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

# ORDER MO-2426

## Appeal MA07-207

## City of Windsor

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## NATURE OF THE APPEAL:

The City of Windsor (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information relating to the requester's "outstanding unresolved complaint regarding the discriminatory outcome of the [City's] application of the Pay Equity Act to its non-union employees":

1) The first "deemed approved" Pay Equity Plan (circa 1991) applied to unionized employees retroactive to January 1, 1990;

2) Copies of all proposed Pay Equity Plans for non-union employees posted prior to December 22, 1998;

3) The Council Report (circa 1991) that accompanied the first proposed Pay Equity Plan for non-union employees, and the resultant Council Decision;

4) The S-Category pay schedule for 1990, 1998 and 1999;

5) The record of all Non-Union Pay Equity and JJE/Internal Equity adjustments made effective January 1, 1990 and later; (Employee names not required but please report title of position, number of such positions, date-nature-and amount of adjustments and any governing policies followed in paying those adjustments); in lieu of amount, a rate of pay will suffice if the relevant rate table is included;

6) Copies of all correspondence about Pay Equity and JJE/Internal Equity from the Corporation directly to All Non-Union Employees;

7) The final value points total assigned to each non-Union position for implementation of the December 22, 1998 Pay Equity Plan;

8) All minutes of the variously named Non-Union Pay Equity/ or Non-Union Job Evaluation or/ Non-Union Joint Job Evaluation Committees from 1988 and later;

9) Any correspondence between the Corporation and the Pay Equity Review Officer regarding the final selection of Male Comparators for the Non-Union Pay Equity Plan posted December 22, 1998.

10) The Commissioner of Human Resources sent a memo dated June 12, 1992 (copy attached) to Non-Union Staff indicating that a Pay Equity Plan posted March 10, 1992 had, effective June 8, 1992, passed its 90-day review period without the receipt of any comments that would require any amendments to that Plan. I request copies of any documents that would explain why that uncontested Plan was not implemented.

The City located records responsive to this 10-part request. It then issued a decision letter to the requester that denied him access to the records responsive to parts 2, 4, 5, 6, 7, 8, 9, and 10, pursuant to the exclusionary provision in section 52(3) of the *Act*. This provision excludes certain labour relations and employment-related records from the scope of the *Act*. Notwithstanding its position that the exclusionary provision in section 52(3) also applied to the records responsive to parts 1 and 3 of the request, the City decided to disclose these records.

The requester (now the appellant) appealed the City's decision to this office. During the mediation stage of this appeal, the City decided to disclose additional records to the appellant. It issued a revised decision letter to him stating that, although it continued to take the position that the records responsive to his request were outside the scope of the *Act*, it had decided to disclose records responsive to parts 2, 6, and 10 of his request.

The appellant advised the mediator that he was not satisfied that the City had conducted a reasonable search for records responsive to parts 3, 6 and 10 of his request, and that he continued to seek access to the records responsive to parts 4, 5, 7, 8 and 9. The City conducted a further search for records and advised the mediator that it was unable to locate any additional records responsive to parts 3, 6 and 10 of the appellant's request.

This appeal was not settled in mediation and was moved to the adjudication stage of the appeal process. This office commenced the inquiry by sending a Notice of Inquiry to the City, inviting it to submit representations, which it did. This office then invited the appellant to provide representations on the issues set out in a Notice of Inquiry. The City's representations were provided to the appellant in full. The appellant submitted representations, which were provided to the City. The City then provided reply representations.

The appeal was subsequently transferred to me for completion of the adjudication process.

## RECORDS:

The records remaining at issue are summarized in the following chart:

| **Request** | **Description of responsive records** | **City's decision** | **Exclusion claimed** |
|---|---|---|---|
| Part 4 – S-Category pay schedules | Schedules for pay groups – "S" (6 pages) | Withheld in full | Section 52(3) |
| Part 5 – All Non-Union Pay Equity and JJ/Internal Equity Adjustments | Female job classes – Pay Equity Adjustments (14 pages) | Withheld in full | Section 52(3) |

| | | | |
|---|---|---|---|
| Part 7 – Final value points assigned to each non-union position | "RO Results" chart (4 pages) | Withheld in full | Section 52(3) |
| Part 8 – Minutes of variously named committees | Sample of documents relating to one position (Director of Site Development) reviewed by a committee (3 pages) | Withheld in full | Section 52(3) |
| Part 9 – Correspondence between Corporation and Pay Equity Review Officer regarding male comparators | Documents regarding male comparators (3 pages) | Withheld in full | Section 52(3) |

In addition, the appellant claims that the City has not conducted a reasonable search for records responsive to parts 3, 6 and 10 of his request.

