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

ORDER MO-2605

Appeal MA10-60

City of Mississauga

Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The appellant made a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the City of Mississauga (the City) for access to information regarding telephone records and invoices for several employees of the City. The request was for the following information:

> … All telephone records, including detailed statements and invoices for all City assigned cell phone and/or blackberry and all City assigned office/land telephone lines for [named Commissioner], [named City Solicitor], [named City Manager], [named City Clerk] and [named Deputy City Clerk] for the months of October 2009, November 2009 and December 2009.

The appellant also noted that, "If this request is deficient in any matter and/or form, please be advised that it should be viewed as an oversight, and should not be viewed as an omission."

> In response, the City denied access to the records on the basis that the records are employment-related information and are excluded from the *Act* due to the operation of section 52(3).

During mediation, the appellant raised the concern with the city that the individual responsible for making the decision on behalf of the city had a conflict of interest in making that decision. The appellant claimed that the Manager, Legislative Services/Deputy Clerk and Freedom of Information and Privacy Coordinator (the Coordinator) that issued the decision in response to the request was in a conflict of interest position because the request was for records related to the Coordinator.

The city requested that this office first rule on the conflict of interest issue before ruling on the other issues raised in this appeal.

As further mediation was not possible, the file was transferred to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*. During the inquiry into the appeal, I sought and received representations from the city and the appellant. Representations were shared in accordance with section 7 of the IPC's Code of Procedure and Practice Direction 7.

RECORDS:

The city has provided a sample of the types of records that would be responsive to the appellant's request, including invoices and telephone logs. This sample did not include any records relating to the Coordinator.

Subsequently, during the inquiry, the city provided a complete copy of the telephone records for the Coordinator for the months of October, November and December of 2009.

DISCUSSION:

CONFLICT OF INTEREST

The appellant submits that the Freedom of Information Co-ordinator for the city is in a conflict of interest position in regard to the requested records and should not have been permitted to make the decision on access to the requested records on behalf of the city.

Both the appellant and the city were asked to consider a series of questions to establish whether a reasonable person could reasonably perceive bias or a conflict of interest on the part of the decision-maker. Further, the appellant was asked to substantiate his conflict of interest claim. I provided a copy of Orders MO-1283 and MO-1285 for the parties' information.

The City provided representations through outside counsel who confirmed that the city's Coordinator (Deputy City Clerk) is the "head" of the city for the purposes of the *Act*. The city's position is that past decisions of this office have found that heads are not in a conflict of interest when they make decisions regarding records in which they have been involved. The city submits:

> The IPC has stated that the following two (2) factors will be considered in determining whether there is a conflict of interest:
>
> (a) whether the decision maker had a personal or special interest in the records; and
>
> (b) whether a well-informed person, considering all of the circumstances, could reasonably perceive a conflict of interest on the part of the decision-maker.
>
> The IPC has also recognized that the head as the administrative decision-maker under the *Act* may make access decisions that relate to him or her. In Order PO-2381, the IPC held that the head was not in a conflict of interest when he made a decision regarding records in which he was involved. In making this decision, the IPC stated the following:
>
> > … the fact that the CEO has been personally involved in resolving the question of the disposition of these lands in his capacity as a senior official of the ORC, including participating in exploring options other than sale of the appellant's company, combined with the fact that the ORC and the appellant are in litigation over the appropriate disposition of these lands, is not sufficient to disqualify the CEO from exercising the statutory function of deciding access requests under the Act. These facts do not establish a conflict of interest or a reasonable apprehension of bias.

…

> In the circumstances of this Appeal, the only records connected to [the Coordinator] are the office telephone records since he has not been provided with a City cell phone or Blackberry. In our respectful view, there is nothing to suggest that [the Coordinator] has a personal, special or pecuniary interest in the telephone records at issue such that his administrative decision in respect of them would be considered to be a conflict of interest.
>
> [The Coordinator] approached his task under the *Act* in a professional manner and sought the advice of legal counsel before making his decision. Accordingly, [the Coordinator] undertook his duties appropriately under the *Act* and there is no reason to perceive bias.

The city also refers me to Order MO-1285 where this office did not find a conflict of interest where the request for information was related to a city employee who processed the request.

The appellant's representations did not address this issue and he did not provide representations or evidence to substantiate his claim that the Coordinator was in a conflict of interest position in making the access decision.

