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

ORDER MO-2332

Appeal MA-060179-2

City of Hamilton

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NATURE OF THE APPEAL:

The City of Hamilton (the City) received a lengthy 6-part request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information related to the City's Legal Services Division. The request was for correspondence, reports and other documents by or between staff and a named consulting firm (the consulting firm) or others relating to various issues including compensation structures, work-related performance issues, salary classifications, designations, and other matters.

In response to the request, the City issued an interim fee decision in which it identified the estimated fees, and advised that access would be denied to the majority of the records in whole or in part on the basis that they fell outside the scope of the *Act* pursuant to section 52(3)3 (employment related matters). The City also identified the exemptions in the *Act* which would apply to the records if they were not excluded from the scope of the *Act*.

The requester (now the appellant) appealed the City's fee estimate decision, and appeal MA-060179-1 was opened. During mediation of that appeal, the parties agreed that the appeal could be closed, and the appellant agreed to submit a new, narrowed request for records. The revised request was for the following records:

> All reports and presentations by [the consulting firm], with respect to the compensation structures, salary classifications, remuneration and related matters for the position of lawyers employed in the City of Hamilton Legal Services Division, for [an identified time period].
>
> All correspondence and documentation from the official job call file concerning [the appellant], including the resume/application, offer letter, interview notes and rating sheets.
>
> All correspondence and other documents, including notes and transcriptions of oral communications, between [four named individuals] and other management staff of the Human Resources Department, or between any of these individuals and [the consulting firm] or any other consulting firm retained by the City of Hamilton, concerning the development and selection process and the criteria for assigning individuals to [a new designated position].

In response to the revised request, the City issued a new decision and fee estimate. In its decision, the City identified 148 pages of responsive records and denied access to them on the basis that they fall outside the scope of the *Act* pursuant to section 52(3). The City also provided the appellant with an index of the responsive records.

The appellant appealed the City's new decision, and the current appeal (Appeal MA-060179-2) was opened.

During the intake stage of the appeal, the appellant acknowledged that section 52(3)3 applied to exclude records responsive to the second and third parts of his request, and that he was not appealing the responses to those portions of his request. However, the appellant confirmed that he was appealing the City's position that section 52(3)3 excluded records responsive to the first

part of his request from the jurisdiction of the *Act*. In addition, the appellant took the position that additional records responsive to the first part of his request should exist beyond those records identified in the index.

During the mediation stage of this appeal, the City located several additional records responsive to the appellant's narrowed request, and took the position that these records are also excluded from the jurisdiction of the *Act* under section 52(3)3. The appellant also appealed the City's position that these records were excluded from the scope of the *Act*. In addition, the appellant maintained that further additional records should exist, and the issue of the adequacy of the City's search for responsive records remains an issue in this appeal.

Mediation did not resolve these matters, and this appeal was transferred to the inquiry stage of the process. A Notice of Inquiry identifying the facts and issues in this appeal was sent to the City, initially, and the City provided representations in response. The Notice of Inquiry, along with a copy of the City's representations, was then sent to the appellant, who also provided representations to this office. After reviewing the appellant's representations, those representations were sent to the City to allow the City to provide reply representations, which it did. The City's reply representations were then shared with the appellant, who then provided surreply representations.

The file was subsequently transferred to me to complete the adjudication process.

RECORDS:

The four records at issue in this appeal are four reports prepared by the consulting firm. They are described as follows:

1) A Power Point presentation entitled "Legal Services Review" (15 slides)
2) A Report entitled "Classification and Compensation for Lawyers" (14 pages)
3) A Report entitled "The Organization of Legal Services" (including Appendix 1) (14 pages)
4) Seven Appendices to an identified report, including:
   (a) Appendix A, "Demand for Legal Services" (18 pages)
   (b) Appendix B, "Outsourcing Options and Costs" (13 pages)
   (c) Appendix C, "The Organization of Legal Services" (16 pages)
   (d) Appendix D, "Performance Management" (22 pages)
   (e) Appendix E, "Manager of Legal Services" (5 pages)
   (f) Appendix F, "Comparison of Staff Complement" (1 page)
   (g) Appendix G, "Memorandum" (5 pages)

DISCUSSION:

REASONABLE SEARCH

The appellant has taken the position that additional records should exist, and the issue of the adequacy of the City's search for responsive records remains an issue in this appeal.

