



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-2317

Appeal MA07-188

City of Toronto



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NATURE OF THE APPEAL:

The City of Toronto (the City) received a request pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the Act). The request was for:

Copies of the five [Municipal Standards Officer] “MSO” job descriptions and job postings referred to in the attached communication under the signature of [name], Director of Investigation Services, Municipal Licensing and Standards.

Copies of any and all correspondence, notes, data, memos, electronic records including hand written notes, charts, graphs, statistics, comparison that were used in the establishment of the 5 “MSO” job descriptions.

The City issued an access decision, releasing some records and denying access to the remainder, based on mandatory exemptions in sections 10 (third party information) and 14 (personal privacy), the discretionary exemption in section 11 (economic and other interests) and the exclusionary provisions in sections 52(3)1 and 3 (labour relations and employment records) of the Act.

The requester, now the appellant, appealed the City’s decision.

During the mediation process, the appellant advised that he was not interested in pursuing access to page 198. As a result, sections 10 and 11 (which had only been claimed for page 198), were no longer at issue in the appeal. As well, the appellant advised that he was not interested in pursuing access to pages 171-174 and as a result, the issue of non-responsive records was no longer at issue in this appeal. As well, the appellant advised that he was not interested in pursuing access to interview questions or assessments and accordingly, pages 176-195 were removed from the scope of this appeal.

As mediation was not successful in resolving the issues in this appeal, the file was transferred to me to conduct an inquiry. I sent a Notice of Inquiry, setting out the facts and issues in this appeal, to the City and the affected persons whose names are contained on pages 1 and 19 of the records. I sought representations from the City on all of the issues. I sought representations from the affected persons on whether the personal privacy exemption in section 14 applied to their names, which was the only information severed from pages 1 and 19 of the records. I received a letter from all of the affected persons objecting to the release of their names. I also received representations from the City.

I sent a copy of the City’s representations along with a Notice of Inquiry to the appellant, seeking his representations. Portions of the City’s representations were not disclosed to the appellant due to confidentiality concerns. I did not receive representations in response from the appellant.

RECORDS:

The records include emails, handwritten notes, briefing notes, job descriptions and job postings. The following pages of the records are at issue:

- pages 1 and 19, the covering pages of two job description analysis forms (denied in part pursuant to section 14)
- pages 41-44, 51-73, 175, 199-212, 216-217 and 219-309 (denied in full pursuant to sections 52(3)1 and 3)

DISCUSSION:

PERSONAL INFORMATION

I will first determine whether pages 1 and 19 of the records contain “personal information” and, if so, to whom it relates. The City submits that the information meets the requirements of the definition of personal information in sections 2(1)(b) and (h) of the *Act*, which read:

“personal information” means recorded information about an identifiable individual, including,

- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (h) the individual’s name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be “about” the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225].

Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

The City submits that:

In the present circumstances, the release of the names ...would, in connection to the other information contained on the records, allow the appellant to determine significant portions of information about [affected persons'] employment histories. By releasing the information in question, the appellant would be able to determine ...portions of [the affected persons] respective employment history as well as the relative employment positions (i.e. reporting responsibilities) between the individuals. The City submits that once the appellant obtains the name, location and position of ... individuals ...the appellant will be able to identify these individuals in their personal capacities.

Analysis/Findings

The information severed from pages 1 and 19 of the records are the names of the individuals on two forms entitled "Job Description Analysis". None of the information in the two forms is the appellant's information. All of the information in these forms has been disclosed to the appellant, except for the names of the individuals whose jobs are being described in the forms. The forms are in a questionnaire format. The questions being answered in the forms concern the affected persons' job responsibilities, duties, authority, relationships, physical demands and working conditions.

The information in the records at issue, which are job description analysis forms, consists of more than the affected persons' name, title and contact information or designation. Although the information at issue is about the affected persons in their professional, official or business capacities and would not normally be considered personal information for the purposes of section 2(1), it reveals something of a personal nature about these individuals. Based on my review of the information at issue, I agree with the City that disclosure of the names of the affected persons listed on the two forms at issue would reveal other personal information about the affected persons, namely, their employment history, pursuant to paragraphs (b) and (h) of the definition of personal information in section 2(1) of the *Act*.

PERSONAL PRIVACY

Having found that pages 1 and 19 of the records contain the personal information of the affected persons, I will now determine whether the mandatory exemption at section 14(1) applies to the information at issue.

Where a requester seeks personal information of another individual, section 14(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 14(1) applies.

If the information fits within any of paragraphs (a) to (f) of section 14(1), it is not exempt from disclosure under section 14. In the circumstances, it appears that the only exception that could apply is paragraph (f). This section reads:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

if the disclosure does not constitute an unjustified invasion of personal privacy.

The factors and presumptions in sections 14(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 14(1)(f).

