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

ORDER MO-2226

Appeal MA-050425-1

City of Toronto

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NATURE OF THE APPEAL:

The requester submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the City of Toronto (the City) seeking access to:

> [a]ny records containing or discussing a proposal that the duties of the City's Freedom of Information Office (officially known as the Corporate Access and Privacy Unit) be transferred to the Integrity Commissioner. This request covers records created from December 1, 2003, to the present.

The City issued a decision letter and denied the requester access in full to the responsive records on the basis that the *Act* did not apply to the records pursuant to section 52(3). The requester (now the appellant) appealed the decision of the City to this office.

During mediation, the City advised this office that it was not prepared to participate in mediation because the records that were responsive to this request were the subject of another access request in a related file (MA-050193-1) that had already been through the mediation process. As a result, no further mediation was possible and the file was moved to the adjudication stage, in which an adjudicator conducts an inquiry under the *Act*.

This order is being issued concurrently with the order in appeal MA-050193-1 (Order MO-2227) which deals, in part, with the same records and related issues.

This office began the inquiry by issuing a Notice of Inquiry to the City and the City's Integrity Commissioner. The Notice of Inquiry sent to the City invited it to respond to all identified issues, including the application of section 52(3). As the decision letter of the City did not identify any exemptions as an alternative to section 52(3), the Notice of Inquiry specifically invited the City to comment on the possible application of the discretionary exemption found in section 7 (advice to government) and to identify any other exemptions in the *Act* that might apply to the records in the event that section 52(3) were found not to apply. The Notice of Inquiry sent to the Integrity Commissioner invited him to respond to the issue of the application of section 52(3) to the responsive records.

In representations filed in response to the first notice, the City stated that:

> The City did not make any representations on the application of any exemptions, discretionary or otherwise, in [MA-050193-1] and have not done so in the current appeal.
>
> The City believes that the outcome of the previous appeal will have a bearing on the current one. Should the IPC find that section 52(3)3 does not apply in either of these appeals, the City would be pleased to provide representations on the possible application of exemptions under the *Act*.

The Integrity Commissioner did not provide representations in response to this notice. This office then contacted the Integrity Commissioner to determine what his intentions were with respect to providing representations. The Integrity Commissioner advised that he did not intend

to make representations in this appeal. He added that he wished to adopt the comments that he made in correspondence to this office in Appeal MA-050193-1 for the purposes of this appeal.

This office then issued a Notice of Inquiry to the appellant, provided him with a severed copy of the City's representations and invited him to make representations on the application of section 52(3)3 to the records. The appellant filed representations that addressed section 52(3)3 and raised a number of other issues.

After receiving the appellant's representations, this office forwarded them to the City and invited it to provide reply representations. This office also repeated the invitation to the City to make representations on the applicability of section 7 or any other exemptions under the *Act* upon which it intended to rely. Further, this office indicated that the decision in this case would include findings on the application of the exemptions without further notice to the City if the City failed to file representations in that regard at that time. In particular, this office stated:

> Please consider this letter as a further invitation to make representations concerning the applicability of section 7 or any other exemptions under the *Act* that would apply to the records. Should you fail to make representations at this time and I find that the *Act* applies to the records I will proceed to consider the application of the other exemptions without further notice to you.

The City filed representations in reply. In the representations, the City stated:

> If the IPC still requires the City to address alternative exemptions under the act, please advise accordingly and the City would be pleased to do so.

This office responded to the reply representations of the City and stated:

> I note that despite two requests to date, the City has not provided representations on what exemptions it will rely on to deny access, should I not accept its position that the records are excluded from the *Municipal Freedom of Information and Protection of Privacy Act* under section 52. Please consider this letter as your final invitation to make any such representations. Should you fail to make representations at this time and I find that the *Act* applies to the records, I will proceed to consider the application of the other exemptions without further notice to you.

The City responded to this letter by acknowledging receipt and advising that it would not be submitting further representations. No further explanation was offered by the City for its position.

Following the exchange of representations, this matter was re-assigned to me to complete the adjudication.

RECORDS:

The records comprise 32 pages in total, and consist of memoranda, handwritten notes and an e-mail. Duplicates of some of the records have been provided to this office. There are seven different documents that comprise the responsive records, which can be described as follows (using the page numbers assigned by the City):

1. Memorandum from Integrity Commissioner to Mayor – March 3, 2005 (pages 1-6)
2. Draft Report – November 1, 2004 (pages 7-11)
3. Memorandum from Mayor to Integrity Commissioner – November 12, 2004 (page 12; duplicate at page 27))
4. Discussion points for [Integrity Commissioner] re: Mayor's memo of Nov. 12/04 (pages 13-17; duplicate at pages 23-27)
5. Notes from Discussion – undated (pages 18-20; duplicate at pages 28-30)
6. E-mail from Integrity Commissioner – January 5, 2005 (page 21)
7. Handwritten Notes - August 25, 2004 (pages 31-32).

