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

ORDER MO-2589

Appeals MA08-281-2 and MA08-282-2

City of Vaughan

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BACKGROUND:

The City of Vaughan (the city) received two nearly identical requests under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to any "personal information" related to each of the named requesters for a specified time period. Prior to making a decision, the city contacted the requesters to clarify the requests. Following an exchange of correspondence, the city issued decisions stating that no records responsive to the requests exist. The decisions stated, in part:

> … The [city] has various operational records that would relate to you as they might to any other … resident. For example, the [city] has assessment records and taxation records that relate to your property. … It is my understanding that you do not require access to these kinds of records which encompass the day-to day operations of the Municipality. The [city] has excluded litigation files or files created in contemplation of litigation, correspondence between the litigating parties, correspondence from you and communication not responsive to the request as you already have a copy of the information.
>
> [Y]ou were advised that the [city] would conduct an additional search for records that relate to your request. The search has now been completed as indicated above [with] the [city having] searched for any non-operational files (or documents) that relate to you … The [city] cannot locate any non-operational records that relate to your access request.

The requesters (now the appellants) appealed the city's decisions on the basis that the city failed to respond adequately to the requests and because they believed that some responsive records ought to exist.

This office opened Appeals MA08-281 and MA08-282 to address the issue of whether the city had conducted a reasonable search for responsive records. Following discussion between the mediator appointed by this office and the appellants' representative, the request was narrowed to include only records that may be contained in a specific litigation file. At the city's suggestion, the requesters submitted new requests specifically identifying the litigation file at issue. Appeals MA08-281 and MA08-282 were closed.

NATURE OF THE APPEALS:

The new requests submitted to the city each stated:

> The personal information that I, [requester's name], am seeking is,
>
> The litigation file that contains my personal information. This litigation file relates to the action that was commenced by the City of Vaughan against my spouse [name of spouse] and me on November 20, 2007. …

In response, the city issued a decision letter to each requester, stating that access to the identified responsive records was denied in full pursuant to the discretionary exemption in section 12 of the *Act* (solicitor-client privilege). The records identified as responsive to both requests are identical. The requesters, now the appellants, appealed the decisions to this office, which opened Appeals MA08-281-2 and MA08-282-2 to address the issues. The same mediator as in the predecessor appeals was appointed to assist the parties in exploring resolution of the issues.

In the Confirmation of Appeal notice sent by this office, the city was advised that if it wished to claim additional exemptions with respect to the records, it had 30 days to do so. In revised decision letters issued just prior to this deadline, the city advised the appellants that it was taking the position that several additional provisions of the *Act* apply to the records: the exclusion for labour relations and employment records in section 52(3)1, as well as the discretionary exemptions in sections 6(1)(b) (closed meeting) and 7 (advice or recommendations).

In addition, the city also advised this office that because the records relate to "sensitive ongoing litigation" and were voluminous, it required the mediator to attend at its premises to review the records pursuant to section 41(6) of the *Act*. The mediator did so.

The city then provided the appellants' representative and the mediator with a brief index of the records, which were described as fitting into eight general categories. Upon review of the index, the appellants narrowed the scope of the requests to the (sub)files titled "Correspondence" and "Council (Closed Session)". As a result, the records listed under the other six categories of the index are no longer at issue in this appeal. The city subsequently forwarded the records at issue comprised of the contents of the two parts of the litigation file to this office.

As it was not possible to resolve these appeals through mediation, they were transferred to the adjudication stage of the appeal process, where they were both assigned to me to conduct an inquiry. Due to the similarity of the requests and issues and the identical records at issue in these two appeals, I decided to conduct a single inquiry to address all of these matters.[1]

Initially, I sent a joint Notice of Inquiry outlining the facts and issues to the city, seeking representations, which I received. While awaiting receipt of a copy of the revised decision referred to in the city's representations, this office sought to explore the sharing of the city's representations through informal discussion with its legal counsel. As the issues related to the sharing of the city's representations with the appellants could not be resolved informally, I issued a sharing order to the city.

The city issued revised decision letters to the appellants, disclosing additional records to them. I received copies of the revised decisions along with separate correspondence from the city requesting that I reconsider my decision respecting the disclosure of certain portions of its representations to the appellants. In a written decision letter, I declined the city's request to reconsider the terms of my sharing order.

[1] For ease of reference, the two requests submitted to the city by the appellants will be referred to in the singular in this order.

The city then submitted a revised version of its original representations proposing amendments and requesting that I substitute the revised version for use in these appeals. On review of the revised representations, together with the original representations, I was satisfied that the minor changes proposed by the city fit within the parameters of my sharing order and, further, that they did not modify the city's original representations in substance. Accordingly, I decided to permit the city to withdraw its original representations and rely instead on the revised ones, which I then shared with the appellants, along with a modified Notice of Inquiry, inviting their representations on the issues. I also invited the appellants to provide their comments, if any, on the city's revised decision letter. The appellants submitted representations on the issues and I decided these representations required reply from the city. I shared the appellant's representations with the city for this purpose and received reply representations. After addressing an issue raised by counsel for the city in its representations[2], I moved the two appeals to the orders stage.

RECORDS:

At issue are over 1400 pages of records, contained in the Correspondence and Council (Closed Session) parts of the litigation file. This (approximate) number accounts for the records identified and disclosed in the city's revised decision and also includes the records the city claims are not responsive to the request. These records consist of internal and external correspondence (including email), memoranda and written notes.

