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

ORDER MO-2542

Appeal MA08-471

City of Ottawa

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BACKGROUND

This appeal concerns a request for information for records about an employee-paid, nontaxable long-term disability plan (the LTD plan) that existed at the City of Ottawa prior to amalgamation of the municipalities in the Ottawa area in 2001. The institition in this appeal, the amalgamated City of Ottawa, explains that as part of the arrangement with the former City of Ottawa, employees would be reimbursed on their contributions by the former City of Ottawa and would have to pay taxes on the amounts reimbursed. This LTD plan was underwritten by Confederation Life and subsequently taken over by Manulife in 1994. On April 1, 1988, a taxable long-term disability plan was also created, and eligible employees were given the opportunity to participate in either plan. Some of the employees chose to remain with the LTD plan. Between 1988 and 2001, a surplus accumulated in the LTD plan and has been accumulating interest. The LTD plan then closed in 2001, at the time of amalgamation. Following its review of the matter, the amalgamated City of Ottawa (the City) took the position that no employee or former employee maintains any interest in the surplus.

THE REQUEST

The City received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*) for access to copies of all records related to the City's review of the LTD plan. As set out in the request, this included the following specified records:

1. Policy Plan GH 36274;

2. Policy Plan GH 35345;

3. City Council Minutes that approved the above-noted policies;

4. Memorandum dated January 31, 1992 from the Commissioner of Human Resources (HR) to all Civic Institute of Professional Personnel (CIPP) Members and "CIPP Exempt";

5. All reports prepared by [a third party] and provided to the City between January 1992 and October 25, 2007 as they related to the LTD investment plan;

6. That portion of the City's Annual Budget Report reflecting the LTD status as it related to the CIPP members and CIPP exempt staff for the budget years of 1992, 1994, 1996, 1998, 2000, 2002, 2004, and 2006;

7. Memorandum from [a named individual] and/or the Commissioner of Finance, to the Commissioner of HR notifying the latter to "stop LTD employee deductions as being illegal pursuant to Revenue Canada," [possibly between 1999 and 2001] and;

8. City Council Minutes reflecting "that the surplus was created by actions taken by the former City of Ottawa to resolve a pre-existing policy deficit and to reimburse premiums paid by former City of Ottawa employees".

The City conducted a preliminary review of the request and issued a fee estimate. Upon receipt of one-half of the estimated fee, the City issued its access decision. The City granted partial access to the records it identified as responsive to the request and reduced its fee to what it stated was the actual cost for processing the request. The City advised that upon payment of the difference between the reduced fee and the deposit paid, the City would provide the requester with copies of the records it had decided to disclose. The City relied on the discretionary exemption at section 15(a) (record publicly available) and the exclusionary provision at section 52(3) of the *Act* (labour relations and employment) to deny access to the records it withheld, which included a Report prepared by the third party identified in the request. Finally, the City advised that Policy Plan GH 36274 (Item 1, above) and the memorandum referenced in Item 7, above, could not be located.

The requester (now the appellant) appealed the City's decision to deny access to the withheld responsive records. In addition to taking issue with the City's refusal to disclose the remaining responsive records, the appellant asserted in her letter of appeal that the City had failed to take reasonable steps to locate Policy Plan GH 36274 and the memorandum referenced in Item 7. As a result, the adequacy of the City's search for responsive records was added as an issue in the appeal. The letter of appeal also expressed concern that the fee listed in the decision letter was different from the fee estimate that the City had originally quoted.

During mediation, the appellant paid the remainder of the fee claimed and was provided with access to the records that the City had decided to disclose. Notwithstanding the payment of the balance of the fee, the appellant asserted that she did not want to pay for searches or photocopies for records that she had not received. The City also issued a supplementary decision letter, enclosing an index of records. The supplementary decision letter:

- corrected a typographical error in the initial decision letter and confirmed that it was Policy Plan GH 35345 (Item 2, above) that could not be located, rather than Policy Plan GH 36274 (Item 1, above) as had been originally stated;

- advised that if the withheld records were not excluded under section 52(3) of the *Act*, the City now wished to rely on the discretionary exemptions at sections 7(1) (advice and recommendations) and 12 (solicitor-client privilege) and the mandatory exemption at section 14(1) (personal privacy) with reference to the presumption at section 14(3)(d) (employment history) of the *Act*, in support of its decision to deny access.