## DISCUSSION:

### LABOUR RELATIONS AND EMPLOYMENT RECORDS

#### General Principles

Section 52(3) states:

> Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> 1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
>
> 2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.

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

If section 52(3) applies to the records, and none of the exceptions found in section 52(4) applies, the records are excluded from the scope of the *Act*.

The term "in relation to" in section 52(3) means "for the purpose of, as a result of, or substantially connected to" [Order P-1223].

The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships [Order PO-2157, *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.)].

The term "employment of a person" refers to the relationship between an employer and an employee. The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship [Order PO-2157].

If section 52(3) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507].

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

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

In their representations, the City has identified that it relies on section 52(3)3 to exempt the records from the scope of the *Act*. The appellant disagrees that section 52(3)3 applies to the records and submits that they are, therefore, subject to the *Act*.

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

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

> 1. the records were collected, prepared, maintained or used by an institution or on its behalf;

2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and

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

The phrase "labour relations or employment-related matters" has been found to apply in the context of:

- a job competition [Orders M-830, PO-2123]
- an employee's dismissal [Order MO-1654-I]
- a grievance under a collective agreement [Orders M-832, PO-1769]
- disciplinary proceedings under the *Police Services Act* [Order MO-1433-F]
- a "voluntary exit program" [Order M-1074]
- a review of "workload and working relationships" [Order PO-2057]
- the work of an advisory committee regarding the relationship between the government and physicians represented under the *Health Care Accessibility Act* [*Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)* , [2003] O.J. No. 4123 (C.A.)]

The phrase "labour relations or employment-related matters" has been found *not* to apply in the context of:

- an organizational or operational review [Orders M-941, P-1369]
- litigation in which the institution may be found vicariously liable for the actions of its employee [Orders PO-1722, PO-1905]

The phrase "in which the institution has an interest" means more than a "mere curiosity or concern", and refers to matters involving the institution's own workforce [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*(cited above)].

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

In order to establish that the *Act* does not apply to the records, the City must satisfy the criteria set out in the three part test, above.

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

The City provided information surrounding the pay equity scheme in Ontario. The City advised that the *Pay Equity Act* (*PEA*) was established to redress gender discrimination in the compensation of employees employed in female job classes in Ontario, and requires that affirmative action be taken to correct that situation.

The *PEA* requires all public sector employers to develop and post pay equity plans, which describe, in detail, how an employer will establish its wage rates to meet the goals of the *PEA*. As part of that process, the City is required to prepare documents to illustrate to pay equity officials that it has complied with the legislation and how it has arrived at that destination.

With respect to the records at issue in this appeal, the City submits that they were prepared by the City in order to comply with the *PEA*'s requirements, and were created as a result of meetings, consultations, discussions or communications.

In his representations, the appellant does not dispute that the records were prepared by the City or that they were created as a result of meetings, consultations, discussions or communications.

I am satisfied that the records were prepared "in relation to" meetings, consultations, discussions or communications and therefore I find that the first two parts of the test have been met by the City.

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

I must now determine whether the City has satisfied the third part of the test. The City must demonstrate that the meetings, consultations, discussions or communications to which the records relate were about labour relations or employment-related matters in which the institution has an interest.

The City submits that documents prepared as part of its obligations under pay equity legislation relate to the relationship between an employer and an employee and are, therefore, related to the "employment of a person." Similarly, the City submits that the records relate to human resources or staff relations issues arising from the employer/employee relationship and are, therefore, "employment-related matters."

The City notes that the records do not arise out of a collective bargaining relationship, as they pertain to non-unionized employees. However, the City argues that the *Act* does not require the records to arise out of a collective bargaining relationship to be outside the scope of the *Act* under section 52(3)3.

In addition, the City submits that the records relate to employment-related matters in which the City has an interest, because they refer to matters involving the City's own workforce.

Lastly, the City further states that:

> …[A]n employer's pay equity plan can be challenged by way of a complaint by, among other persons, any employee or group of employees. Therefore, records are also collected, prepared, maintained or used on behalf of the City in anticipation of proceedings before the Hearings Tribunal established under the *PEA* to hear complaints in regard to a pay equity plan.

The appellant submits that the records do not relate to "labour relations," as they do not relate to unionized employees who participate in and are subject to the collective bargaining process. However, the appellant, relying on Order PO-2157, concedes that the records relate to "employment-related matters," and states:

> Accepting that the documents requested concern employment-related matters, the remaining question is whether or not the institution "has an interest" with regard to each of the outstanding documents.