The appellant's request was for telephone (including cell phone and Blackberry) records, statements and invoices for various city employees including the Coordinator. Having reviewed the Coordinator's telephone records and the sample records provided by the City relating to other individuals, I am unable to find any personal or special interest the Coordinator may have in the records. In Order PO-2381, Adjudicator John Swaigen, in finding that the decision-maker was not in a conflict of interest position, stated the following:

> In carrying out his functions under the *Act*, the CEO was not required to be impartial in the way that would be expected of an independent adjudicator. As set out in the *Imperial Oil* decision, the contextual nature, may vary to reflect the content of a decision-maker's activities and the nature of his functions. The CEO was required to carry out certain functions and, in doing so, to comply with the procedural fairness obligations set out in the Act and to comply with other legislation governing the ORC. He was also required to exercise his discretion in good faith, taking into account all relevant considerations and disregarding irrelevant ones. I cannot conclude from the evidence before me that he did otherwise.

I agree with the rationale in that decision and apply it here. In this particular appeal, neither the records nor the appellant's representations substantiate a finding that the Coordinator did not carry out his duties as Head in a fair and impartial manner. There is no indication that the Coordinator had a personal or special interest in the records, notwithstanding that some of them may have pertained to him. Moreover, in my view, a well-informed person, considering all of the circumstances, would not reasonably perceive a conflict of interest on the part of the Coordinator.

Accordingly, I find that there is no conflict of interest in the Coordinator's decision about the responsive records in this appeal.

LABOUR RELATIONS AND EMPLOYMENT RECORDS

The city submits that the records at issue are excluded from the application of the *Act* under section 52(3)3, which 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) 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*.

For the collection, preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in paragraphs 1, 2 or 3 of this section, it must be reasonable to conclude that there is "some connection" between them. [Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).]

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 [*Ministry of Correctional Services*, cited above].

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.

Part 1: collected, prepared, maintained or used

The appellant's request was for the city's telephone records relating to landline, cell phone and Blackberry usage for three employees for a three month period. Given the nature of this request, I find that the responsive records would have been collected, prepared, maintained or used by the city on its behalf. The city has met the test under part 1 for the application under section 52(3)3.

Parts 2 and 3: "in relation to" 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, it must be reasonable to conclude that there is "some connection" between the collection, preparation, maintenance or use of the records and meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

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)*].

In addition, as noted by the Divisional Court in *Ministry of Correctional Services*, cited above, "the type of records excluded from the Act by s. 65(6) [the equivalent of section 52(3) in the *Freedom of Information and Protection of Privacy Act*] 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."

In support of its position that the records are excluded by way of section 52(3)3, the city submits that the records at issue are "in relation to" employment-related matters in which the city has an interest. The city relies on the recent decision of the Divisional Court of Ontario in *Ministry of Attorney General and Toronto Star*[1] in support of their position that "in relation to" should be given a broad interpretation and cites from the Court's decision, which states:

> Section 65(5.2) contains the phrases "relating to" and "in respect of". The Supreme Court of Canada has interpreted these phrases: *Canada (Information Commisioner)* v. *Canada (Commissioner, RCMP),* 2003 SCC 8, [2003] 1 S.C.R. 66, at para. 25; *Markevich* v. *Canada* 2008 SCC 9, [2003] 1 S.C.R. 94. In *Markevich*, the Court held the following, at para. 26:
>
> > The appellant's submission turns on whether these proceedings are undertaken "in respect of a cause of action". The words "in respect of" have been held by this Court to be words of the broadest scope that convey some link between two subject matters.

[1] 2010 ONSC 991 (CanLII) (Div. Ct.).