Also at mediation, the City agreed to undertake another search for Policy Plan GH 35345 and the memorandum referenced in Items 2 and 7 of the appellant's request. It did so but no additional responsive records were located. The City also confirmed that it had originally relied on the discretionary exemption at section 15(a) of the *Act* in response to the portions of the appellant's request that sought access to public City Council documents, including City Council Minutes.

The appellant subsequently confirmed that she had conducted her own search for additional records at the City of Ottawa Archives and had located a City Council Minute from 1999, relating to a particular report. The appellant theorized that in all the circumstances, there should have been some "reporting back" to Council with respect to this report and, as a result, additional responsive records should exist. The City then conducted another search for any records relating to a "reporting back," but none were found. After further discussion with the Mediator, the appellant ultimately decided to only challenge the adequacy of the City's search for Policy Plan GH 35345 (hereinafter referred to as the Policy Plan). As a result, the adequacy of the City's search for other responsive records is no longer at issue in the appeal.

Mediation did not resolve all of the issues in this appeal and it was moved to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*.

I commenced the inquiry by sending a Notice of Inquiry setting out the facts and issues in the appeal to the City. As the records at pages 72 to 73, 78 to 85 and 90 to 92 appear to contain the personal information of the appellant, I added the potential application of the discretionary exemptions at sections 38(a) (discretion to refuse requester's own information) and 38(b) (personal privacy) as issues in the appeal. The City provided representations in response to the Notice. I then sent a Notice of Inquiry to the appellant, along with the non-confidential representations of the City. The appellant provided representations in response to the Notice. In her representations the appellant incorporates the contents of both the initial and revised reports that the Mediator prepared in this appeal. The appellant also takes the position that she never asked for personal information of other employees and that all she "wanted and still wish to have is City Council's rules on the issue for a better understanding of the matter relating to deductions from my paystubs."

RECORDS:

The records remaining at issue are set out in an index of records prepared by the City and provided to the appellant. These consist of letters, email correspondence and a Report prepared by a third party.

SEARCH FOR RESPONSIVE RECORDS

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 of the *Act* [Orders P-85, P-221 and 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 [Orders P-624 and PO-2559]. To be responsive, a record must be "reasonably related" to the request [Order PO-2554].

A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request [Orders M-909, PO-2469, PO-2592].

A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control [Order MO-2185].

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 [Order MO-2246].

Representations

The City's Representations

The City submits that it has carried out an extensive and thorough search of its records during the processing of the appellant's access request in order to locate responsive records, including the Policy Plan. As set out in an affidavit the City provided in support of its positions, the following steps were taken to locate the Policy Plan:

- experienced staff from the City's Legal Services Department, Clerk's Department, and Employee Services conducted searches of internal records. The Deponent of the affidavit states that these were the appropriate locations for the searches because the request is for records concerning the City's Employee Services and Legal Services review of the status of the LTD plan and the policy surplus.

- Employee Services staff also directed that its third party LTD plan administrator, the third party that prepared the Report at issue in the appeal and external legal counsel, conduct a search of their records for a copy of the Policy Plan.

- finally, the City Archivist conducted a search of the City Archives for a copy of the Policy Plan.

The deponent of the affidavit states that she believes "that those areas of the City that would possibly possess documents related to the request were searched."

As set out in the Nature of the Appeal above, when the City was advised by the Mediator that the appellant had located a City Council Minute from 1999 relating to the Report at issue in this appeal, and of the appellant's position that there should have been a "reporting back," the City conducted a further search by contacting Archives directly and re-confirming with Committee and Council Services that there were no further records regarding the Report, including any "reporting back."

The City submits that despite these efforts it did not locate a copy of the Policy Plan. The City submits that while its staff cannot state with certainty why the searches were unsuccessful, it can only be assumed that any copies of the Policy Plan that might have been in the City's custody and control were inadvertently lost or misplaced.

The Appellant's Representations

The appellant submits that the Policy Plan must be somewhere, and she asks, "how can a public document be misplaced from the public domain?"

