



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

ORDER MO-2452

Appeal MA08-214

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 access to records related to the recruitment of City firefighters in the previous year, including recruiting contract information and the requester's own participation in the program. Shortly thereafter, the requester submitted a revised request, clarifying that she sought access to the following information:

1. Contract information between City of Windsor and [a named company]/The Fitness York Fire Fighter Fitness Test for the recruitment year of 2007-2008;
2. My written test scores for the CPS - Entry Fire Fighter Test and OS - Fire Fighting Assessment tests as conducted by [a named company] for Windsor Fire for the recruitment year of 2007-2008;
3. The answer key for the CPS - Entry Fire Fighter Test and OS - Fire Fighting Assessment tests as conducted by [a named company] for Windsor Fire for the recruitment year of 2007-2008; and
4. Any supporting documentation to the contract mentioned above for the year of 2007-2008.

The City issued a decision letter, confirming the clarification of the request. The City claimed that the records responsive to parts one and four of the request fall outside of the *Act*, due to the operation of the exclusion in section 52(3) (labour relations and employment records). Accordingly, the City takes the position that the records are not subject to the access provisions of the *Act*. With respect to part two of the request, the City advised the requester to contact the named company, the provider of the written test to obtain access to it. The City also took the position that records responsive to part three of the request are not under the custody or control of the City, "as they reside with outside agencies."

The requester, now the appellant, appealed the City's decision to this office, which appointed a mediator to try to resolve the issues between the parties. During mediation, the appellant narrowed her request to include only the information related to the first and fourth parts of the request, namely the contract between the City and the named company, and any supporting documentation. The appellant expressed the view to the mediator that the supporting documentation referred to in part four could include information on the process used to select the named company, as well as any amendments to the contract. Accordingly, parts two and three of the request are removed from the scope of this appeal and will not be addressed further in this order.

During mediation, the City prepared an index of records, and provided it to the appellant. Upon review of the index, the appellant advised the mediator that she does not wish to pursue access to two documents: a letter to candidates (identified as an attachment to Record 4); and two lists of names of firefighter applicants/candidates (identified as attachments to Record 7). The appellant also indicated that she did not wish to pursue access to the personal information of any applicants that may be contained in the records, or any information which may be publicly available.

Regarding the selection of the named company, the City advised the mediator that “Council Resolution CR46/2008 [adopted the named company’s] Testing and Assessment Services to administer, deliver and support the physical testing assessment component and the Occupational Screening for Firefighting Testing.” The City explained that its decision on this issue resulted from a wide consultation with counterparts across Canada, and a review conducted by a specified university. While the appellant accepted the City’s explanation about the selection of the named company, she still wishes to pursue access to the information relating to the contract between the City and the named company, and to its supporting documentation. The appellant maintains that there is a public interest in disclosure of the requested information, raising the possible application of section 16 (public interest override) of the *Act*.

Finally, the City advised that if this office finds that section 52(3) does not apply and that the records are within the scope of the *Act*, it would argue, in the alternative, that the records are exempt under section 10(1) (third party information) of the *Act*.

It should be noted that due to the City’s initial position that section 52(3) applied to exclude the records, it had not provided notice to the company named as provider of the testing materials and services (the affected party). Section 21 of the *Act* requires notification of affected parties prior to disclosure of information that may be subject to the mandatory exemption for confidential third party information in section 10(1) of the *Act*. In this way, affected parties are permitted an opportunity to provide submissions to the institution as to whether the requested record should be disclosed.

No further resolution of the issues through mediation was possible, and the appeal was transferred to the adjudication stage of the process, where it was assigned to me to conduct an inquiry. At this point, I decided to notify the affected party. Accordingly, I sent a Notice of Inquiry outlining the issues to the City and the affected party, seeking representations. I received representations from the City, as well as brief correspondence from the affected party objecting to the disclosure of records related to the contract.

Next, I sent a modified Notice of Inquiry to the appellant, along with a complete copy of the City’s representations, seeking her submissions, which I received. I decided that it was necessary to seek reply representations from the City and sought these by sending a complete copy of the appellant’s submissions. The City submitted brief representations in reply.

RECORDS:

Remaining at issue in this appeal are nine records, consisting of emails, internal City memoranda, contract documents and notes (totalling 31 pages).

DISCUSSION:

LABOUR RELATIONS AND EMPLOYMENT RECORDS

The City takes the position that the *Act* does not apply to the records because they fall within the ambit of sections 52(3)2 and 52(3)3. These provisions 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:

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.

The interpretation of sections 52(3) and (4) is a preliminary issue which goes to the jurisdiction of the Commissioner, or her delegate, to continue an inquiry into the issue of whether or not a record is subject to any of the exemptions contained in the *Act*. If the requested record falls within the scope of section 52(3), it would be excluded from the scope of the *Act*, unless it is found to fall within the ambit of one of the exceptions in section 52(4). Section 52(3) is record-specific and fact-specific. If it applies to a specific record, in the circumstances of a particular appeal, and none of the exceptions listed in section 52(4) are present, then the record is excluded from the scope of the *Act* and not subject to the Commissioner's jurisdiction.

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]. 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 [Order MO-2024-I].

The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships. The meaning of "labour relations" is not restricted to employer-employee relationships [*Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.)]. See also Order PO-2157].

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

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

The type of records excluded from the *Act* by section 52(3) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees' actions [*Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.)].

Based on my findings below, it is only necessary to set out the required elements of section 52(3)3. For section 52(3)3 to apply, it must be established 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 negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution; 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]
- the work of an advisory committee regarding the relationship between the government and physicians represented under the *Health Care Accessibility Act* [*Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.)]