As identified above, the request for records was originally a lengthy 6-part request. This request was subsequently revised to a shorter, 3-part request, and the City provided the appellant with an access decision and an index of records identifying 42 responsive records. During mediation, the appellant narrowed the request to only include the following:

> All reports and presentations by [the consulting firm], with respect to the compensation structures, salary classifications, remuneration and related matters for the position of lawyers employed in the City of Hamilton Legal Services Division, for [an identified time period].

The City's initial decision identified that there were two records responsive to the request; however, in the course of mediation, the City identified two additional responsive records. The appellant remained unsatisfied with the City's decision, and maintained that additional records exist.

Representations

In its representations, the City takes the position that the searches conducted by it for responsive records were reasonable. The City sets out the steps taken to respond to the appellant's request, and provides a detailed review of the requests, the responses, and the subsequent narrowing of the requests. The City also identifies in some detail the searches that were conducted for responsive records (the nature of the searches, the departments and offices that were searched, and the results of the searches), and provides a detailed affidavit, sworn by the City's Access and Privacy Officer, which confirms the searches conducted and the results of those searches.

In addition, the City provides information regarding the reason why two records, not initially identified as responsive to the final, narrowed request, were subsequently identified as responsive during the mediation process. The City states:

> During the Mediation stage of [the appeal], [the City's Access and Privacy Officer] realized that she had inadvertently omitted to pull records provided to her in response to the initial access request [Records 3 and 4, identified above]. It was determined that these records were also responsive to the modified access request and copies were thereupon immediately provided to the Mediator.

The City's Access and Privacy Officer confirms this information in her sworn affidavit, provided with the representations.

In response to the City's representations, the appellant provided lengthy, detailed representations in support of his position that the searches conducted were not reasonable. These representations can be summarized as follows:

- The appellant questions the veracity of the Access and Privacy Officer's explanation of why the two records subsequently identified were not located originally.
- He refers to the fact that these two records are fairly lengthy (totalling 94 pages), and that they would likely have been referenced in the agenda and minutes of Council.
- He questions why documentation initially provided to him in response to his broader request indicates that the City Clerk had no responsive records, given the nature of these records.
- He identifies his concern that there is no indication of which individual at the City had these records, and provides information regarding various identified staff at the City who, in the appellant's view, ought to have had these records in their possession. He also provides some documentation in support of his position.
- He suggests that, based on the circumstances, there are grounds to believe that various individuals (whom he identifies by name and/or position) may have committed an offence under section 48(1)(d) of the *Act* by "wilfully obstructing the Information and Privacy Commissioner in the performance of her functions under the *Act*".
- He confirms his view that "there is reason to doubt whether the City has conducted a thorough search in good faith for all reports and presentations prepared by [the consulting firm] with respect to [the requested records]".
- He submits that a named City Manager should be required to provide an affidavit confirming that no other responsive reports are in existence, and explaining why his search in response to the initial request only came up with one e-mail. He also refers to an article written in a local newspaper in which this individual [allegedly] states that "The full report by [the consulting firm] will be released to the public [at a future time]", and attaches a copy of that article to his representations.

The appellant's representations were shared with the City, and the City provided representations in reply to the appellant's representations.

The City's main contention is that the appellant misconstrued the evidence submitted by it concerning its search for records responsive to the appellant's revised access request. The City identifies the appellant's initial, lengthy request, and compares it to his final, narrowed request, and states that "the first search clearly encompassed a search for the same records identified by the appellant in his revised access request." The City then confirms that an initial search had been conducted for the records responsive to the initial request and that, when the issue of the reasonableness of the search for records responsive to the narrowed request was raised, a further search was subsequently conducted for any additional records. The City states that the appellant had confused the results of the two searches. The initial search for responsive records had located all of the records (including various records in the City Clerk's office), and the subsequent search located the one additional email (non-responsive to the revised request).