She submits that the former City of Ottawa City Council utilized public funds to award the contract to the third party, which was described as an Employee Benefit Review Project in the former City Council Minute approving the contract award.

She submits that the company was selected through a Request for Proposal. She states that the City Council Minutes discussing the contract award conclude that, "Upon Council's award of this contract, the firm will commence work immediately and it is anticipated that the project will be completed within 6 to 9 months." She submits that for the deponent to say that the company was not expected to report back "is ridiculous and contrary to Council's reasons for the contract."

The appellant submits that:

> City Council decisions cannot be inadvertently lost or misplaced as the City claims. Nor could any important memoranda from the Commissioner of Finance to the Commissioner of Human Resources as for the former instructing the later to "stop LTD employee deductions as being illegal pursuant to Revenue Canada" be vanished.

The appellant explains that she raised her concerns about the LTD Fund in a letter to the City prior to the official amalgamation. She asserts that the Policy Plan must have been in existence on that date. She submits that in the years that followed she repeatedly asked for a response to her original letter and for a copy of the policy that governed employee deductions. She submits that over the seven year span that she pursued a response to her original letter, at no time was she ever advised that the Policy Plan did not exist. She further submits that the 2007 response to her original letter implies that a full review of the matter was conducted. She queries how such a review could have occurred without referring to a copy of the Policy Plan.

Analysis and Finding

The affidavit included with the City's representations describes in detail the multiple searches it conducted in an effort to locate the Policy Plan. These included asking third parties to search for the record. In my opinion, with one exception, these searches were extensive and wide-ranging. Unfortunately, a copy of the Policy Plan was never found.

As set out above, in order to satisfy its obligations under the *Act*, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records within its custody or control [Orders P-624 and PO-2559]. In my view, with one exception, based on the multiple searches it conducted, the City has made a reasonable effort to locate the Policy Plan.

The one exception is with respect to the adequacy of the search conducted by the City's Legal Services Department. As set out in the supporting affidavit, the City bases its assertion that it conducted an adequate search for responsive records in part on the Manager of Legal Operations and Support Services (the Manager) being asked to search for responsive records, and the deponent of the affidavit receiving responsive records from the Manager. While there is extensive information provided by the City with respect to the searches conducted by its human resources department and by third parties, including external legal counsel, there is comparatively very little information about the actual scope of the search conducted by the Manager. For example, were individual City lawyers, who may have worked with the Policy Plan asked to conduct a personal search of their electronic or hard copy files?

In all the circumstances, I am not satisfied that the City has conducted an adequate search for a copy of the Policy Plan and I shall order the City to conduct a further search for the Policy Plan within the City's Legal Operations and Support Services department.

FEE FOR ACCESS

As set out in the Revised Mediator's Report, during mediation the appellant expressed concern with the fee that she had been charged:

> Specifically, the appellant stated that she did not want to pay a fee for searches or photocopies for records that she had not received. The City explained that the fee that had been charged reflected the original cost of the search and did not include the cost of copying records for which access was denied.

In addition to its specific submission on how it calculated the fee, set out in more detail below, the City submitted that:

> … under the *Act*, the requester is required to pay for the processing of the access request, including search time for responsive records that may not be disclosed once the processing of the request is complete. This position is reflected in s. 45(1)(a) of the *Act*, which states that the person making the request for access to a record is required to pay the costs of every hour of manual search required to locate a record. The *Act* does not state that the search time is payable only if the record is disclosed.

General principles

Section 45(1) requires an institution to charge fees for requests under the *Act*. That section reads:

A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,

(a) the costs of every hour of manual search required to locate a record;

(b) the costs of preparing the record for disclosure;

(c) computer and other costs incurred in locating, retrieving, processing and copying a record;

(d) shipping costs; and

(e) any other costs incurred in responding to a request for access to a record.

More specific provisions regarding fees are found in sections 6, 6.1, 7 and 9 of Regulation 823. Those sections read:

6. The following are the fees that shall be charged for the purposes of subsection 45(1) of the *Act* for access to a record:

1. For photocopies and computer printouts, 20 cents per page.

2. For records provided on CD-ROMs, $10 for each CD-ROM.

3. For manually searching a record, $7.50 for each 15 minutes spent by any person.

4. For preparing a record for disclosure, including severing a part of the record, $7.50 for each 15 minutes spent by any person.