I will refer to these records by number in the discussion that follows, and my findings also apply to the duplicate pages. All seven records were also at issue in Order MO-2227 and are identified as such in Appendix A to that decision. Regarding record 7, page 32 is a duplicate of page 31, but the version of this record addressed in Order MO-2227 consists of two different pages. In this order, I am addressing record 7 as consisting of the two pages identified in Order MO-2227 (referred to as pages 99-100 in Order MO-2227).

DISCUSSION:

PRELIMINARY ISSUES

The appellant raised a number of preliminary issues in his representations that I will consider here.

Adequacy of Decision Letter

The appellant objects to the fact that the decision letter issued by the City in this appeal did not specify which paragraph within section 52(3) it relies on to exclude the records from the scope of the *Act*. The appellant states that he only became aware of the paragraph that the City relies on when he received the City's representations at the adjudication stage of the appeal.

In representations filed in response, the City acknowledges that its initial decision did not identify which paragraph of section 52(3) it relies upon and stated that this omission was the result of inadvertence.

The obligation to issue a decision letter is established by section 19. The contents of a decision to deny access are set out in section 22(1)(b) of the *Act*:

> Notice of refusal to give access to a record/ or part under section 19 shall set out,
>
> (b) where there is such a record,
>
> (i) the specific provision of this Act under which access is refused,
>
> (ii) the reason the provision applies to the record,
>
> (iii) the name and position of the person responsible for making the decision, and
>
> (iv) that the person who made the request may appeal to the Commissioner for a review of the decision.

In Order M-913, former Adjudicator Anita Fineberg made the following comments regarding the purpose of including the required information in a decision letter. She stated:

> In my view, the purpose of the inclusion of the above information in a notice of refusal is to put the requester in a position to make a reasonably informed decision on whether to seek a review of the head's decision (Orders 158, P-235 and P-324).

This position was adopted by Adjudicator Bernard Morrow in Order MO-1731. In that case, the appellant had essentially the same objection to the decision letter as the concern raised by the appellant in this appeal. In Order MO-1731, the City of London's decision did not refer to the paragraph of section 52(3) that it relied upon to support its decision to withhold access to records. Adjudicator Morrow found that the decision did not comply with the requirements in paragraphs (i) and (ii) of section 22(1)(b). Nevertheless, Adjudicator Morrow stated:

> [I] also see no useful purpose in requiring the City to provide a new decision letter to the appellant to address this inadequacy, or in providing any other remedy [*Gravenhurst (Town) v. Ontario (Information and Privacy Commissioner)*, [1994] O.J. No. 2782 (Div. Ct.); *Brown v. Troia Investments Inc.* (1995), 22 O.R. (3d) 637 (Div. Ct.)]. The appellant has been given a full and fair opportunity to argue the issues in this appeal. I would urge the City to be mindful of its responsibilities under the *Act*, in this case to provide more detailed reasons for withholding information, in accordance with section 22(1)(b).

I adopt the approach taken by Adjudicators Fineberg and Morrow. Despite the fact that the decision letter did not comply with the requirements of section 22(1)(b) of the *Act*, the appellant has been given a full and fair opportunity to respond to the issues in this appeal by the exchange of representations. Further, there is no suggestion in the appellant's representations that he has been prejudiced in any ongoing way by the inadequacy of the decision letter. In the circumstances, I find that no useful purpose would be served by any remedy that I might order to

deal with this omission. Nevertheless, it would be a good practice for the City to identify the paragraph(s) it relies on when claiming section 52(3) in future cases.

Mediation

The appellant also objects to the failure of the City to participate in mediation in this appeal. The appellant states:

> You will also be aware that the City has failed to cooperate in mediation and that its participation was cursory at best.
>
> While the statute does not explicitly make mediation mandatory, I respectfully submit that an institution is required to participate in mediation in a sincere, meaningful and constructive manner.
>
> Section 40 of MFIPPA provides that "The Commissioner may authorize a mediator to investigate the circumstances of any appeal and to try to effect a settlement of the matter under appeal." You will note that the discretion belongs to the Commissioner, not to the parties. It is clear from section 40, and from the implicit optimism for settlement in section 41, that the Legislature sees mediation as a positive process that serves the public interest.
>
> …
>
> Clause 48(1)(d) provides that no person shall "wilfully obstruct the Commissioner in the performance of his or her functions under this Act." I respectfully submit that to frustrate the mediation process, is a form of obstruction contemplated by section 48.
>
> The City's conduct has done more than to frustrate the mediation process. Its conduct is also disrespectful of my rights as a requester.

In response, the City stated that mediation was not successful in this appeal because mediation had already been attempted, and was not successful, in the related appeal (MA-050193-1) where the records at issue included the records that are at issue in this appeal. Appeal MA-050193-1 had already moved to the adjudication stage of the appeal process and the records in common in the two appeals were to be adjudicated upon. The City takes the position that it refused to participate in mediation in an attempt to be consistent in its treatment of the records in common in the two appeals. The City thought that this appeal should be moved to the adjudication stage of the appeal process in an attempt to have both appeals considered by this office at the same time. In the result, I note that the orders are, in fact, being issued concurrently in the two appeals.