If section 14(4) applies, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 14. In the circumstances, it appears that paragraph (a) of section 14(4) may apply. This section reads:

...a disclosure does not constitute an unjustified invasion of personal privacy if it,

discloses the classification, salary range and benefits, or employment responsibilities of an individual who is or was an officer or employee of an institution;

The City submits that:

[It] agrees that the disclosure of the personal information... would provide the appellant with the classification and employment responsibilities of certain individuals [the affected persons] as allowed by section 14(4). This information has been provided to the appellant severed from any information which could be used to identify an individual. Furthermore, the release of the names of certain [the affected persons] would also reveal the additional personal information referred to above, as the information in question cannot be severed into portions, the City submits that the release of names of the [affected persons] would provide more than the allowable information under section 14(4) and should not be disclosed.

Analysis/Findings

At issue are two job description analysis forms. The first form comprises pages 1 to 18 of the records. The second form comprises pages 19 to 33 of the records. All of the information in these forms has been disclosed to the appellant except for the names of the employees whose jobs are being described in these forms. These forms disclose the classification and employment responsibilities of the affected persons who are employees of an institution and, as such, contain the type of information referred to in section 14(4)(a) of the *Act*.

Section 14(4)(a) allows disclosure of the personal information at issue in the forms. Disclosure of this information does not constitute an unjustified invasion of personal privacy under section 14(1)(f). Therefore, I will order the City to disclose the personal information at pages 1 and 19 of the records, being the names of the employees whose job classification and employment responsibilities are contained in the two job description analysis forms that comprise pages 1 to 18 and 19 to 33 of the records.

LABOUR RELATIONS AND EMPLOYMENT RECORDS

The City has claimed the application of exclusionary provisions in sections 52(3)1 and 3. I will first determine whether section 52(3)3 excludes the records at issue at pages 41-44, 51-73, 175, 199-212, 216-217 and 219-309 from the *Act*. This section reads:

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(3) 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. The meaning of “labour relations” is not restricted to employer-employee relationships. [*Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.). See also Order PO-2157.]

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].

Section 52(3) may apply where the institution that received the request is not the same institution that originally “collected, prepared, maintained or used” the records, even where the original institution is an institution under the *Freedom of Information and Protection of Privacy Act* [Orders P-1560, PO-2106].

The exclusion in section 52(3) does not exclude all records concerning the actions or inactions of an employee simply because this conduct may give rise to a civil action in which the Crown may be held vicariously liable for torts caused by its employees [*Ontario (Ministry of Correctional Services) v. Goodis*, [2008] O.J. No. 289 (Div. Ct.)].

The type of records excluded from the *Act* by section 52(3) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees' actions [*Ontario (Ministry of Correctional Services) v. Goodis*, cited above].

In the non-confidential portions of its representations, the City describes the records as:

... [being] used to determine the establishments of the content for the specific job postings for municipal standards officer (MSO) positions with the City.

In late 2006, the City reviewed the need for additional MSOs to be hired in specific areas of the City's operations...

Due to ... the fact that several possible methods of proceeding with the recruitment process for the MSOs would lead to possible employment related litigation, an extensive review of the above-mentioned issues was undertaken. Throughout late 2006, and early 2007, Staff members of the City reviewed the issues concerning the standards to apply in the job postings for new MSO positions... Several versions of job postings were drafted. Extensive internal correspondence concerning the requirements was written. Reviews of employee concerns were undertaken. The job postings were eventually finalized and the recruitment process to fill the vacancies was undertaken...

There are four subcategories of records within the employment records. The City's description of these records can be summarized as follows:

- A. Notes which were collected or created specifically to deal with the issues relating to the selection of new MSO positions, including possible grievances of City employees resulting from the job recruitment process. These notes as to the City's position would be therefore of use in any negotiations which will need to be undertaken. (pages 41-44 of the employment records)

- B. Draft job postings and comments thereto. These documents were created to avoid the very real prospect of grievance proceedings being commenced. (pages 51-73, 199-212, 220, 222-248, 256-270, 274-286, 291-298 of the employment records)
- C. General correspondence with respect to the job postings which provide a general review of the recruitment process, and identifies general issues or concerns with the recruitment process for the new MSO position and the possible affect on current employees and collective agreements. In this review, certain issues were addressed, which would have relevance in both avoiding labour relations or employment-related proceedings in dealing with any resulting labour relations or employment-related proceedings which cannot be avoided. (pages 175, 216, 217, 219, 249-255, 271-273, 299-309 of the employment records)
- D. Contains meeting notes held concerning the recruitment process for the new MSOs. These records relate to the general review of issues inherent in the creation of this process, including union and employee concerns. (pages 287-290 of the employment records)

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.

Parts 1 and 2: collected, prepared, maintained or used in relation to meetings, consultations, discussions or communications

The City combined its representations on parts 1 and 2. In the non-confidential portions of its representation, the City submits that:

City staff collected, prepared, maintained or used the records at issue during the process of determining the methodology to undertake a recruitment procedure for specific positions. The City submits that specific negotiations took place during a meeting held by City staff and union representatives, considering the labour relations matters which may result from the manner in which these would be filled...