5. For developing a computer program or other method of producing a record from machine readable record, $15 for each 15 minutes spent by any person.

6. The costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying the record if those costs are specified in an invoice that the institution has received.

6.1 The following are the fees that shall be charged for the purposes of subsection 45(1) of the *Act* for access to personal information about the individual making the request for access:

1. For photocopies and computer printouts, 20 cents per page.

2. For records provided on CD-ROMs, $10 for each CD-ROM.

3. For developing a computer program or other method of producing a record from machine readable record, $15 for each 15 minutes spent by any person.

4. The costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying the record if those costs are specified in an invoice that the institution has received.

7. (1) If a head gives a person an estimate of an amount payable under the *Act* and the estimate is $100 or more, the head may require the person to pay a deposit equal to 50 per cent of the estimate before the head takes any further steps to respond to the request.

(2) A head shall refund any amount paid under subsection (1) that is subsequently waived.

9. If a person is required to pay a fee for access to a record, the head may require the person to do so before giving the person access to the record.

Section 45(1)(b) includes time for severing a record [Order P-4]. Generally, this office has accepted that it takes two minutes to sever a page that requires multiple severances [Orders MO-1169, PO-1721, PO-1834, PO-1990].

Section 45(1)(b) does not include time for:

- deciding whether or not to claim an exemption [Order P-4, M-376, P-1536]
- identifying records requiring severing [MO-1380]
- identifying and preparing records requiring third party notice [MO-1380]
- assembling information and proofing data [Order M-1083]
- photocopying [Orders P-184 and P-890]
- preparing an index of records or a decision letter [P-741, P-1536]
- preparing a record for disclosure that contains the requester's personal information [Regulation 823, section 6.1].

The purpose of a fee estimate is to give the requester sufficient information to make an informed decision on whether or not to pay the fee and pursue access [Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699]. The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees [Order MO-1520-I]. In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated [Orders P-81 and MO-1614].

Where the fee is $100 or more, the fee estimate may be based on either

- the actual work done by the institution to respond to the request, or
- a review of a representative sample of the records and/or the advice of an individual who is familiar with the type and content of the records [Order MO-1699].

This office may review an institution's fee and determine whether it complies with the fee provisions in the *Act* and Regulation 823, as set out below.

Fee waiver

There are provisions in the *Act* pertaining to a fee waiver.

Section 45(4) of the Act requires an institution to waive fees, in whole or in part, in certain circumstances. Section 45(4) reads:

> A head shall waive the payment of all or any part of an amount required to be paid under subsection (1) if, in the head's opinion, it is fair and equitable to do so after considering,
>
> (a) the extent to which the actual cost of processing, collecting and copying the record varies from the amount of the payment required by subsection (1);
>
> (b) whether the payment will cause a financial hardship for the person requesting the record;
>
> (c) whether dissemination of the record will benefit public health or safety; and
>
> (d) any other matter prescribed by the regulations.

Section 8 of Regulation 823 sets out additional matters for a head to consider in deciding whether to waive a fee. Section 8(1) provides that the following are prescribed as matters for a head to consider in deciding whether to waive all or part of a payment required to be made under the *Act*:

1. Whether the person requesting access to the record is given access to it.

2. If the amount of a payment would be $5 or less, whether the amount of the payment is too small to justify requiring payment.

The fee provisions in the *Act* establish a user-pay principle which is founded on the premise that requesters should be expected to carry at least a portion of the cost of processing a request unless it is fair and equitable that they not do so. The fees referred to in section 45(1) are mandatory unless the requester can present a persuasive argument that a fee waiver is justified on the basis that it is fair and equitable to grant it or the *Act* requires the institution to waive the fees [Order PO-2726].

A requester must first ask the institution for a fee waiver, and provide detailed information to support the request, before this office will consider whether a fee waiver should be granted. This office may review the institution's decision to deny a request for a fee waiver, in whole or in part, and may uphold or modify the institution's decision [Orders M-914, P-474, P-1393, PO-1953-F].

