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

ORDER MO-2352

Appeal MA07-409

City of Elliot Lake

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BACKGROUND:

The Elliot Lake Residential Development Commission (the ELRDC) was created as a corporation without share capital under the auspices of the *City of Elliot Lake Act, 2001* (Ch. Pr1). The stated object of the ELRDC, according to section 3(4) of that statute is:

> to manage, as the [City's] agent, the development for residential purposes of land acquired from the Province of Ontario and, for the purpose of carrying out such object, the [City] may, under the authority of a by-law passed by the council, delegate to the Commission any of the [City's] powers…

The powers given to the City of Elliot Lake (the City), and to the ELRDC by delegation, include carrying out the actions necessary to develop the land, retaining consultants and agents as required, and marketing the developed land. The Board of Directors of the ELRDC consists of two members of City council, and five community members appointed by City council.

NATURE OF THE APPEAL:

The City received a seven-page request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records dating from the time of the requester's employment with the City, and including records relating to the ELRDC.

The City issued a decision granting access to some of the records identified as responsive to the request. However, access to the remainder of the records was denied. The City claimed that the records were excluded from the *Act* based on section 52(3)1 (labour relations and employment records), or were exempt pursuant to sections 6(1)(b) (closed meeting) and 7(1) (advice or recommendations) of the *Act*.

The requester, now the appellant, appealed the City's decision with respect to one record only, an agreement for which the City relied on section 6(1)(b) to deny access. That record is described in the request as:

> A copy of the payment agreement entered into by the ELRDC with Elliot Lake Retirement Living (ELRL) in February, 2006 whereby ELRDC committed to pay $200 out of the sale proceeds of every cottage lot sold between January 1, 2006 and December 31, 2011 in return for consulting services provided by ELRL, and also agreed to make those payments – not to ELRL - but to [a named business] …

During mediation, the appellant advised the mediator that the record had been considered and approved at a regular council meeting on May 14, 2007. He further advised that although the record was discussed in a closed session at that council meeting, council came out of closed session and passed a resolution to approve the record. The appellant provided the relevant resolution numbers to the mediator, who conveyed the appellant's position on this issue to the City. The City reconsidered its position on section 6(1)(b), and subsequently issued a revised decision letter in which it claimed only that the record was excluded from the *Act* under section 52(3)1 or, alternatively, was exempt under section 7(1).

The appellant confirmed that he wished to pursue his appeal of the City's revised decision. It was not possible to resolve this appeal by mediation and, accordingly, it was transferred to the adjudication stage of the appeal process where it was assigned to me to conduct an inquiry.

I sent a Notice of Inquiry outlining the issues to the City, initially, in order to seek representations. The City chose not to submit representations. In the circumstances, I concluded that it would not be necessary to invite representations from the appellant.

RECORD:

The sole record at issue is a one-page letter described by the City as a "payment agreement for strategic planning and consultant services between the Elliot Lake Residential Development Commission and Elliot Lake Retirement Living".

DISCUSSION:

LABOUR RELATIONS AND EMPLOYMENT RECORDS

The City's decision letter refers to section 52(3)1 as the basis for its position that the record is excluded from the operation of the *Act*. In addition, it appears from my review of the appeal file that the mediator and City staff also discussed the possible application of section 52(3)3 to the record during mediation. Since section 52(3) of the *Act* pertains directly to the issue of my jurisdiction in this appeal, I will review the possible application of both provisions. The relevant parts of section 52(3) state:

> Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> 1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
>
> …
>
> 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) 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].

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].

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

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

2. this collection, preparation, maintenance or usage was in relation to proceedings or anticipated proceedings before a court, tribunal or other entity; and

3. these proceedings or anticipated proceedings relate to labour relations or to the employment of a person by the institution.

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

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

2. this collection, preparation, maintenance or usage was in relation to 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.

Analysis and Findings

As previously noted, the City did not provide representations for my consideration in this appeal. Consequently, for the purposes of determining the issues in this appeal, I must rely on the evidence available to me from the record itself and the surrounding circumstances, as well as the guidance offered by past orders of this office.

The Courts have recently confirmed that the types of record excluded from the *Act* under section 52(3) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue [*Ontario (Ministry of Correctional Services) v. Goodis* [2008] O.J. No. 289 (Div. Ct.)]. On this basis alone, and given the nature of the record at issue, I am of the view that the City's claim of section 52(3) to exclude the record cannot stand. However, I will provide further explanation for my finding that the requirements for the application of sections 52(3)1 and 3 have not been met.