With respect to whether the City "has an interest" in the records, the appellant cites Order P-1242 and states that:

> …[A]n "interest" is more that mere curiosity or concern. An "interest" must be a legal interest in the sense that the matter in which the Ministry has an interest must have the capacity to affect the Ministry's legal rights or obligations.
>
> The non-union appellant does not have the right to grieve a decision made by the City but, if the appellant is dissatisfied with the terms and conditions or employment, there may be other legal remedies available. With regard to the outstanding requested documents in the current case, only the Pay Equity Plan appears subject to any obvious legal process of complaint and adjudication. The other requested documents don't meet the threshold of "legal interest" as defined earlier. (Even regarding the Pay Equity Plan, the *Pay Equity Act* requires in its section 1(3) that copies of Plans be provided to affected employees.)

***Analysis and Findings***

In *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner),* cited above, the Ontario Court of Appeal addressed the question of whether the term "interest" connotes a "legal" interest. The Court addressed this issue in the context of section 65(6)3 of the *Freedom of Information and Protection of Privacy Act*, the equivalent of section 52(3)3 of the *Act*:

> In arriving at the conclusion that the words "in which the institution has an interest" in s. 65(6)3 must be referring to a "legal interest" in the sense of having the capacity to affect an institution's "legal rights or obligations", the Assistant Privacy Commissioner stated that various authorities support the proposition that an interest must refer to more than mere curiosity or concern. [See note 10 at end of document] I have no difficulty with the latter proposition. It does not however lead to the inevitable conclusion that "interest" means "legal interest" as defined by the Assistant Privacy Commissioner.
>
> …
>
> …To import the word "legal" into the subclause when it does not appear, introduces a concept there is no indication the legislature intended.

The Court therefore rejected the need for a "legal interest" under this section, finding instead that an institution's "interest" must be "more than a mere curiosity or concern." In addition, an institution's "interest" must relate to the proper management of the institution's own workforce [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above and Orders PO-2163, PO-2212, PO-2234 and PO-2374].

I accept that, as an employer, the City has a management interest in fulfilling the requirements of the *PEA*, as it directly affects the remuneration of particular employees and involves a legislated duty. In my view, this interest in the records is one that is "more than a mere curiosity or concern" and relates to the proper management of the City's own workforce.

I agree with the City that the records are related to matters in which the City is acting as an employer and that the remuneration of employees, as well as, comparisons between female and male salaries, form their subject matter. In particular, the City's position, with which I agree, is that the records relate to its own work force and are, therefore, employment-related matters in which they have a sufficient interest. Additionally, the City's duty to comply with the *PEA* by developing pay equity plans and demonstrating how it arrived at the contents of the plans is, in my view, an employment-related matter.

I further find that these employment-related matters are separate and distinct from matters related to the City's employees' actions. Upon my review of the contents of the records, I find that the records simply do not concern the actions or inactions of an employee where the employee's

conduct may give rise to a civil action in which the Crown may be held vicariously liable for torts caused by its employees [*Ontario (Ministry of Correctional Services) v. Goodis*, cited above].

Accordingly, I find that the City has established that the records concern an employment-related matter in which it has the requisite "interest" and that the third requirement of the test under section 52(3)3 [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner),* cited above] is satisfied. Therefore, as all three parts of the test have been met, I find that section 52(3)3 applies to the records in their entirety. As section 52(3)3 applies, it is not necessary for me to consider whether section 52(3)1 also applies to exclude the records at issue from the scope of the *Act*.

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

Section 52(4) sets out exceptions to the exclusionary provisions of section 52(3). If the records fall within any of the exceptions in section 52(4), the *Act* applies to them. Section 52(4) states:

> This Act applies to the following records:
>
> 1. An agreement between an institution and a trade union.
>
> 2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.
>
> 3. An agreement between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees.
>
> 4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment.

The City submits that the records, by their very nature, are not an "agreement." Alternatively, the City submits that the appellant has formally contested the *PEA* process and decisions that have been made by the Pay Equity Hearings Tribunal and, hence, there can be no "agreement" while this process is in progress.

The appellant submits that the records constitute "agreements" under section 52(4). The appellant states:

> As non-union employees we do not get to actively sign or endorse a typical "agreement" with the employer. Even the Pay Equity Plan process did not *require* employers to consult or negotiate with their non-union employees. The employer was only required to develop and post a Plan and receive comments. Employee "agreement" to a Pay Equity Plan can only be assumed by way of an *absence* of objections from the affected employees during the mandatory period of posting of a Plan. Even if these Plans were considered to be "agreements" suitable for sharing, the final Plan only contained partial information supporting specified Pay Equity purposes. For example, the values assigned to *non*-female jobs, their placement into pay bands and their salary ranges similarly effective January 1, 1990 was information not included. The sources of "agreement" for these excluded jobs must be sought elsewhere. My list of requests is that "elsewhere."
>
> In short, the documents I request represent or contain a series of "agreements" leading up to a final agreement in the form of a Pay Equity Plan which was uncontested until the manner of its implementation was learned. This type of agreement is an exception per subsection 52(4)3 …
>
> To the limited extent that non-union employees can be said to be party to very one-sided "negotiations," this is the type of "agreement" that the records at issue constitute. Each individual employee, to the extent that he/she is given an opportunity to participate, is responsible to agree/disagree.