The employment records will be used for purposes of undertaking [labour relations] negotiations, therefore, the entirety of the employment records are being maintained for the purpose of negotiations concerning the renewal of the relevant employees' collective agreement.

The City submits that this collection, preparation, maintenance and usage of the employment records was in relation to meetings, consultations, discussions or communications about City employees, more specifically about the current employees' employment duties and responsibilities, as well as the employment duties and responsibilities of potential new employees. The City also submits that the collection, preparation, maintenance and usage of the employment records was in relation to meetings, consultations, discussions or communications about the methodology of a job recruitment process and the rights and interests of the current employees' under their collective agreement.

Analysis/Findings

Based on my review of the records at issue, and the confidential and non-confidential representations of the City, I find that they were all collected, prepared, maintained or used by the City in relation to meetings, consultations, discussions or communications concerning its selection process for new MSO positions. This process also encompassed meetings, consultations, discussions or communications in relation to possible grievances of City employees resulting from this job recruitment process. Therefore, I find that the City has satisfied parts 1 and 2 of the test.

Part 3: labour relations or employment-related matters in which the institution has an interest

The phrase "labour relations or employment-related matters" 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)*, cited above].

The records collected, prepared maintained or used by the institution are excluded only if the meetings, consultations, discussions or communications are about labour relations or “employment-related” matters in which the institution has an interest. Employment-related matters are separate and distinct from matters related to employees’ actions. [*Ontario (Ministry of Correctional Services) v. Goodis*, cited above]

In the non-confidential portions of its representation, the City submits that:

The determination of the criteria of an employment position for a person within an institution is a labour relations or employment-related matter, depending on whether the employment is within a collective bargaining arrangement or not [Orders PO-2157, MO-2227]...

The meetings consultations, discussions or communications are about “labour relations” or “employment-related” matters... The present circumstances dealt with two issues where the City was an active participant in:

- the operation of a job competition or recruitment process; and
- employment of individuals with the City as MSOs.

The City submits that its interest in either of the two labour relations or employment-related matters has the capacity to affect its legal rights or obligations, including those pursuant to the collective agreement, and as such its interests were much more than a curiosity or concern.

Analysis/Findings

I accept that, as an employer, the City has a management interest in ensuring that the recruitment process for MSOs is fair, which, in my view, constitutes an interest in the records that is “more than a mere curiosity or concern” [Order PO-2077-R].

I agree with the City that the records are related to matters in which the City is acting as an employer and the terms and conditions of employment of an employee or labour relation questions form the subject matter of them. In particular, the City’s selection process for new MSO positions is an employment-related matter. The City’s interest in the records as they relate to possible grievances of City employees resulting from this job recruitment process is a labour relations matter.

I further find that these labour relations and employment-related matters are separate and distinct from matters related to the City’s employees’ actions. Upon my review of the contents of the records, along with the representations of the City, I find that the records simply do not concern the actions or inactions of an employee where the employee’s conduct may give rise to a civil action in which the Crown may be held vicariously liable for torts caused by its employees [*Ontario (Ministry of Correctional Services) v. Goodis*, cited above].

Accordingly, I find that the City has established the requisite “interest” in the records at issue to satisfy the third requirement of the test under section 52(3)3 [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above]. Therefore, as all three parts of the test have been met, I find that section 52(3)3 applies to the records at pages 41-44, 51-73, 175, 199-212, 216-217 and 219-309. As section 52(3)3 applies, it is not necessary for me to consider whether section 52(3)1 also applies to exclude the records at issue from the scope of the *Act*.

Section 52(4): exceptions to section 52(3)

If the records fall within any of the exceptions in section 52(4), the *Act* applies to them. 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.

The City submits that:

...none of the employment records are records to which section 52(4) applies. The City submits that although discussions took place during the meeting [referred to at a specified page in the records] between City staff and union representatives, no agreement was formed... The remainder of the documents are internal documents created by staff of the City for the purpose of preparing a job recruitment process, including specific job postings, responsive to the interests of the City. These documents are neither “agreements” nor “expense accounts”...

Based on my review of the records, I agree with the City that none of the exceptions listed in section 52(4) apply to the records at issue. None of the records at issue comprise an agreement between the City and a trade union or an employee. Nor are there any expense accounts contained in the records. As none of the exceptions in section 52(4) apply and as section 52(3)3 applies, I find that pages 41-44, 51-73, 175, 199-212, 216-217 and 219-309 of the records are excluded from the *Act*.

ORDER:

1. I order the City to disclose to the appellant, by **July 17, 2008** but not before **July 11, 2008**, the severed personal information from the job description analysis forms at pages 1 and 19 of the records.
2. In order to verify compliance with provision 1 of this Order, I reserve the right to require the City to provide me with a copy of the records disclosed to the appellant.
3. I uphold the City’s decision to exclude pages 41-44, 51-73, 175, 199-212, 216-217 and 219-309 of the records from the scope of the *Act* and I dismiss that part of the appeal.

Original signed by: _____
Diane Smith
Adjudicator

June 12, 2008 _____