The City also provides other information in response to the appellant's representations, which can be summarized as follows:

- the evidence provided by the City's Access and Privacy Officer regarding why the two records were not initially located is clear and precise, and contained in an affidavit;
- a detailed breakdown of the searches conducted, attached to the affidavit, confirmed that a search of the office of the City Manager was conducted, and resulted in the location of the responsive reports (as well as other records responsive to the broader request);
- the responsive reports were all located as a result of the search conducted in response to the broader request. It is only in the course of locating records responsive to the narrowed request that the City's Access and Privacy Officer inadvertently omitted to "pull" the two records from the records previously located.

The City also provides two additional affidavits in support of its reply representations. One affidavit is a supplementary affidavit sworn by the City's Access and Privacy Officer in which she confirms the information set out in the reply representations, including confirming that the two records located during mediation had been provided to her as a result of the searches responsive to the broader request, and were in her possession, but that she had inadvertently omitted to include them when identifying records responsive to the narrowed request.

The second affidavit attached to the City's reply representations is sworn by the Freedom of Information Liaison Officer for the City Manager's Department, and in it this individual confirms that she conducted the search for responsive records held by the City Manager's Office. She attests that, as part of her responsibilities as the City Manager's Office Departmental Freedom of Information Liaison Officer, she was responsible for undertaking the searches for responsive records in the City Manager's Office as a whole, and that those searches included searches for responsive records in the files of the City Manager. She confirms that the initial searches located various records, including reports, and that the subsequent searches located one email.

Finally, the City addresses two additional matters raised by the appellant. With respect to the appellant's concern that the City Clerk reported that he had "no responsive records", the City stated that the City Clerk does not personally keep all records submitted to and/or used by Council, but that these records are filed as part of the City's formal records system following Council meetings. The City identifies that the Deputy Clerk/Manager Legislative Services located responsive records, and identified them as "Council records". With respect to the appellant's comments concerning what the City describes as "an alleged quote by [the City Manager] … published by [a local newspaper]", the City states:

> …the City denies that this sentence can be fairly or properly attributed to [the City Manager]. A closer examination of the newspaper article reveals that there are no quotation marks around the subject sentence relied upon by the appellant, and that while the first sentence of the penultimate paragraph of the article does attribute a

> statement to [the City Manager], the sentence specifically cited by the appellant does not. Rather, the subject sentence appears to be the sole creation of the author of the article himself.

After receiving a copy of the City's reply representations, the appellant provided representations by way of surreply. These representations can be summarized as follows:

- the appellant questions why the City's Access and Privacy Officer kept the two records in what she describes as a "separate file", and believes additional explanations relating to this are necessary;
- the appellant continues to question why the City Manager himself did not provide an affidavit, and takes the position that the affidavit sworn by the City Manager's Office Departmental Freedom of Information Liaison Officer is insufficient evidence to support a finding that the searches conducted were reasonable.

Findings

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17 [Orders P-85, P-221, PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [P-624].

Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.

I have carefully reviewed the representations provided by the parties on this issue, which were extensive, as reflected in my summary of them set out above. Upon my review of the material and the parties' representations, I am satisfied that the searches conducted by the City were reasonable in the circumstances of this appeal.

As set out above, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. The representations provided by the City, along with the three sworn affidavits, set out in detail the nature of the searches conducted by the City and the results of those searches. The detailed information provided by the City satisfies me that reasonable searches were conducted by the City. Furthermore, although the appellant has questioned a number of the statements made by the City, and questions why certain documents were only identified as responsive later in the process, the appellant has not provided a reasonable basis for concluding that additional records exist. The appellant's representations focus largely on his questions about why the two records were subsequently located and who

swore the affidavits, and not so much on the manner and nature of the searches conducted, nor on whether there is a reasonable basis for concluding that additional records exist. In the circumstances, I am satisfied with the explanations provided by the City in response to the appellant's concerns.