Based on my review of the records, I find that the exceptions in section 52(4)1, 52(4)2 and 52(4)4 are not applicable to the records at issue, as they are clearly not collective agreements between an employer and a trade union, nor are they settlement agreements reached as a result of a labour relations or employment-related proceeding before a court or tribunal. In addition, the records do not contain any expense accounts.

Under section 52(3)3, I must consider whether the records contain agreements between an institution and one or more employees, resulting from negotiations about employment-related matters between the institution and the employee or employees. The City argues that the records are by their nature not "agreements." The appellant argues that the records consist of a series of "agreements" leading up to a final agreement, namely the Pay Equity Plan, which is available to employees to review and to comment on.

In order for section 52(4)3 to apply, the record itself must be an agreement that was negotiated between the employer and the employee [Order P-1302]. Past orders of this office have found that, for example, severance agreements [Orders MO-1676, MO-1711, and PO-2564] and negotiated termination agreements [Orders MO-1731, MO-1776, MO-1622, MO-1970, and MO-

1941] fall within this exception.

I accept the City's submissions that the records were created in order to fulfill its obligations under the *PEA*, and are not the result of negotiations between an employee or employees and the City. Even the appellant in his representations concedes that the records were not the result of negotiations between the City and its non-union employees. The fact that non-union employees may have had an opportunity to comment on the contents of the plans does not turn those plans into agreements. Therefore, based on the representations of the parties and my review of the records, I find the records do not constitute "agreements" as contemplated under section 52(4)3 of the *Act*.

Consequently, as none of the exceptions in section 52(4) apply, and as I have already found that section 52(3)3 applies, I find that the records in their entirety are excluded from the *Act*.

## SEARCH FOR RESPONSIVE RECORDS

The appellant claims that the City has not conducted a reasonable search for records responsive to parts 3, 6 and 10 of his request.

Parts 3, 6 and 10 of the appellant's request are:

- The Council Report (circa 1991) that accompanied the first proposed Pay Equity Plan for non-union employees, and the resultant Council Decision;

- Copies of all correspondence about Pay Equity and JJE/Internal Equity from the Corporation directly to All Non-Union Employees;

- The Commissioner of Human Resources sent a memo dated June 12, 1992 (copy attached) to Non-Union Staff indicating that a Pay Equity Plan posted March 10, 1992 had, effective June 8, 1992, passed its 90-day review period without the receipt of any comments that would require any amendments to that Plan. I request copies of any documents that would explain why that uncontested Plan was not implemented.

During the mediation stage of this appeal, the City advised the mediator that it conducted a further search for records and was unable to locate any additional records responsive to parts 3, 6 and 10 of the appellant's request.

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 [Order 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.

The appellant submits that he did receive records responsive to the above referenced parts of his request, but believes that further records exist that were not disclosed to him.

In particular, with respect to parts 3 and 10 of his request, the appellant submits that another City Council report must exist, explaining why the Pay Equity Plan was not implemented.

With respect to part 6 of his request, the appellant states:

> This is not personal information. It is correspondence I, as a non-union employee at the time, should have received. I want to confirm I have received all. I am not convinced the City conducted a thorough search for the information as it failed to provide some of the correspondence of which I was already aware.

With respect to part 10 of his request, the Appellant submits that a documented decision by City Council and/or City staff members not to implement the 1992 Pay Equity Plan must exist and was not disclosed to him.

In its representations, the City states:

> The appellant maintains that documents exist explaining why the City did not implement pay equity plans (see request identified as number 3 and 10). These do not exist. The City implemented its pay equity plans, so there are no documents explaining why it did not implement the plans. The City is required by law to implement the plan. The appellant's expectation that there must be further material does not become a self-fulfilling prophecy that magically creates the documents he believes to exist. They do not exist. Our efforts to search for responsive records are well documented.

The City conducted a search for records and disclosed a number of records to the appellant. In addition, during mediation, the City conducted a second search for records responsive to parts 3, 6 and 10 of the appellant's request, and found no further responsive records. The appellant has not provided a reasonable basis for concluding that any additional records exist.

In the circumstances of this appeal, I am satisfied that the City has made reasonable efforts to search for responsive records in response to the appellant's request.

## ORDER:

I uphold the City's decision.

Original Signed By: June 2, 2009
Brian Beamish
Assistant Commissioner