While it is generally desirable to participate in mediation, it is not mandatory for parties to do so, and I find the City's approach to the issue was reasonable in the circumstances of this case. In this regard, the decision to proceed with mediation is a discretionary decision of the Commissioner. Former Assistant Commissioner Tom Mitchinson made the following comments about the mediation process in Order PO-2187:

> As the language of [section 40] makes clear, mediation is entirely an optional step in the appeal process, which can be invoked by this office at its sole discretion. The Commissioner *may authorize* a mediator to investigate the circumstances of any appeal and *to try to effect a settlement* of the matter under appeal.
>
> While the purpose of mediation is "to try to effect a settlement", by definition mediation is a voluntary and open-ended means of dispute resolution. No particular process, form of investigation, consultation, or substantive outcome is mandated.
>
> …
>
> The *Act* does not mandate that the mediation stage of the inquiry take any particular form, involve any specified level of contact with the parties, be of a certain duration or necessarily enjoy a particular level of success. A mediator may engage in substantial investigation and negotiation efforts, or may determine based on very limited activity that further efforts would not prove fruitful. *No party is entitled to insist on a specific level of mediation or to control when an appeal should proceed to adjudication*. As the plain wording of section [41(1)] of the *Act* indicates, the jurisdiction and authority to proceed to conduct an inquiry in the circumstances provided in paragraphs (a) and (b) lies within the Commissioner's discretion. [Emphasis added.]

In view of the fact that participation is not mandatory, and given the nature of mediation itself, that the Commissioner cannot insist on any particular level of participation or outcome, I am not satisfied that declining to participate could reasonably be construed as "willfully obstruct[ing] the Commissioner in the performance of his or her functions under this Act" as contemplated by section 48(1)(d). As well, the decision to proceed to the adjudication stage of the appeal process was made by this office at its discretion, and having regard for the circumstances of this appeal.

Scope of Request/Responsiveness of Records

The appellant raises two other preliminary issues that relate to the responsiveness of the records produced and the scope of the request. I will deal with both of the issues here. The appellant states that the City has included in the group of responsive records a number of records that are not responsive to his request. The appellant states that by including non-responsive records with responsive, the City has "mudd[ied] the waters concerning section 52."

The City responded to this argument by stating that it adopted a "liberal interpretation of the request in order to best serve the purpose of the spirit of the *Act*" and that it provided this office with records that were "reasonably related to the request."

The precise wording of the appellant's request was as set out at the beginning of this order. For ease of reference, I will reproduce it here again. The appellant requested:

> [a]ny records containing or discussing a proposal that the duties of the City's Freedom of Information Office (officially known as the Corporate Access and Privacy Unit) be transferred to the Integrity Commissioner. This request covers records created from December 1, 2003, to the present.

In his appeal letter and representations, the appellant offers a number of interpretations of the scope of the request.

The appeal letter refers to a campaign promise by the Mayor, to the effect that "(a) there be an Integrity Commissioner and (b) that the Integrity Commissioner's duties include responsibility for the [access to information] process." The appellant goes on to state:

> I seek documents related to the decision not to implement the policy in the manner it was proposed during the campaign.
>
> In other words, I seek records that relate to that policy decision, taken by the City, about what would and would not be the responsibilities of … the Office of the Integrity Commissioner. Specifically, I am looking for records that reveal why the Commissioner was not given responsibility for [access to information].

In his representations, the appellant states:

> The City's representations claim that, "The records that are at issue relate to the possible role of the Integrity Commissioner with respect to the City's access and privacy functions." This bald and general statement is much broader than my request. I only asked about "a proposal that the duties of the City's Freedom of Information Office (officially known as the Corporate Access and Privacy Unit) be transferred to the Integrity Commissioner." Any other "possible role" for the Integrity Commissioner is not part of my request.

The issue of what criteria to apply in determining the issue of responsiveness was addressed in Order P-880. Adjudicator Anita Fineberg stated:

> In my view, the need for an institution to determine which documents are relevant to a request is a fundamental first step in responding to the request. It is an integral part of any decision by a head. The request itself sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as

> being responsive to the request. I am of the view that, in the context of freedom of information legislation, "relevancy" must mean "responsiveness". That is, by asking whether information is "relevant" to a request, one is really asking whether it is "responsive" to a request. While it is admittedly difficult to provide a precise definition of "relevancy" or "responsiveness", I believe that the term describes anything that is reasonably related to the request.
>
> In my view, an approach of this nature will in no way limit the scope of requests as counsel fears. In fact, I agree with his position that the purpose and spirit of freedom of information legislation is best served when government institutions adopt a liberal interpretation of a request. If an institution has any doubts about the interpretation to be given to a request, it has an obligation pursuant to section 24(2) of the Act to assist the requester in reformulating it. As stated in Order 38, an institution may in no way unilaterally limit the scope of its search for records. It must outline the limits of the search to the appellant.