In addition, I make the following findings regarding some of the appellant's specific concerns:

- With respect to the appellant's concern that the two, fairly lengthy records were not initially identified as responsive to the narrowed request, I am satisfied with the explanation set out in the City's Access and Privacy Officer's sworn affidavits that this omission was an inadvertent error, which was corrected as soon as it was determined that these records were responsive. I am satisfied that these two records were identified and provided to the City's Access and Privacy Officer in response to the earlier, broader request, and that the subsequent failure to include these records as responsive to the subsequent, narrowed request was an inadvertent error. I am also satisfied that there is no need to provide further explanations regarding the City's Access and Privacy Officer's reference to these reports being located in a "separate file".
- With regard to the appellant's wish that the City Manager himself provide an affidavit about the nature of the searches conducted, I am not persuaded that this is necessary in order for me to make a finding that the searches conducted were reasonable. Although there are circumstances where an affidavit from an individual who has direct knowledge of a matter, rather than the individual who actually conducts the search, has been ordered (see, for example, PO-1954-I), in my view this is not necessary in the circumstances of this appeal. The affidavit provided by the City Manager's Office Departmental Freedom of Information Liaison Officer is sufficient evidence to support a finding that the searches conducted were reasonable, and I have not been provided with sufficient evidence to support a finding that additional affidavits by others is necessary.

As a result, I am satisfied that the searches conducted by the City were reasonable.

LABOUR RELATIONS AND EMPLOYMENT RECORDS

The City takes the position that the *Act* does not apply to the records because they fall within the exclusion in section 52(3)3.

General Principles

Section 52(3)3 of the *Act* 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)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. 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)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 type of records excluded from the *Act* by s. 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* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.)]

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

Introduction

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.

Requirement 1: Were the records collected, prepared, maintained or used by the City or on its behalf?

The City takes the position that the records were maintained and used by or on behalf of the City. It states that all of the records are reports prepared by the consulting firm for the City, and contain information collected by the consulting firm for the City.

The appellant does not directly address this part of the test in his representations.

Based on my review of the records and the representations of the City, I am satisfied that the records were collected, prepared, maintained and/or used by the City.

Requirement 2: Were the records collected, prepared, maintained and/or used in relation to meetings, consultations, discussions or communications?

In support of its position that the records were collected, prepared, maintained and/or used in relation to meetings, consultations, discussions or communications, the City states:

> The records constitute consultations, discussions and communications about employment-related matters, arising from the relationship between the City as employer and the lawyers and other staff employed in its Legal Services Division, in which the City has an interest.
>
> The records were prepared, maintained and used in relation to meetings, consultations, discussions and communications about employment-related matters concerning the City as employer and the lawyers and other staff employed in its Legal Services Division, in which the City has an interest.
>
> In addition, and more specifically, the records at issue have been considered and discussed during meetings and communications dealing with compensation structures, salary classifications, and remuneration of lawyers employed in the City of Hamilton Legal Services Division for [an identified time period].

Based on the City's representations, I am satisfied that the records were collected, prepared and/or used in relation to meetings, consultations, discussions or communications.

Part 3: Were the meetings, consultations, discussions or communications 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 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 [*Solicitor General* (cited above)].

In support of its position that the records fall within the exclusion in section 52(3)3, the City provided the representations set out above, and also stated:

> The information contained within the records is clearly employment-related, dealing with such matters as: workload issues, workload management, staff management, working relationships, compensation plans, remuneration, and performance initiatives. All of these matters are integral to the employment relationship and involve the City's own workforce.
>
> As the City retained [the consulting firm] to collect and prepare the records, to be maintained and used by or on behalf of the City, the City has an obvious interest in the records and the information contained therein. Moreover, as employer, the City has an inherent interest in the records as it works to implement various options and plans respecting the classification and compensation for Legal Services lawyers and staff, work attribution, personnel management and administration, and the performance management of said employees in the Legal Services Division.

The appellant takes issue with the City's position that the records fall within the third part of the three-part test. He specifically refers to Orders M-941 and P-1369, in which the exclusion was found not to apply to an organizational or operational review, and then states:

> … based upon the titles of the [records at issue] it is very probable that the content of these four records is exclusively or predominantly in the nature of an organizational review of the City's Legal Services Division, although it is possible that the various records touched upon matters such as classification and compensation for lawyers employed by the City, in a general manner related to the primary subject matters of the effectiveness of the Legal Services Division, the performance of paralegal and technical support in the Division, and the best configuration of the Division.

The appellant then states that those matters were the primary areas of the consulting firm's engagement, and refers to a letter from the consulting firm to the City summarizing the matters addressed in the report in support of his position. He then states that "the subjects of compensation structures and remuneration were clearly secondary to these more major areas of concern." He also refers to a new range of salary classifications for lawyers instituted by the City, and identifies his belief that the City's entire salary structure is readily available for access by all employees on the City's internal website.

