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

ORDER MO-2455

Appeal MA08-469

City of Toronto

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NATURE OF THE APPEAL:

The City of Toronto (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act)* for access to identified reports prepared by a consulting firm. The request specifically stated:

> This is a request under [the *Act*] for the Management/Exempt Compensation review done by [a named consulting firm] and reported to [an identified] meeting of the City's Employee and Labour Relations Committee.

The request also identified specific information the requester was interested in obtaining, including the cost of the study, the number of drafts done of the study, the first draft study presented to the City's human resources officials and a copy of the draft presented to the Employee and Labour Relations Committee, the current status of the management/exempt compensation review and next steps, and the next reporting date on the matter to the Employee and Labour Relations Committee.

In response, the City identified two responsive records and denied access to the records in their entirety on the basis that the records fall outside the scope of the *Act* pursuant to section 52(3)3. The City's decision stated in part:

> A report entitled *Best Practices Review Management Exempt Compensation Program* (March 25, 2008) and a report entitled *Compensation Review Phase I: Market Review* (March 25, 2008) were provided to the City by [the named consulting firm]. These are the only two reports provided to the City by [the named consulting firm]. No other drafts or studies have been given. These reports provide a summary of [the named consulting firm's] review and form the basis of future consideration and recommendations.

The City also advised that if the records were subject to the *Act*, access to the records would be denied in their entirety on the basis of the exemptions in sections 6(1)(b) (closed meeting) and 11(f) (plans relating to the management of personnel or the administration of an institution that have not yet been put into operation or made public).

In addition, the City identified the final cost of the study, and advised the requester that the matter was still under review, and that staff had been directed to do additional work/analysis and would be reporting back to the Employee and Labour Relations Committee in the first quarter of 2009, although no specific date had been assigned.

The requester, now the appellant, appealed the City's decision.

During mediation, the appellant confirmed that she was appealing only the denial of access to the two records identified by the City in its decision letter. Mediation did not resolve this appeal, and it was transferred to the inquiry stage of the process. I sent a Notice of Inquiry setting out the facts and issues in this appeal to the City, initially, and the City provided representations in

response. I then sent the Notice of Inquiry, along with a severed copy of the City's representations, to the appellant, who also provided representations in response.

RECORDS:

The two records remaining at issue are the following two reports prepared by a consulting firm:

1) *Best Practices Review Management Exempt Compensation Program* (March 25, 2008)
2) *Compensation Review Phase I: Market Review* (March 25, 2008)

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 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:
>
> > 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) apply, 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 two reports were collected, maintained and used by the City, and it refers to the meetings, consultations and communications about the City's compensation program and the results of the consulting firm's review of identified positions.

The appellant does not directly address this part of the test in her 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 two reports were collected, maintained and used by the City in relation to meetings, consultations, discussions or communications about the City's management/exempt compensation program, specifically the results of [the consulting firm's] review of the management/exempt group and the inside/outside union positions. The meetings, consultations, discussions etc. were amongst City staff, officials etc. as well as with the consultants and include a meeting of the Employee and Labour Relations Committee held on May 20, 2008 …. The reports are continuing to be maintained and used for further discussions, meetings, communications, etc. with respect to the production of a final report on the compensation system.

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

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 states:

> The City submits that these meetings, consultations, discussions or communications were about employment-related matters in which the institution has an interest.
>
> The City's Employee and Labour Relations Committee has already held one meeting to discuss the reports' findings and recommendations and issues arising from the reports. Staff have been directed to provide a final report to the Committee for further discussions/deliberations with a view to making a final decision on whether or not to renew, modify or replace the City's existing management compensation system.
>
> The City submits that the above are employment-related matters that have implications for both the City and its employees, in particular its management/exempt staff.
>
> The City further submits that its interest in these employment-related matters is not mere or idle curiosity. In order to fulfil its legal obligations as an employer, the City must make decisions on how to compensate its employees for their work….

The City also provides some information in the confidential portion of its representations about how the disclosure of the information contained in the reports could affect the City.

The appellant's representations do not address the three-part test set out above, rather, her representations focus on the interest there is in access to records of this nature, and the reasons for this interest. She states:

> The reason I felt it important to appeal the City's decision not to release the two reports … was because they cost taxpayers $75,000.

The appellant, who is a member of the media, also identifies her concerns that the *Act* is being used by the City to withhold information that ought to be released. She refers to information of which she was made aware that there is "nothing" in the two reports that could not be divulged publicly, and her position that the reason the records were not disclosed is not because they are "highly sensitive" but for other reasons. She also takes the position that the reports are simply an "environmental scan" of what the City provides in the way of a merit pay scheme compared to what other public sector institutions provide, and that the reports provide a range of options the City might consider. Furthermore, the appellant refers to decisions which have since been made by the City and which relate to the issues addressed in the reports.

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" labour relations or employment-related matters.

In this appeal the two records at issue are identified above. The City has stated that the information in the records is clearly employment-related, and deals with the City's existing management compensation system and how to compensate its employees for their work.

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

Specifically, I make the following findings:

Record 1: Best Practices Review Management Exempt Compensation Program

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. This record, prepared by the named consultant, relates to the City's compensation program for identified employee groups. Although portions of this record are general in nature, dealing with a review of best practices, on my review of this record, I find that it directly addresses and reviews the City's compensation program, and includes specific findings and recommendations relating to the City's program. Accordingly, I am satisfied that the record relates directly to the compensation matters relating to the City's workforce and that it fits within the exclusionary provision in section 52(3)3.

Record 2: Compensation Review Phase I: Market Review

Similar to my finding for Record 1, I am satisfied that Record 2 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. This record, also prepared by the named consultant, relates to the City's compensation program for identified employee groups. Although this record's title suggests that the focus of this record is more in the nature of an "environmental scan," as suggested by the appellant, on my review of this record, I find that it directly addresses and reviews the City's compensation program, and also includes specific findings and recommendations relating to the City's compensation program for identified employee groups. Although the record does include some general information about the compensation programs in other institutions, the focus of this record is the City's compensation program. As a result, I am satisfied that the record relates directly to the compensation matters relating to the City's workforce, and that this record also fits within the exclusionary provision in section 52(3)3.

I made a similar finding in Order MO-2332, where I reviewed records requested from the City of Hamilton relating to a review of that City's Legal Services Department. In that Order I stated:

> … 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.

Similarly, in this appeal I find that the two records deal predominantly with compensation issues, and accordingly deal with the management of the City's workforce.

In summary, I am satisfied that the two records at issue in this appeal were collected, prepared, maintained or used for meetings, consultations, discussions or communications about employment-related matters. As a result, 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. Accordingly, 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*.

Additional matter

As an additional matter, the appellant has indicated her view that these records ought to be available to the public, that there are no good reasons why these records should be withheld, and that there is a compelling public interest in these records. Even if the appellant is correct in her assessment of the records (on which I make no finding), the City has taken the position that the records fall outside the scope of the *Act*, and I have found that the records indeed fall within the exclusionary provision in section 52(3)3. Accordingly, I do not have the jurisdiction to review whether the exemption claims also made for these records would have applied to them, or whether the public interest override might have also applied.

ORDER:

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: August 31, 2009
Frank DeVries
Adjudicator