From my review of the record, I am prepared to accept that it was prepared, maintained or used by the City and, therefore, that the first part of the test under section 52(3)1 and section 52(3)3 has been met.

The next part of the test under sections 52(3)1 and 3 requires me to decide whether the connection between the record and the proceedings or the employment-related matter in which the City has "an interest" is clear enough to be able to state that the preparation, maintenance or use of the record was "in relation to" those activities.

In Order MO-2024-I, Senior Adjudicator John Higgins reviewed the possible application of both of these exclusions to the "total amount paid" to a specific law firm "with respect to" a former employee of the institution. The Senior Adjudicator stated:

> The consequence of a finding that section 52(3)1 applies is a serious one – the total exclusion of the record from the scope of the access and privacy provisions of the *Act*. In this case, as the appellant points out, the record relates to the expenditure of public funds to defend a legal action. This type of information has a strong connection to government accountability, which the Supreme Court of Canada refers to as an "overarching" purpose of access legislation (see *Dagg v. Canada (Minister of Finance)* (1997), 148 D.L.R. (4th) 385 (S.C.C.)). In my view, this purpose, which relates to the right of public access to government-held records identified in sections 1 and 4 of the *Act*, must be kept in mind in assessing the proper meaning of "in relation to" in this case.
>
> Another relevant factor to consider in assessing the meaning of "in relation to" is the stated intent and goal of the *Labour Relations and Employment Statute Law Amendment Act*, which added section 52(3) to the *Act*. The long title of this Bill identified this goal as to "restore balance and stability to labour relations and to promote economic prosperity".
>
> As noted above, the term "in relation to" in section 52(3) has previously been defined as "for the purpose of, as a result of, or substantially connected to" [Order P-1223]. In my view, meeting this definition requires more than a superficial connection between the creation, preparation, maintenance and/or use of the records and the labour relations or employment-related proceedings or anticipated proceedings. For example, **the preparation of the record would have to be more than an incidental result of the proceedings, and would have to have some substantive connection to the actual conduct of the proceedings in**

> **order to meet the requirement that preparation (or, for that matter, collection, maintenance and/or use) be "in relation to" proceedings. This interpretation would also apply under sections 52(3)2 and 3, which require that the collection, preparation, maintenance and/or use of the records be "in relation to" either negotiations or anticipated negotiations, or to meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest** [emphasis added**].**
>
> In this case, I acknowledge that, but for the proceedings, this record would never have been created. However, in my view, the City's record of payments to a law firm, and particularly the total amount paid, is too remote to qualify as being "in relation" to proceedings for which the law firm was retained by the City. This record, which the City states was prepared by its Clerk, appears to be extracts from the City's accounting records, which were created and maintained for accounting reasons that have nothing to do with the proceedings. Based on my examination of the record, there is no obvious relationship between it and the actual conduct of the proceedings, nor is any such relationship explained by the City in its representations.

I agree with the reasons of Senior Adjudicator Higgins in Order MO-2024-I, and adopt them for the purposes of this appeal.

I have considered the record at issue in this appeal in the context of the discussion from Order MO-2024-I, excerpted above, and I find that it does not meet the second requirement of the test for exclusion under either of sections 52(3)1 or 52(3)3.

The record at issue is dated February 2006 and reflects an arrangement between the Elliot Lake Residential Development Commission, a branch of City government, and a third party, for the provision of consulting and planning services in exchange for payment based on certain terms.

With respect to section 52(3)1, I note that in Order MO-2024-I, the Senior Adjudicator acknowledged that the record at issue in that case would not have been created but for the proceedings, but found that there was no obvious relationship between it and the proceedings in question. In the present appeal, the City apparently seeks to rely on the ongoing civil action between the City and the appellant, a former employee, to form the requisite "proceedings" for the second requirement. However, based on the information before me, the proceedings upon which the City relies, did not exist, nor could it be said that they were reasonably contemplated at the time of the record's creation. In my view, not only is the record not "an incidental result" of the civil proceedings, there is no connection between the creation of the record and those proceedings at all, let alone a substantial connection of the type required by section 52(3)1. For all these reasons, I find that the second requirement under section 52(3)1 is not met, and the record cannot be excluded on that basis.