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

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

The phrase “in which the institution has an interest” means more than a “mere curiosity or concern”, and refers to matters involving the institution’s own workforce [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2000), 55 O.R. (3d) 355 (C.A.), at para. 35].

If the records fall within any of the exceptions in section 52(4), the *Act* applies to them. In my view, section 52(4) has no application in the circumstances of this appeal.

Representations

Although the City originally claimed that section 52(3) applied to all of the records at issue in this appeal, it revised that position in its initial representations by stating it would release the contract with the affected party “subject to the [affected] party identifying any information contained in that contract that it feels should be withheld under s. 10 of [the *Act*].” The City explains that its revised decision about the contract is based on its belief that the contract itself does not fall outside the *Act*. However, the City maintains that the “supporting documentation” to the contract falls within the ambit of sections 52(3)2 and 52(3)3. The City submits:

The agreement for services itself is not in relation to labour relations or employment related matters, [but] the services to be provided that are set out in Schedule “A” of the contract pertain to the preparation, administering, overseeing, collection and grading of a test in regard to labour relations and employment-related matters. In that regard, meetings, consultation discussions and communication leading up to the contract are about labour relations or employment-related matters and fall outside of the ambit of the *Act*.

Further, documents created after the contract was made pertain to issues about the testing process for prospective firefighters and therefore relate to “labour relations” and/or “employment-related matters” in which the City has an interest by virtue of s. 52(3)3 and fall outside of the ambit of the *Act*. We note [that] Orders M-830 and PO-2123 have determined that a job competition has been found to be “labour relations or employment-related matters”...

In her representations, the appellant maintains that the records are within the scope of the *Act*. She submits that “I am trying to obtain records that pertain to the contract that are not related to labour relations or the employment of any particular individuals” but, instead, were developed to structure an “anticipated hiring.” The appellant also notes that the records do not fall within any of the exceptions in section 52(4) “because the contract information does not relate to an employee or employees.” The remainder of the appellant’s representations do not directly address section 52(3), but more generally convey her concern that there may have been an exclusionary bias in the recruitment process.

In reply, the City submits that Orders M-830 and PO-2123 stand for the principle that records do not fall within the exclusion based on whether they relate or do not relate to an individual. The City states that if the records “relate to a job competition, which is the case, they are excluded from the *Act*.” The City submits that:

The appellant’s desire to see if any documents reveal such an intent [to exclude individuals] ... does not dispel the essential nature of those documents as being in regard to a job competition and excluded by virtue of being about “labour relations or employment-related matters.”

Analysis and Findings

Notwithstanding the City's apparent change in position regarding section 52(3) and the contract between it and the affected party for the provision of firefighter recruitment testing services, I must still review whether that record meets the criteria established under section 52(3) as this issue goes directly to my jurisdiction to conduct an inquiry.

Based on my review of the records, the representations and the overall circumstances of this appeal, I find that all of the records at issue were collected, prepared, maintained or used by the City. Accordingly, the first requirement of section 52(3)3 is met.

Regarding the second part of section 52(3)3, I note that previous orders have found that records produced or prepared in the context of a job competition are "communications" for the purposes of section 52(3)3 (Orders M-86, P-1258, PO-1667, PO-2035 and PO-2123). In this appeal, I am satisfied that the collection, preparation, maintenance or use of the records at issue was in relation to meetings, consultations, and discussions, as well as communications. Accordingly, I find that the second requirement for exclusion from the *Act* under section 52(3)3 is met.

Finally, I am also satisfied that these meetings, consultations, discussions or communications were about employment-related matters in which the institution has an interest for the purpose of the third requirement of section 52(3)3 of the *Act*. Past orders of this office have established that an institution's entire hiring process for a position is considered to be an employment-related matter, and that records regarding recruitment and screening processes can qualify as an "employment-related matter" [Orders P-1627, P-1685-F, PO-1760 and MO-1291]. In my view, the records at issue, which document various aspects of the City's firefighter recruitment process constitutes an employment-related matter for the purposes of the third requirement of section 52(3)3.

The next question to be answered is whether or not the City's firefighter recruitment process is an employment-related matter in which the City "has an interest." In this regard, I note that in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355, leave to appeal refused [2001] S.C.C.A. No. 509), the Ontario Court of Appeal stated:

Having regard to the purpose for which the section was enacted, 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 institutions' own workforce where the focus has shifted from "employment of a person" to "employment-related matters" [at paragraph 35].

The Court in *Ontario (Solicitor General)* (cited above) also held that an "interest" must "... refer to more than mere curiosity or concern." In the circumstances of this appeal, I am satisfied that the City has a significant interest, as the employer, in constructing, determining and managing the process by which it selects its firefighting personnel, and that this interest extends beyond

“mere curiosity or concern” [Orders PO-2077-R and PO-2123]. Accordingly, I find that the requisite “interest” in the firefighter recruitment process that generated the records at issue in this appeal has been established and that the final requirement of section 52(3)3 is satisfied.

As all three parts of the test have been met, I find that section 52(3)3 applies to the records and that they are, therefore, excluded from the scope of the *Act*. As section 52(3)3 applies, it is not necessary for me to consider whether section 52(3)2 also applies to exclude the records at issue from the scope of the *Act*. I further find that none of the exceptions to section 52(3) in section 52(4) apply in the circumstances of this appeal.

Since the *Act* does not apply to the records at issue, I am unable to review the City’s alternative decision to exempt the information from disclosure pursuant to section 10(1), or to consider whether there is compelling public interest that would require its disclosure.

ORDER:

I uphold the City’s decision.

Original signed by: _____
Daphne Loukidelis
Adjudicator

_____ August 25, 2009