I agree with and adopt these observations by Adjudicator Fineberg. I have reviewed all of the records that the City states are responsive to the request. Adopting a liberal interpretation of the request, I find that all of the records that have been provided to this office are responsive to the request. In fact, many of the records address the precise issue mentioned by the appellant in his appeal letter, *i.e.*, they relate to why the Commissioner was not given responsibility for access to information. Some records also discuss a further role for the Integrity Commissioner in relation to access to information, and in that instance, I disagree with the appellant's apparent view that this is non-responsive. In my opinion, based on a liberal reading of the request, it was appropriate for the City to view this as responsive. I am satisfied that the City's approach here is entirely consistent with Order P-880.

There is one exception to this finding that the identified records are responsive. This relates to Record 6, which I find contains non-responsive portions that have nothing to do with the subject matter of the request. The non-responsive portions can be easily severed from the responsive portion and doing so does not in any way affect the meaning of the responsive portion. For clarity, I will highlight the non-responsive portions of this e-mail on a copy of the record that will be provided to the City with this order. The non-responsive portions of the e-mail should not be disclosed.

As I have found that all of the records that have been identified as responsive records by the City are responsive, with the exception of portions of Record 6, there is insufficient evidence before me to support the argument of the appellant that the City has attempted to "muddy the waters" or confuse the issues in this appeal by including non-responsive records.

LABOUR RELATIONS AND EMPLOYMENT RECORDS

I now turn to consider the claim by the City that section 52(3)3 applies and therefore the records are excluded from 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:
>
> 3. 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)3 means "for the purpose of, as a result of, or substantially connected to" [Order P-1223].

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 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 "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)* (2000), 55 O.R. (3d) 355 (C.A.), at para. 35].

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's Representations

The City submits that the Integrity Commissioner is an employee of the City reporting directly to City Council. In its representations, it states that the responsive records that are at issue relate to "the possible role of the Integrity Commissioner with respect to the City's access and privacy functions." The City states:

> The City collected, prepared, maintained or used the records at issue in relation to meetings, consultations, discussions or communications concerning the possible role and responsibilities of a City employee, i.e., the Integrity Commissioner, in particular with respect to the City's access and privacy functions (currently handled by the City Clerk and her CAP staff).

Therefore, requirements 1 and 2 have been met.

The City also submits that requirement 3 under section 52(3)3 (outlined above) has been met since the meetings, consultations, discussion and communications are about whether the Integrity Commissioner's employment roles and responsibilities should include specific functions relating to access and privacy. The City submits that these are all employment-related matters and that they are matters in which the City has an interest. The City explains its position as follows:

> The City further submits that it has certain obligations/responsibilities as an employer with respect to all of its employees, including the determination of the appropriate assignments of job duties and responsibilities for which an employee is qualified to do within the City's current organization…. Further, the City is obliged to consult and consider the views and input of the employee in making these determinations. Therefore, the City has an interest in all of the employment–related matters noted above.
>
> Therefore, requirement 3 has been met.

Appellant's Representations

The appellant states that he cannot comment on requirement 1 because he has not seen the records. The appellant comments as follows regarding requirement 2:

> With respect to the second branch of the test, I cannot dispute that e-mails and memoranda are *ipso facto* communications. On the other hand, handwritten notes and draft reports do not necessarily relate to meetings, consultations, discussions or communications. I note that on this point the City provides no detail to back up its representations – see top of page 3 of the City's representations. It asserts that the records were "collected, prepared, maintained or used … in relation to meetings, consultations, discussions or communications" but it does not support or justify that assertion.
>
> As you know, the City bears the onus of proving that the records meet each branch of the subs. 52(3)3 test: Order P-55 Commissioner Linden. In my respectful submission, Toronto has not met the onus of demonstrating that the handwritten notes and the draft report relate to meetings, consultations, discussions or communications.
>
> I note that this topic was never considered or discussed at a Council or committee meeting. It is therefore impossible for the City to argue that the records relate to such meetings.

With respect to part three of the test for the application of section 52(3)3, the appellant states:

> … that provision was never intended to apply to the sort of records that I have requested.
>
> I am not interested in [the Integrity Commissioner's] employment contract or employment duties. I am only concerned with a policy decision about whether this new office would not be responsible for FOI. I seek documents related to the decision not to implement Mayor Miller's policy in the manner he proposed it during the campaign.
>
> Just because organizations contain employees does not mean that all organizational matters are employment-related. To use an example, employees staff the information desk at City Hall, but that does not mean that a campaign promise to change the hours or the services provided to the public at the information desk is employment related.

The appellant then cites Order M-941, in which a finding was made by this office that an organizational review of a department, incidentally involving the creation and elimination of certain positions, and primarily related to the efficiency and effectiveness of the operation, did not fall within section 52(3)3 of the *Act* on the basis that it was not about employment-related matters. The appellant submits that the records at issue in this appeal are not about employment but are about organizational and public policy issues. The appellant submits that to treat these records as employment-related is "both a mischaracterization of the records and a misinterpretation of [the *Act*]."