In addition, the appellant states:

> It is also significant, in my opinion, that the minutes of [an identified meeting of the Committee of the Whole] … refer to item 3 under the heading: "Report of the Legal Services Review Sub-Committee", and that [the consulting firm's] report is referred to in the minutes as the "Report on the Legal Services Operational Review". In addition, none of the actions which City Council directed the City Manager to take related to subjects which could be regarded as falling within the phrase "employment-related matters", as that term is used in section 52(3)3 of the *Act*. Similarly, none of the titles of Appendices "A" to "G" which were submitted with [an identified report] relate in any way to subjects which would be considered as "employment-related matters".
>
> …[The City's] own description of the information contained in the records, as set out in [its representations], demonstrates that the records are truly in the nature of an operational review, and are not excluded from the operation of the *Act*. …

Finally, the appellant identifies his position that, based on the titles of the records, "it ought to be relatively easy to sever any information which is essentially concerned with meetings, consultations, discussions, or communications about labour relations or employment related matters in which the City has an interest, as that term has been interpreted by the Information and Privacy Commissioner and the Courts."

In its reply representations the City responds to the appellant's position by reviewing certain court decisions regarding the application of the section 52(3) exclusion. The City then responds to the appellant's position that the records are more in the nature of an "operational review" by stating:

> … The records at issue do not comprise a general "operational review" as described in Orders P-1369 and M-941. Indeed, those Orders are distinguishable on a number of grounds: In Order P-1369, the institution itself admitted that the subject report there "was created for the purpose of setting policy and direction for future management of the LCBO". The IPC held that the report was "a broadly-based organizational review which touches occasionally, and in an extremely general way, on staffing and salary issues". In the within appeal, the City has made no such admission and, to the contrary, submits that the records at issue in the present appeal are not for the purpose of setting policy and direction for future management nor do they constitute a broadly-based organizational review. Rather, the reports prepared by [the consulting firm] are specific, detailed documents that effectively create a new Legal Services Division for the City, setting out thresholds for Legal Services staff and their employment, including hiring, workload, assignments, compensation, and salary.
>
> The record at issue in Order M-941 was a report of an operational review of the subject institution's Department of Public Works. The IPC found that the report was "primarily an organizational review of the department and contains summaries of management's areas of concerns, employee's concerns, department goals, summary of a survey conducted on efficiency of service delivery mechanisms of the department". The IPC held that it was "more appropriately characterized as relating to the 'efficiency and effectiveness of the operation' than to labour-relations or employment-related matters". Again, the City submits that that is a very different type of report than the records at issue in the present appeal. The matters dealt with in the [the records at issue] are on a detailed and specific level, and are action-oriented in terms of the analysis and recommendations made to the staffing and work situation in Legal Services.
>
> The City submits that Orders PO-2057 and MO-1264 are more applicable decisions when dealing with records of the sort at issue in the present appeal. In Order PO-2057, the subject record was a 17-page report prepared by [consultants] brought in to review issues raised relating to a Probation office run by staff of the Ministry of Correctional Services. … the Ministry described the objective of the review as two-fold:
>
> > 1. To examine workload issues and, where appropriate, develop strategies and recommendations for effective workload management; and

> 2. To review the working relationships and, where appropriate, determine resolutions.

> The IPC held that the report related to a review conducted by the institution to examine workload and workforce issues and that issues of this nature are clearly employment-related. The IPC further held that the institution, as an employer, has an interest in addressing and resolving the issues as part of the overall management of its workforce. Accordingly, [the exclusionary provision] was satisfied and the report was excluded from the scope of the *Act*. The City submits that the … documents at issue in the present appeal constitute the same type of report excluded in Order PO-2057 - an examination of workload and workforce issues that are clearly employment-related and that the City has an interest in addressing and resolving as part of the management of its workforce.