The submission of the appellant as reflected in the Revised Mediator's Report may be interpreted as a request for a fee waiver. This is because she asserts that she does not want to pay a fee for searches for records that she had not received and section 8(1) of the regulations provides that in deciding whether to waive all or part of a payment required to be made under the *Act*, the head is to consider whether the person requesting access to the record is given access to it. Accordingly, the submission of the City that "the *Act* does not state that the search time is payable only if the record is disclosed" is not entirely accurate. The terms of the *Act* do contemplate the possibility of reduced fees on the basis of whether records were disclosed or not.

That said, I did not request, nor did I receive submissions on a fee waiver. Accordingly, should the appellant request one, it should be proceeded with in the normal course under the *Act*. I now turn to the consideration of the amount of the fee claimed.

The City's Representations

The City initially issued a fee estimate of $208.80 to the appellant. It submits that this comprised an estimated search fee of $150.00 (representing 5 hours of search time by experienced Legal Services and Employee Services staff), a photocopying fee of $43.80 for an estimated 219 pages of responsive records, and a preparation fee of $15.00 for 30 minutes of estimated preparation time. When the appellant paid a deposit of one-half the fee estimate the City processed the request and issued its decision letter.

In its initial access decision letter the City advised the appellant that the actual fee for processing her request, after amendments, was $158.60. The City submits that as set out in the accompanying fee statement this was comprised of five hours of search time for a total fee of $150.00 and the sum of $8.60 for photocopying 43 pages of responsive records, although 44

pages were ultimately disclosed to the appellant. The City advises that it did not charge the appellant for preparation time.

In the course of mediation, the City explained that the fee charged to the appellant reflected the original cost of the search for the responsive records and that she was only charged for the cost of the photocopies that she received.

The Representations of the Appellant

The appellant submits that she was promised 216 pages for $208.80 and received 43 pages for $158.50. She states that prior to being promised the 216 pages, she was advised that "the full research and calculations of all the available materials had been completed." She submits:

> Certainly, the City did not research all over again in a second round before I was advised that I owed the new total and surprisingly received 43 pages later?

Analysis and Findings

As set out above, the City is entitled to charge $7.50 for each 15 minutes of time spent searching for or preparing the records for disclosure and 20 cents per page for each photocopy. Based on the representations of the City with respect to the time it spent actually locating the responsive records, I have no difficulty in upholding the search time, as well as the photocopying cost. In accordance with these findings, and subject to any fee waiver request the appellant may make, I uphold the City's fee estimate for search time of $150.00 and I allow the City's claim of $8.60 for the photocopying cost of 43 pages of responsive records.

INFORMATION CURRENTLY AVAILABLE TO THE PUBLIC

The City submits that section 15(1)(a) of the *Act* applies to records that are responsive to items 3, 6 and 8 of the appellant's request, because City Council minutes and annual budgets are publicly available, either through the City's website or a search of its Archives.

Section 15(a) of the *Act* reads:

> A head may refuse to disclose a record if,
>
> > the record or the information contained in the record has been published or is currently available to the public.

For this section to apply, the institution must establish that the record is available to the public generally, through a regularized system of access, such as a public library or a government publications centre [Orders P-327, P-1387 and MO-1881].

To show that a "regularized system of access" exists, the institution must demonstrate that

- a system exists

- the record is available to everyone, and
- there is a pricing structure that is applied to all who wish to obtain the information [Order MO-1881]

Section 15(a) is intended to provide an institution with the option of referring a requester to a publicly available source of information where the balance of convenience favours this method of alternative access. It is not intended to be used in order to avoid an institution's obligations under the *Act* [Orders P-327, P-1114 and MO-2280].

In order to rely on the section 15(a) exemption, the institution must take adequate steps to ensure that the record that they allege is publicly available is the record that is responsive to the request [Order MO-2263].

The exemption may apply despite the fact that the alternative source includes a fee system that is different from the fees structure under the *Act* [Orders P-159, PO-1655, MO-1411 and MO-1573].

The City's Representations

The City submits that Council Minutes, reports and budget documents are available to the public through publicly-accessible methods, namely its website and City Archives. The deponent of the affidavit provided by the City advises that she confirmed with the Program Manager, Committee and Council Services (in the City Clerk and Solicitor Department) that Council Minutes (pre-2000) and Budget documents (pre-2001) are publicly available in the City Archives. She further confirmed that Council Minutes (2001 to present) and Budget documents (2002 to present) are publicly available and searchable on the City's website. Accordingly, the City takes the position that these Council Minutes and Budget documents are publicly available.