The appellant also cites former Assistant Commissioner Tom Mitchinson's decision in Order P-1223, which discusses the meaning of "in relation to" in section 65(6) of the provincial *Freedom of Information and Protection of Privacy Act* , which is that statute's equivalent of section 52(3). The former Assistant Commissioner stated that, in order for the collection, preparation, maintenance or usage of a record to qualify as being "in relation to" an activity listed in paragraph 1, 2 or 3 of the section, "the connection must be fairly substantial." He went on to explain:

> 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.

The appellant states that any connection to employment in this appeal is tangential and attenuated and cannot be said to be "fairly substantial."

The appellant also refers to Order MO-1711 of Adjudicator Donald Hale for an understanding of the distinction between records that are personal to particular employees and those related to organizational principles or practices. The appellant states:

> The IPC should not accept the City's contention that the meetings, consultations, discussions or communications for which the records were collected, prepared, maintained or used relate to 'the employment of a person' by the City.
>
> Meetings, consultations, discussions or communications concerning, David Miller's Government Ethics Policy do not relate to the employment of a person by the City.
>
> While Mr. Miller's Government Ethics Policy may touch on matters relating to the activities of certain City employees, in my view the issues under consideration relate primarily to addressing systemic problems within the City's administration and not specifically to issues pertaining to the 'employment of a person.'

City's Reply Representations

Although the City was given the opportunity to file reply representations on all of the issues in the appeal, it did not make any further comments in its reply representations regarding the application of section 52(3)3 of the *Act*.

Analysis

Having carefully reviewed the records at issue and the representations of the parties, I find that section 52(3)3 does not apply in the circumstances of this appeal. I am satisfied that the records were collected, prepared, maintained and/or used by the City, meeting requirement 1. As well, given that the records consist of memoranda, e-mails, notes taken in discussions, and a draft description of an access and privacy role for the City's Integrity Commissioner that was clearly intended for circulation, and all the records relate to consultations concerning the functions to be assigned to the City's Integrity Commissioner, I am satisfied that the records were prepared, etc., in relation to consultations, discussions or communications, meeting requirement 2.

However, requirement 3 is not met. It is clear that the consultations, discussions or communications in this case were not about labour relations. I am also not satisfied that the consultations, discussions or communications in question were "about employment-related matters". Rather, the consultations, discussions, and communications reflected in the records relate to organizational, management and public policy issues, and do not relate to the terms of employment of the Integrity Commissioner, nor to the City's employment relationship with him. Because all three requirements must be met, the section does not apply and the records are not excluded from the scope of the *Act*. I will explain this conclusion in more detail, in relation to each record, below.

The distinction between records that are about employment-related matters and records that are about organizational issues has been considered in a number of orders of this office (Orders M-941, P-1369, P-1223, MO-1654-I)

In Order MO-1711, referred to by the appellant as mentioned above, Adjudicator Donald Hale reviewed these earlier orders:

> In Order P-1369, [Senior] 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 [Senior] 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) [the equivalent of section 52(3) in the provincial *Freedom of Information and protection of Privacy Act*] to apply. As section 65(6) did not apply, the review was subject to the *Act*. [Emphasis added.]
>
> 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 [the] 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 Oakvillle 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, [Senior] 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:

> …
>
> … 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.

. . .

> 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.

I agree with the approach taken in Order MO-1711 and the other orders it cites. I acknowledge that the discussion in the records before me is not about a general review, focussing rather on the possibility of assigning the City's access to information functions to the incumbent occupying the position of Integrity Commissioner for the City. Nevertheless, absent a labour relations component, or one relating specifically to the terms upon which an individual may be employed, the assignment of roles to a particular City official is organizational, and not employment-related within the meaning of section 52(3)3. If a broad interpretation of this term is applied, virtually all records within the custody or control of an institution could be considered employment-related.

I now turn to the individual records. As noted above, there are seven records at issue, one of which is only partially responsive to the request. I will refer to each document by the record numbers assigned under the heading, "Records" earlier in this order.

Record 1

This record is a memorandum to the Mayor prepared by the Integrity Commissioner. The purpose of the report is set out on the first page. The report identifies four structural possibilities for the management of access and privacy that are under consideration in the report, including the possible involvement of the Integrity Commissioner.

The report is a high level and broadly based consideration of possible change in the service delivery mechanism that is currently in place for access and privacy matters relating to the City. The report was generated as a result of the City's review of its existing practices in light of the then-proposed *City of Toronto Act*. It reviews the issues that may arise from the possible restructuring of access and privacy service delivery from a legal, public policy and efficiency perspective.

Although the report itself touches briefly on the staffing and budgetary issues that might arise in the event of a transfer of the service delivery obligations, it does not discuss the performance of the staff that are currently providing the service, nor whether the incumbent Integrity Commissioner would deliver those services.

Further, although the ideas that are under consideration may have an impact on employment-related matters, the relationship is too remote to satisfy part three of the test for the application of

section 52(3)3. As noted in Order P-1369, 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. I find that Record 7 is not substantially connected to employment-related matters. Accordingly, I find that part three of the test has not been met.

