provide representations on this exemption. Because of the *Act*'s privacy

protection purpose, I will also notify the former employee and invite her, and the City, to comment on whether the record contains her personal information, and if so, whether the mandatory exemption at section 14(1) of the *Act* (personal privacy) applies.

In this case, it is not necessary for the City to issue a new decision. It has indicated its intention to rely on section 12, and I have raised the possible application of section 14(1). In order to expedite the matter as much as possible, I will issue a Notice of Inquiry to the City, its law firm and the former employee and invite their representations on these issues, and after their receipt, I will invite the appellant to provide representations, following which an order will be issued to dispose of the question of access to the record.

Section 16 – The Public Interest Override

The appellant's representations refer to the public's right to know. This raises the possible application of section 16 of the *Act*, which overrides certain exemptions where a compelling public interest in disclosure clearly outweighs the purpose of the exemption. Section 12 is not subject to this override, but section 14(1) is, and in the process described above, I will invite representations on this subject as well as on sections 12 and 14(1).

ORDER:

1. I do not uphold the City's determination that the records are excluded from the scope of the *Act* under section 52(3).

2. I remain seized of this appeal to deal with all outstanding issues including the section 12 and 14(1) exemptions under the *Act*, and the possible application of section 16.

Original Signed By: March 3, 2006
John Higgins
Senior Adjudicator