> See *Nowegijick* v. *The Queen*, [1983] 1 S.C.R. 29, at p.39, *per* Dickson J. (as he then was):
>
> > The words "in respect of" are, in my opinion, words of the widest possible scope. They import such meanings as "in relation to", "with reference to" or "in connection with". The phrase "in respect of" is probably the widest of an expression intended to convey some connection between two related subject matters.
> >
> > In the context of s. 32, the words "in respect of" require only that the relevant proceedings have some connection to a cause of action.
>
> Accordingly, the words "relating to" in s. 65(5.2) require some connection between "a record" and "a prosecution"…

The city submits that the Court's reasoning is applicable to section 52(3)3 as the records at issue are "in relation to" employment-related matters since they are connected to the review of employee usage of both the office/landline telephones and the wireless devices. The city provides this further explanation:

> The records at issue include both telephone and wireless usage records by named employees. The telephone records are held electronically by the City which operates its own telephone service. These records provide information about the date and time of the calls, the employees' extension, whether the call is incoming or outgoing, the telephone number of the person with whom the City employee spoke, the location of the call, the duration of the call and the cost of the call.
>
> The wireless records include records of use as provided by the service provider, Rogers. These records show a summary of the wireless services used by the City employee, including a summary of the telephone and data usage, the date and time of the calls, the employee's phone number and account number, the location of where the call was from, the phone number called, whether the call is incoming or outgoing, the duration of the call and the cost of the call.
>
> In the ordinary course of business, the City advises that it does not generate an electronic list of employee telephone calls unless there is an allegation of wrongdoing against an employee. In these circumstances, the records would be generated to determine if there is abuse of the phone system. The City advises that it works with the Human Resources and Information Technology departments to determine whether it is appropriate to generate these records to investigate an allegation of improper use.

The city then refers to its corporate policy and procedure entitled "Personal Telephone Charges," which requires that employees charge their personal long-distance calls or fee-for-service calls made on city telephones or cellular equipment to their home telephone or their long-distance calling card unless permitted under the policy. The policy sets out the permissible long-distance calls and then the responsibilities of city staff for obtaining reimbursement of charges. The responsibility of the department administrator or designate is to check telephone statements for reasonableness and to advise the Communications Analyst if fraud or abuse is suspected. The city submits that the office/land and cellular telephone records are collected, used and maintained to investigate alleged employee abuse which may lead to employee discipline and concludes:

> The records at issue in this Appeal are collected, prepared, maintained and used by the City. In addition, based on the facts of this matter and the interpretation by the Divisional Court and the Supreme Court of Canada of the words "in relation to", in our respectful view, the records are collected, prepared, maintained and used in *connection with* meetings, consultations, discussions or communications about employment-related matters. [italics in original]

In the present appeal, I do not accept the city's argument that there is the requisite connection between the collection, preparation, maintenance or use of the responsive records and meetings, consultations, discussions or communications about employment-related matters in which the institution has an interest. The responsive records are the telephone records for three employees over a three month period. While the city has provided me with a copy of its "Personal Telephone Charges" policy and procedure, it does not allege that the three named employees have failed to comply with this policy or are being investigated for improper telephone usage.

The city advises that it does not, in the ordinary course of its business, generate electronic lists of telephone calls for an employee unless there is an allegation of wrongdoing against the employee. However, an access request for such information would be another instance where the city would generate this electronic list of information in the ordinary course of business. Further, in the case of an access request, there is no requirement of an "allegation of wrongdoing" to generate the record and an access request may simply relate to the city's expenditure of public funds for its telephone usage for a specified period. The appellant's request does not allege any wrongdoing on the part of the named employees and simply relates to telephone records including statements and invoices for the three named employees.

It is therefore clear that, in the circumstances of this appeal, no issues regarding the terms and conditions of employment, nor human resources questions, have been raised with respect to the employees whose records are at issue, as referred to in *Ministry of Correctional Services*, cited above. This indicates that section 52(3)3 does not apply, and it also supports a view that no employment-related issue in which the institution "has an interest" is present in this case.

Accordingly, I am unable to find that there is "some connection" between the responsive records and any meetings, consultations, discussions or communications about labour relations or employment-related matters in which the city has an interest.

I find that section 52(3)3 does not exclude the responsive records from the *Act*. As the exclusionary provision does not apply to the records, I will order the city to issue the appellant a decision regarding access to them.

ORDER:

1. I do not uphold the City's determination that the responsive records are excluded from the scope of the *Act* under section 52(3).

2. I order the City to provide the appellant with a decision respecting access to the responsive records, without recourse to a time extension and in accordance with sections 19, 21 and 22 of the *Act*, treating the date of this order as the date of the request. The City is asked to send this office a copy of the decision letter when it is sent to the appellant.

Original signed by: March 10, 2011
Stephanie Haly
Adjudicator