> In Order MO-1264, the IPC held that a report obtained and utilized by the institution for a review of its compensation plans relating to its employees satisfied s. 52(3) since it related to activities undertaken by the institution to address remuneration of its employees which was an integral part of the "employment" relationship. Similarly, the City submits that the records at issue prepared by [the consulting firm] constitute activities undertaken by the City to address its employment relationship with staff in the Legal Services Division, including remuneration, and clearly relate to and are about employment-related matters. Further, as found in Order MO-1264, it can be said that the … documents constitute "labour-relations information" since they refer to information concerning the collective relationship between an employer and its employees (i.e., the Legal Services Division staff as a whole).

The City then refers to the following quotation from the decision in *Ontario (Solicitor-General)*, cited above, which dealt with section 65(6) of the *Freedom of Information and Protection of Privacy Act* (similar to section 52(3) at issue in this appeal). In that decision the Court stated:

> As already noted, s. 65 of the Act contains a miscellaneous list of records to which the Act does not apply. Subsection (6) deals exclusively with labour relations and employment-related matters. Subsection (7) provides certain exceptions to the exclusions set out in subs. (6). Examined in the general context of subs. (6), the words "in which the institution has an interest" appear on their face to relate simply to matters involving the institution's own workforce. ... Subclause 3 deals with records relating to a miscellaneous category of events "about labour relations or employment-related matters in which the institution has an interest." Having regard to the purpose for which the section was enacted [cite omitted], and the wording of the subsection as a whole, the words "in which the institution has an interest" in subclause 3 operate simply to restrict the categories of excluded records to those records relating to the institution's own workforce where the focus has shifted from "employment of a person" to "employment-related matters". ...

Findings

This office has considered the application of section 52(3)3 (and its equivalent in the *Freedom of Information and Protection of Privacy Act*, section 65(6)3) to records held by an institution on a number of occasions. Many of these cases have turned on the issue of whether the preparation, collection, maintenance or use of a record is "in relation to" a labour relations or employment-related matter. A number of those cases are referred to by the parties in their representations, set out above.

In this appeal the four records at issue are identified above. The City has stated that the information in the records is clearly employment-related, dealing with such matters as: workload issues, workload management, staff management, working relationships, compensation plans, remuneration, and performance initiatives, and that "all of these matters are integral to the employment relationship and involve the City's own workforce".

I have carefully reviewed the records at issue, as well as the representations of the parties. In my view it is clear that a number of the records relate directly to the City's own workforce.

Specifically, I make the following findings:

Record 1: *A Power Point presentation entitled "Legal Services Review"*

On my review of this record, I am satisfied that it relates directly to matters relating to the City's own workforce and, consequently, to "employment-related matters" for the purpose of section 52(3)3. Notwithstanding the title of this presentation, I find that the large majority of the slides in this record relate directly and specifically to "Classification and Compensation" matters relating to the City's workforce. I am satisfied that this record fits within the exclusionary provision in section 52(3)3.

Record 2: *A Report entitled "Classification and Compensation for Lawyers"*

Similar to my finding for Record 1, I am satisfied that Record 2 relates directly and specifically to "Classification and Compensation" matters relating to the City's workforce. I find further that portions of this record also address other matters such as performance measures and other employment-related matters. Consequently, I am satisfied that this record fits within the exclusionary provision in section 52(3)3.

Record 4: *Appendix D "Performance Management"*
Appendix E "Manager of Legal Services"
Appendix F "Comparison of Staff Complement"

I find that these three appendices also relate directly to matters relating to the City's own workforce and, consequently, to "employment-related matters" for the purpose of section 52(3)3. On my review of Appendix D entitled "Performance Management", I find that the majority of this document deals with Human Resource matters and/or performance indicators and

evaluations for individual lawyers. With respect to Appendix E entitled "Manager of Legal Services", this record contains information relating directly to the responsibilities and performance management matters relating to this position. Finally, Appendix F entitled "Comparison of Staff Complement" relates directly to staffing issues. I am satisfied that all three of these appendices relate directly to matters relating to "employment-related matters" for the purpose of section 52(3)3.