The City states that its submission that there is an accessible and effective regularized system of access is reinforced by the appellant's ability to attend at the City Archives to search for Council minutes and, with the assistance of Archives staff, locate a Council minute relevant to her request.

The City submits that its usual practice is to apply section 15(1) to requests for access to Council Minutes and to direct requesters to the City website or to City Archives for these records so that a requester is not bound by the fee structure under the *Act*.

The Appellant's Representations

The appellant submits that:

> … to state that all information can be found at the archives and on the website is trite as I repeatedly researched those avenues from 2001 to the present. The last time I spent two days at the archives was the middle of May 2009. At that time,

> the archivist believed that the City had purged some documents on the LTD Investment Fund issue.

Analysis and Finding

The appellant challenges the public availability of certain records, but provides no detailed and convincing evidence in support of that assertion. Simply stating that "the archivist believed that the City had purged some documents on the LTD Investment Fund issue" without more, such as explaining which records she believes were purged, is not sufficient. In my view, the City has established that Council Minutes, reports and budget documents are available to everyone either through the City's website or its Archives in accordance with section 15(a). As a result, I am satisfied that these records are exempt under section 15(a) of the *Act*.

LABOUR RELATIONS AND EMPLOYMENT RECORDS

The City submits that pages 44 to 134 (excluding page 119) of the records at issue, which include the Report prepared by a third party, are excluded from the *Act* under section 52(3)3 because they were collected, prepared, maintained or used by City staff or external parties on behalf of the City, and are in relation to meetings, consultations, discussions, or communications about employment-related matters in which the City has an interest.

The appellant submits that she is aware that the Report at issue in this appeal was prepared to address the LTD issue. She submits that because the third party's work is described as an Employee Benefit Review Project in the former City Council Minute approving the contract award, and on the basis of the reasons set out in the Minute for recommending the contract award, the Report at issue in this appeal:

- was "not dealing with personal information of specific employees," and
- was "not collected or prepared in relation to court or tribunal proceedings or to negotiations or anticipated negotiations or the employment of a person, or meetings about labour relations."

The appellant's position is that the Report was simply "generic on benefits information."

Section 52(3)3 reads:

> 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.

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

1. the records were collected, prepared, maintained or used by the City 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 City has an interest.

Section 52(4): exceptions to 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.

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*.

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 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]. 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.)].

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 and 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 and P-1369]
- litigation in which the institution may be found vicariously liable for the actions of its employee [Orders PO-1722 and 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)*].

Part 1: collected, prepared, maintained or used

The City submits that the withheld records consist of communications in the form of e-mails, letters, opinions, reports, memos, briefing documents, and meeting notes to or from City employees and external parties retained by the City. The City submits that these communications were either prepared, used or maintained by City staff, or were prepared by external parties (advisors or legal counsel) for the benefit of the City and to be used and maintained by the City in relation to City business concerning the LTD plan.

I have reviewed the records at issue in this appeal and based on their contents and the plainly evident circumstances of their creation, I am satisfied that the records were collected, prepared, maintained or used by the City or on its behalf. Accordingly, I find that the City has established the first of three requirements for the application of the section 52(3)3 exclusion, set out above.

Part 2: meetings, consultations, discussions or communications

The City submits that the withheld records were collected, prepared, used or maintained for the purposes of:

- written consultations and discussions among internal City staff or with external advisors and City staff,
- preparation for meetings with internal City staff,
- briefing of internal City staff, and
- summarizing meetings among internal City Staff.

I have reviewed the records and their contents and I am satisfied that the collection, preparation, maintenance or usage of the records was in relation to meetings, consultations, discussions or communications. Accordingly, I find that the City has established the second of three requirements for the application of the section 52(3)3 exclusion, set out above.