Record 2

This draft report was prepared at the request of the Chief Administrative Officer of the City. Like many of the other records, this draft report canvasses the City's options in addressing its obligations under the *Act*. Specifically, it reviews the City's current arrangements for the management of access and privacy issues under the *Act* and looks at the legal requirements for a decision maker under the *Act*. The report goes on to assess a proposal for the office of the Integrity Commissioner to assume responsibilities under the *Act*. There is no discussion about the willingness or the ability of the incumbent of that position to assume additional responsibilities. The issues here are about broader organizational concerns.

For the same reasons that I have outlined above, although this record was clearly prepared by the City in relation to consultations, discussions and/or communications, meeting requirements 1 and 2 under section 52(3)3, it does not meet requirement 3. I am not satisfied that the consultations, discussions and communications reflected in the records are about an employment-related matter.

Record 3

This record is a memorandum from the Mayor to the Integrity Commissioner. In the memorandum, the Mayor acknowledges receipt of the Integrity Commissioner's report on "information and privacy". The Mayor asks for the Integrity Commissioner's opinion about a possible access and privacy role for the holder of that office and poses a particular question about the nature of that possible role. That question is organizational and I find that it does not relate to employment-related matters. Although this record was prepared by a City official and relates to consultations, discussions and communications, meeting requirements 1 and 2, I am not satisfied that the consultations, discussions and communications were about an employment-related matter and therefore the third requirement under section 52(3)3 has not been met.

Record 4

This record is a set of notes that appear to have been prepared following the delivery of Record 3. Although this record was created by City staff and is clearly intended to be used for communication purposes, meeting requirements 1 and 2, it does not meet requirement 3. The notes analyse the Mayor's question posed in Record 3, which, as noted, is not about an employment-related matter. The organizational nature of the discussion in this memo is reinforced by its reference to possible legislation to create the contemplated organizational structure. There is no evidence before me that this record relates to the actual employment of the Integrity Commissioner or any other staff of the City. I find that the consultations, discussions

and communications reflected in this record are not about an employment-related matter. Therefore, I find that this record does not meet requirement 3 under section 52(3).

Record 5

This record is undated and it is not clear who the author is. It contains some notes taken regarding a possible access and privacy role for the office of the Integrity Commissioner. There is some background information regarding the current system for the management of access and privacy issues. The discussion surrounds a possible shift in responsibility for access and privacy and the viability of such a change. There is no discussion of the suitability or willingness of the incumbent Integrity Commissioner to assume these responsibilities.

I find that requirement 3 under section 52(2)3 has not been met. This record was not prepared or created for "the purpose of" or "as a result of" an employment-related matter. The information in this record relates to organizational issues and the means by which services that the City is obliged to deliver under the *Act* would be managed by the City. On this basis, I am not satisfied that the record is "substantially connected to" an employment-related matter. I therefore find that the consultations, discussions and communications reflected in the record are not about an employment-related matter.

Record 6

This record is an e-mail that refers to a meeting that the Integrity Commissioner had with the Mayor the previous month. As previously noted, the e-mail contains some information that is not responsive to the request, and this information should be severed. In this e-mail the Integrity Commissioner outlines his understanding of the issue the Mayor would like him to review and comment on. This articulation of the issue by the Integrity Commissioner confirms that the issues under consideration by him were not employment-related but related to organizational matters surrounding the City's management of access and privacy issues. Although the e-mail was prepared by the Integrity Commissioner and consists of a communication, thereby meeting requirements 1 and 2 under section 52(3)3, it does not satisfy requirement 3 as the communication is not about an employment-related matter.

Record 7

This record consists of hand written notes that were taken at a meeting. As the notes are barely legible, it is not clear on the face of the record what information it contains. Where there is no evidence on the face of the record to assist me with my determination regarding the application of section 52(3)3, I must rely upon the representations filed by the City. However, the City's representations do not specifically address this record. I am left with a blanket assertion from the City that the records meet the requirements of all three parts of the test for the application of section 52(3)3.

Based on the nature and contents of the record, to the extent that I can discern them, I am satisfied that requirements 1 and 2 under section 52(3)3 have been met. This record is a note prepared on behalf of the City in relation to a meeting or discussion.

However, I find that the City has failed to establish that requirement 3 has been met. The City's representations are very general, and there is no specific evidence before me to suggest that the meetings, consultations, discussions or communications reflected in this record are about an employment-related matter in which the City has an interest.

My findings set out above on the other records conclude that the evidence concerning those records does not support a finding that the consultations, discussions or communications reflected in them were "about" employment-related matters. There is no evidence before me that suggests that this record is any different from the other responsive records. No substantial connection between the meeting (or, for that matter, any consultation, discussion or communication) reflected in this record and any employment-related matter has been established. Accordingly, I find that section 52(3)3 does not apply to this record.

Conclusion

I have found that the City has failed to establish that any of the responsive records in this appeal have met requirement 3 under section 52(3)3. As the City is required to satisfy all three requirements under section 52(3)3, I find that the application of that exclusion from the *Act* is not established. Accordingly, I find that the *Act* applies to the records and will now turn to consider the application of the exemptions.