The other records at issue are the following:

Record 3: *A Report entitled "The Organization of Legal Services" (including Appendix 1)*
Record 4: *Appendix A "Demand for Legal Services"*
Appendix B "Outsourcing Options and Costs"
Appendix C "The Organization of Legal Services" (similar to Record 3)
Appendix G "Memorandum" (5 pages)

With respect to Record 3 and the remaining portions of Records 4, I have carefully examined these records to determine whether they are excluded under section 52(3)3 of the *Act*, or are more in the nature of an "organizational or operational review" as argued by the appellant. I also reviewed the previous orders of this office which examined records of this nature. As the parties point out, records that are essentially organizational reviews are generally not excluded from the *Act* under section 52(3)3. However, if the creation of the records was initiated in response to workload and other human resources concerns raised by institution employees (as was the case in Order PO-2057), or if the records deal predominantly with compensation issues (which may include comparative analyses from outside sources), the records could be found to deal with the overall management of its workforce.

Additionally, in Order MO-1654-I, former Assistant Commissioner Mitchinson had to determine whether a review undertaken by consultants fell within the ambit of part three of the test under section 52(3). He found that:

> Having reviewed the terms of reference for the consultant's assignment, as described in the City's representations, I find that records produced in this context were not created or prepared for "the purpose of" or "as a result of" an employment-related matter. The consultant was hired to conduct a review of the newly-established EMS organization that was put in place at the time of the amalgamation of various municipalities into the [City]. The mandate, as described by the City, was to "review the EMS organizational structure and develop recommendations for an effective and efficient EMS operation", not to investigate the performance of a particular employee. In this regard, it closely resembles the situation in Order M-941. The fact that a review of this nature involves organizational issues and job design is not, in my view, sufficient to alter the purpose of the review and the nature of the records produced in that context.

> The question of whether any of the records stemming from the consultant's review are "substantially connected to" an employment-related matter turns on the question of how the records were maintained or used by the City outside the primary purpose of assessing the effective and efficient operation of the EMS.

I adopt the approaches set out in the previous orders, and apply them to the remaining records at issue in this appeal. Record 3 and the remaining portions of Record 4 (one of which is essentially identical to Record 3) address and review the organization and structure of the City's Legal Services department; however, as identified by the City, they also address (in considerable detail) matters such as workload issues, workload management, staff management, working relationships, compensation plans, remuneration, and performance initiatives. Although former Assistant Commissioner Mitchinson stated in MO-1654-I that "The fact that a review of this nature involves organizational issues and job design is not, in my view, sufficient to alter the purpose of the review and the nature of the records produced in that context", the records at issue in this appeal, in my view, do more than simply "involve organizational issues and job design", they address a number of employment-related issues in considerable detail.

Furthermore, in Order MO-1654-I, the former Assistant Commissioner went on to state as follows in regards to a record he found to be in the nature of an "organizational review":

> … if the City were able to establish that records were maintained or used in relation to a labour relations or employment-related matter, that would satisfy the "substantially connected to" component of the test, regardless of whether they were created or prepared by the consultant for this purpose.

Given the nature of the information contained in the records, and in light of the statement by the City, noted above, that these records have been considered and discussed during meetings and communications dealing with specific employment-related issues relating to the City's workforce, I am satisfied that all of these remaining records relate directly to matters relating to "employment-related matters" for the purpose of section 52(3)3.

I find further support for this position in the wording of the narrowed request itself, which was a request for:

> All reports and presentations by [the consulting firm], with respect to the *compensation structures, salary classifications, remuneration and related matters* for the position of lawyers employed in the City of Hamilton Legal Services Division …. [emphasis added]

Clearly the appellant's request was for matters that are integral to the employment relationship between the City and its own workforce.

In summary, I am satisfied that all of the records at issue in this appeal were collected, prepared, maintained or used for meetings, consultations, discussions or communications about employment-related matters. As such, the records are "substantially connected to" the activities

listed in section 52(3)3, and were therefore created, prepared, maintained or used "in relation to" them. As a result, I find that the third requirement of section 52(3)3 has been established for the records at issue in this appeal.

Furthermore, as established in *Ontario (Solicitor General)* (cited above) if section 52(3)3 applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date.

All of the requirements of section 52(3)3 of the *Act* have thereby been established by the City, and I find that the records fall within the parameters of this section, and are therefore excluded from the scope of the *Act*.

ORDER:

1. I find that the searches conducted by the City were reasonable.

2. I uphold the City's decision that the records are excluded from the scope of the *Act* as a result of section 52(3)3.

Original Signed By: July 25, 2008
Frank DeVries
Adjudicator