For similar reasons, this record does not meet the second requirement of the test for exclusion under section 52(3)3 of the *Act*. In the circumstances, I am not satisfied that the preparation,

maintenance or use of the record was "in relation to" meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest. Although the City alluded to the appellant's civil action as an "employment-related matter" that could be construed as "an interest," there is no evidence before me to support such a connection. Specifically, I reject the suggestion that there existed such "an interest" at the time the record was created. Since there is no recognizable connection between the creation of the record and any labour relations or employment-related matter in which the City might be said to have an interest, I find that part two of the test under section 52(3)3 is not met, and the record is not excluded from the *Act* under that provision.

In view of my finding that the record is subject to the *Act*, I will now review the possible application of the discretionary exemption in section 7(1) to it.

ADVICE TO GOVERNMENT

Section 7(1) states:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

The purpose of section 7 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure [Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

"Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised. Furthermore, advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations

- the information, if disclosed, would permit one to accurately infer the advice or recommendations given

[Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563].

Sections 7(2) and 7(3) create a list of mandatory exceptions to the section 7(1) exemption. If the information falls into one of these categories, it cannot be withheld under section 7. Based on the analysis and my findings on section 7(1), however, it will not be necessary to review the exceptions.

Representations

As previously noted, the City did not provide representations in support of its claim that section 7(1) applies to the record. While no representations were solicited from the appellant, he had the following to say in a letter written to the City (earlier in this appeal) about the claim of section 7(1) of the *Act* to deny access:

> You accurately referred [in the revised decision letter] to the subject agreement as a "payment agreement" and that's all that it is.
>
> [The record] contains no advice or recommendations of any officer or employee of an institution, or any consultant retained by an institution. Its provisions deal singularly with the allocation of substantial public monies over a period of five years to a third party that was not a [signatory] to it.

Analysis and Findings

Although the City takes the position that the record should be withheld because it contains advice or recommendations, there is no evidence before me to support this position. For the reasons that follow, I find that the information contained in the record does not qualify for protection as advice or recommendations under section 7(1) of the *Act*.

Implicit in the City's decision to claim section 7(1) is the fact that the record formed part of a deliberative process. In my view, this much was evident from the former claim of section 6(1)(b) of the *Act* to deny access. However, I note that the City withdrew their reliance on section 6(1)(b) because the appellant was able to provide evidence during mediation that a resolution approving the agreement set out in the record had been passed in an open meeting of City council.

Moreover, on my review of the record, I find that it consists mainly of background and factual information that forms the basis of this agreement between the ELRDC and the third party. In my view, to argue, as the City has implicitly done, that this record contains information that "suggests a course of action that will ultimately be accepted or rejected" is unsupported by the evidence. Rather, I find that the record documents contractual terms agreed to by the ELRDC and the third party; that is, payment for planning and consulting services. While it may be the case that advice or recommendations were sought or received during the preparation of the agreement, the resulting record simply reflects a decision already made by the ELRDC, and one which was approved by City Council in an open meeting.

Furthermore, taking a purposive approach to this exemption requires consideration of whether disclosure of the information at issue could *reasonably* be expected to hinder the provision of

expert or professional assistance within the deliberative process (Orders PO-2028 and 94). Based on my review of the record, which is the only evidence before me in this appeal, I find that disclosing this information would not, as former Commissioner Linden established in Order 94, interfere with "the free flow of advice and recommendations within the deliberative process of government decision-making and policy-making", or inhibit the free and frank exchange of views.

I find that this information does not constitute advice or recommendations or suggest a course of action that may be accepted or rejected for the purpose of section 7(1). For all of these reasons, I find that the record does not qualify for exemption under section 7(1) of the *Act*, and I will order that it be disclosed, in its entirety, to the appellant.

ORDER:

1. I do not uphold the City's determination that the record is excluded from the scope of the *Act* under section 52(3), or its decision that the record is exempt under section 7(1).

2. I order the City to disclose the record to the appellant by sending him a copy of the record no later than **November 14, 2008.**

3. In order to verify compliance with Order Provision 2, I reserve the right to require the City to provide me with a copy of the record disclosed to the appellant.

October 23, 2008

Daphne Loukidelis
Adjudicator