EXEMPTIONS

Introduction

As I indicated previously, the City was given an opportunity to claim the application of the exemptions in the *Act* and it declined that opportunity. Having found that the *Act* applies to the records, they are subject to the right of access created under section 4(1) unless an exemption applies. As noted previously, the City has not identified any applicable exemptions despite several invitations to do so.

After the appellant provided his representations, the City was invited to provide reply representations. The cover letter inviting those representations stated:

> As you are aware, I sent a Notice of Inquiry dated April 7, 2006 to you and invited your representations concerning the applicability of section 7 or any other exemptions under the *Act* that would apply to the records, in the event that I decide that the *Act* does apply to the records. In your letter dated May 11, [2006] you indicated that you will make representations in this regard after a finding that the records apply to the *Act* had been made.

> Please consider this letter as a further invitation to make representations concerning the applicability of section 7 or any other exemptions under the *Act* that would apply to the records. Should you fail to make representations at this time and I find that the *Act* applies to the records I will proceed to consider the application of the other exemptions without further notice to you.

The appellant's representations, which were provided to the City to facilitate its reply, suggested that there may be no responsive records based upon the wording of the request, and on information subsequently provided by the City. I have already dealt with this issue (see above) and concluded that all of the records are, in fact, responsive except for parts of Record 6. Responding to these representations, the City stated as follows in its reply representations:

> Given this new development [*i.e.*, the appellants' position on responsiveness], the City submits that its application of section 52(3) is no longer at issue. If, however, the [Commissioner] is of a different view and wishes the City to comment further, it remains the City's position that section 52(3) applies to the records originally identified as responsive for the reasons set out in the City's previous representations. If the [Commissioner] still requires the City to address alternative exemptions under the *Act*, please advise accordingly and the City would be pleased to do so.

This office responded to the City's reply representations. The response noted that "some of the records may, in fact, be responsive to the appellant's request", and stated as follows on the issue of the City providing representations on any exemptions it wished to claim:

> I note that, despite two requests to date, the City has not provided representations on what exemptions it will rely on to deny access, should I not accept its position that the records are excluded from the [*Act*] under section 52. Please consider this letter as your final invitation to make any such representations. Should you fail to make representations at this time and I find that the *Act* applies to the records, I will proceed to consider the application of the other exemptions without further notice to you.

The City responded to this letter, stating that "… the City will not be submitting any further representations on this appeal."

Regardless of the position taken by the City, I am obliged to consider the possible application of the mandatory exemptions under the *Act*. The mandatory exemptions apply to the records whether or not an institution has claimed their application. Mandatory exemptions are found in sections 9 (relations with governments), 10 (third party information) and 14 (personal privacy). I have reviewed the records carefully and have considered whether any of the mandatory exemptions under the *Act* might apply to those records (and, regarding Record 6, to the portions I have found to be responsive to the request). Based on the contents of the records themselves,

and the surrounding circumstances, I find that these records are not subject to any of the mandatory exemptions under the *Act*.

I turn now to consider the proper approach to take regarding the discretionary exemptions in the *Act*. Discretionary exemptions give an institution the discretion to withhold records, if the criteria for the application of those exemptions have been met. Once an institution decides that the criteria have been met, it must exercise its discretion. On appeal, this office must consider whether the records meet the criteria for the application of the discretionary exemption, and then determine whether the institution appropriately exercised its discretion or erred in doing so. This office may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

An institution's right to claim a discretionary exemption is governed by the *Act* and this office's *Code of Procedure* (the *Code*). The head of an institution is required to give notice under section 19 of the *Act* to the requester within thirty days as to whether or not access to a record or a part of it will be given (section 19). As mentioned above, the notice of refusal to give access to a record or part of a record (i.e. the decision letter) shall, among other things, state the specific provision of the *Act* under which access is refused and the reason the provision applies to the record (section 22).

There have been circumstances when the institution decides to raise discretionary exemptions after the decision letter referred to in section 19 has been issued. Section 11 of the *Code* permits an institution to claim a new discretionary exemption within 35 days after it has been notified of the appeal. In an appeal before this office, the adjudicator may *decide not to consider a new discretionary exemption* where the claim is made after the 35 day period.

Section 11 of the *Code* and the provisions of the *Act* that set out the procedures an institution must follow in the event that it wishes to claim the application of discretionary exemptions have been considered by a number of previous orders. The principles established by these orders were recently reviewed in Order PO-2500. In that order, I stated:

> The purpose of this office's 35-day policy is to provide institutions with a window of opportunity to raise new discretionary exemptions, but only at a stage in the appeal where the integrity of the process would not be compromised and the interests of the requester would not be prejudiced. The 35-day policy is not

inflexible, and the specific circumstances of each appeal must be considered in deciding whether to allow discretionary exemption claims made after the 35-day period (Orders P-658, PO-2113). The 35-day policy was upheld by the Divisional Court in *Ontario (Ministry of Consumer and Commercial Relations) v. Fineberg* (21 December 1995), Toronto Doc. 110/95, leave to appeal refused [1996] O.J. No. 1838 (C.A.).