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

In its non-confidential representations the City submits that the withheld records relate to "the City's investigation of, research of, consideration of, deliberation about and administration of its obligations as employer and sponsor of the LTD plan." In its confidential representations the City provides further information about the contents of the records it seeks to exclude under section 52(3)3. The City submits that these issues arise as a result of the employer-employee relationship existing between the City as employer and plan sponsor and its employees and former employees that were members of the LTD plan.

The City further submits that it has an interest in the LTD plan and the administration of the surplus in it, given that as employer and plan sponsor it is presently in control of the surplus.

In Order PO-2632 Adjudicator Daphne Loukidelis addressed an argument that the provincial *Freedom of Information and Protection of Privacy Act* (*FIPPA*) did not apply to a Pension and Benefits Cost Allocation Agreement, being one of a number of agreements created when the Ontario Power Generation Inc. (OPG) contracted out the management and operation of its business processes and technology services.

In determining that the exclusion at section 65(6)3 of *FIPPA* (the provincial equivalent of section 52(3)3 of *MFIPPA*) applied to a Pension & Benefits Cost Allocation Agreement, Adjudicator Loukidelis wrote:

> It may be, as the appellant has argued, that the overriding purpose of the Agreements is to give effect to a commercial transaction in which the Company is to provide technology and business services to OPG. However, I find that it does

> not necessarily follow that the Agreements, or individual records or components of the Agreements, do not fall within the exclusion in section 65(6) as a consequence of that overriding purpose. …
>
> …
>
> Previous orders, for example, have established that an institution may have an interest in records containing information relating to benefits provided to former employees for the purposes of this part of the 65(6) test [Orders PO-2212 and PO-2536]. Furthermore, records that directly address other potential labour relations or employment-related issues surrounding the main Agreements under consideration have been found to satisfy the "in which the institution has an interest" criteria [see Order MO-1587]. In my view, this principle applies equally to the appendices containing the Pension & Benefits Cost Allocation Agreement and the Deferred Employee Transfer Agreement, which were prepared to clarify the signatories' understandings with respect to their future pension obligations.
>
> Furthermore, I accept that OPG, as an employer, has an interest in addressing and resolving issues relating to employee severance, indemnification and termination as part of the overall management of the Agreements entered into with the Company.
>
> Section 65(6) is record-specific and fact-specific and this is relevant to my determination that certain components of the Agreements in this appeal - even individual terms - are "about" labour relations or employment-related matters in which OPG has an interest, for the purposes of section 65(6).
>
> Based on the information before me, my review of the Agreements and the representations of the parties, I am satisfied that OPG has established that the meetings, consultations, discussions or communications in which it made use of the appendices addressing issues related to pensions and benefits, and employee transfer, as well as certain other portions of the larger Agreements, are about labour relations or employment-related matters in which it has an interest. The only reason these particular appendices exist is because of the employment relationship its employees have with OPG. For these reasons, I find that OPG's interest in the particular records, or components thereof, goes well beyond "mere curiosity or concern" in that they directly address potential labour relations issues. As a result, I conclude that they are subject to the exclusion in section 65(6)3.

In this case I am satisfied that the LTD plan is an employment related matter pertaining to the City's own workforce. As in Order PO-2632, this is a matter in which the City has an interest that goes well beyond "mere curiosity or concern." It is also clear that the meetings, consultations, discussions or communications set out in the records are about this labour relations or employment-related matter.

Accordingly, I find that the City has established the last of the three requirements for the application of the section 52(3)3 exclusion, set out above. Furthermore, I find that none of the withheld records fall within the exception in section 52(4).

Accordingly, records at pages 44 to 134 (except page 119) are excluded from the scope of the *Act*.

ORDER:

1. I order the City to conduct a further search for Policy Plan GH 35345 within the City's Legal Operations and Support Services department. If, as a result of the further search, the City locates a copy of Policy Plan GH 35345, I order the City to provide a decision letter to the appellant regarding access to this record, considering the date of this order as the date of the request.

2. Subject to any fee waiver request the appellant may make, I uphold the City's fee claim of $158.60.

3. I uphold the decision of the City that the *Act* does not apply to the records at pages 44 to 134 (except page 119).

4. In order to verify compliance with this order, I reserve the right to require the City to provide me with a copy of any decision letter provided to the appellant.

Original signed by: July 27, 2010
Steven Faughnan
Adjudicator