In Order PO-2113, Adjudicator Donald Hale set out the following principles that have been established in previous orders with respect to the appropriateness of an institution claiming additional discretionary exemptions after the expiration of the time period prescribed in the Confirmation of Appeal:

> In Order P-658, former Adjudicator Anita Fineberg explained why the prompt identification of discretionary exemptions is necessary in order to maintain the integrity of the appeals process. She indicated that, unless the scope of the exemptions being claimed is known at an early stage in the proceedings, it will not be possible to effectively seek a mediated settlement of the appeal under section 51 of the Act. She also pointed out that, where a new discretionary exemption is raised after the Notice of Inquiry is issued, this could require a re-notification of the parties in order to provide them with an opportunity to submit representations on the applicability of the newly claimed exemption, thereby delaying the appeal. Finally, she pointed out that in many cases the value of information sought by appellants diminishes with time and, in these situations, appellants are particularly prejudiced by delays arising from the late raising of new exemptions.
>
> The objective of the 35-day policy established by this Office is to provide government organizations with a window of opportunity to raise new discretionary exemptions, but to restrict this opportunity to a stage in the appeal where the integrity of the process would not be compromised or the interests of the appellant prejudiced. The 35-day policy is not inflexible. The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions can be raised after the 35-day period.

Order PO-2500 and the other decisions it cites underline the point that the procedures established by this office in relation to the late raising of discretionary exemptions are designed to protect the integrity of the process and the rights of the appellant. Where an institution has declined numerous invitations to address the application of discretionary exemptions, it is not usually possible for this office to apply those exemptions in an order. It would interfere with the

integrity of the appeal process and the appellant's right to a fair, just and expeditious determination of his rights under the *Act*.

More specifically, the impact of Appeal MO-050193-1 (the "other" appeal), which led to Order MO-2227**,** must be considered. In the other appeal, the City claimed discretionary exemptions for the records that are also at issue in *this* appeal (MA-050425-1), and provided representations on them, but those exemption claims were not made in this appeal, nor were any representations provided in that regard. Those exemption claims and representations therefore formed no part of the process in this appeal. Nor did the City ever suggest that they should. Moreover, given the differences in the nature of the requests and the records at issue, and the fact that there are different appellants in the two appeals, it would not have been appropriate or practicable to provide the representations from the other appeal to the appellant in this case. In these circumstances, it would have been unfair for me to consider the discretionary exemptions or representations from the other appeal in adjudicating this appeal.

In addition, I find that it would not be fair or just to give the City an opportunity at this late stage to refer the matter back and compel the City to consider the application of the discretionary exemptions. The City has already been given numerous opportunities to make those claims in this proceeding.

Generally, if this office were to adopt a two-stage procedure permitting the institution to claim the application of section 52(3) and wait for a finding on that issue before claiming discretionary and/or mandatory exemptions in the alternative, requesters would experience significant delays in the processing of their access to information requests. It is well recognized that the value of the information to the requester diminishes over time in many cases. An exception exists where the circumstances of the appeal, including the contents of the records at issue, appear to establish a *prima facie* case that one of the exclusions in section 52 would apply. In that instance, the adjudicator (in his or her discretion) may decide to adjudicate the section 52 issue first.

This choice of process is consistent with jurisprudence indicating that tribunals are masters of their own procedure (*Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653). As well, the Divisional Court has upheld the Commissioner's rejection of an attempt by an institutional party to impose a two-step process in an appeal under the "refuse to confirm or deny" provision at section 21(5) of the provincial *Freedom of Information and Protection of Privacy Act* (*Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 1669 (Div. Ct.), leave to appeal refused [1996] O.J. No. 3114 (C.A.)). The provincial *Act* contains provisions that parallel those in the *Act*, but applies to municipalities and other local public bodies. In that case, Ontario Hydro had sought to delay the requirement to claim discretionary exemptions in the alternative until after the issue of section 21(5) had been fully addressed in the appeal.

In my view, the City was given ample opportunities to indicate which discretionary exemptions it relies on and to provide representations concerning those exemptions. The consequences of failing to do so were also clearly spelled out. Accordingly, I am satisfied that there is no

unfairness in ordering disclosure of the records on the basis that no mandatory exemption applies, and no discretionary exemption has been claimed.

SUMMARY OF CONCLUSIONS

In summary, I have found that section 52(3)3 does not apply to the records at issue in this appeal and that, therefore, the records are subject to the *Act*. I have also reviewed the mandatory exemptions in the *Act* and find that they do not apply to the records at issue in this appeal. Having carefully considered the issues before me and the records and representations of the parties, I find that the responsive portions of the records should be disclosed in full to the appellant.

ORDER:

1. Subject to provision 2, I order the City to disclose all of the records to the appellant by sending him a copy on or before **October 15, 2007**.

2. I order the City not to disclose the non-responsive information in Record 6. The non-responsive portions are highlighted on the copy of Record 6 that is being provided to the City with this order. The highlighted portions should *not* be disclosed.

3. I reserve the right to require the City to provide me with a copy of the records disclosed pursuant to order provisions 1 and 2.

Original signed by: September 21, 2007
John Higgins
Senior Adjudicator