DISCUSSION:

PRELIMINARY ISSUE: SCOPE OF THE REQUEST/RESPONSIVENESS OF RECORDS

As suggested in the description of the records provided above, the city now takes issue with the responsiveness of certain records that were identified as responsive to the request upon initial review. More specifically, the city claims that certain records, or portions of them, are not responsive for two reasons: some records relate to other matters and others were created after the date of the appellants' revised request (September 15, 2008).

The city identifies record 8 and portions of record 14 from the Council (Closed Session) file as well as pages 209, 356, 433-438, 614, 765, 766, 893, 1081, 1113, 1149 and 1166 of the Correspondence file as belonging to the former category of non-responsive records. The city also submits that records 2, 3 and 4 of the Council (Closed Session) file and pages 1238-1362 of the fifth batch from the Correspondence file fit into the latter category.

[2] In reply representations, the city's legal counsel observed that the appellants had provided a document with their representations that, in the city's view, they ought not to have. The city requested "that copies of this document be immediately destroyed by the IPC and that the contents not be relied upon or referred to in the decision in this matter." As I advised the city's legal counsel, "Courts and tribunals do not destroy evidence provided by parties." However, I assured counsel that section 41(9) of the *Act*, as well as various policies and practices (e.g. *Practice Direction 1*, item 12) of this office, were firmly in place to protect the confidentiality of documents and evidence provided during an inquiry.

The appellants were not specifically asked to comment on the issue of responsiveness in their representations, and they did not do so.

Regardless, in order to proceed with my determination of the denial of access by the city on the various grounds claimed, I must first determine whether all of the records before me fit within the scope of the appellants' request.

Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This provision requires a requester to provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record. Section 17(2) requires the institution to assist the requester in "reformulating" the request if it does not adequately describe the records sought.

It is a well-settled principle that institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Ambiguity in the request should be resolved in the requester's favour (Orders P-134 and P-880). To be considered responsive to the request, records must "reasonably relate" to the request (Order P-880).

The scope of the appellants' request has not really ever been in doubt. It was submitted on September 15, 2008, following mediation and other discussions between this office and the parties. In the request, the appellants sought access to the "litigation file" relating to the civil action commenced by the city against the appellants on November 20, 2007. I am satisfied that the city properly and liberally interpreted the request to mean that the appellants were seeking the entire contents of the city's "litigation file" for the specified civil action.

However, based on the clear wording of the request, I agree with the city's submission that any records, or portions of records, that happen to be located within the litigation file and which relate to other matters, legal or otherwise, in which the city is involved, fall outside of the scope of the request, as this information is not "reasonably related" to the request (Order P-880). In a similar fashion, I also accept the city's submission that records created after the date the request was submitted fall outside the scope of the request.

Accordingly, based on my own independent review of the records, or portions of records, identified by the city in its representations, I agree that these fall into the two different categories of non-responsive records described above. I find, therefore, that they fall outside the scope of the appellants' request. In addition, there are other records located in an earlier part of the fifth batch of the Correspondence file that were similarly created after September 15, 2008. Although the city did not identify all of these in its representations, I find that they also fall outside the scope of the request.

I will now review whether the responsive records are excluded from the *Act* through the operation of section 52(3).

LABOUR RELATIONS AND EMPLOYMENT RECORDS

The city takes the position that sections 52(3)1 and 52(3)3 apply to all of the records at issue in this appeal and, therefore, that the *Act* does not apply. Since section 52(3) of the *Act* pertains directly to the issue of my jurisdiction in this appeal, I must review its possible application.

If I find that the exclusion applies to the records, and that none of the exceptions in section 52(4) apply, it follows that I lack jurisdiction to review the issue of access, or denial thereof, to those records.

The relevant parts of section 52(3) 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:
>
> > 1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution. …
> >
> > 3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

In *Ontario (Attorney General) v. Toronto Star*[3], the Ontario Divisional Court defined "relating to" in section 65(5.2)[4] of the *Act* as requiring "some connection" between the records and the subject matter of that section. This definition has been adopted for the words, "in relation to" in section 52(3).[5] For either of the section 52(3) provisions set out above to apply, therefore, there must be some connection between "a record" and either "proceedings or anticipated proceedings" or "meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest."

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*).[6]

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

[3] 2010 ONSC 991 (Div.Ct.) (*Toronto Star*).
[4] Section 65 of the provincial *Freedom of Information and Protection of Privacy Act* is the equivalent of section 52 in the municipal *Act*. Both sections deal with exclusions, i.e. the non-application of the statute to certain types of records.
[5] See Order MO-2537.
[6] (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.)

issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship (Order PO-2157).

Based on my findings below, it is only necessary to set out the required elements of section 52(3)1. For section 52(3)1 to apply, it must be established that:

1. the record was collected, prepared, maintained or used by an institution or on its behalf;

2. this collection, preparation, maintenance or usage was in relation to proceedings or anticipated proceedings before a court, tribunal or other entity; and

3. these proceedings or anticipated proceedings relate to labour relations or to the employment of a person by the institution.

To provide context, the city explains that the records in the litigation file relate to a civil action the city initiated against both appellants on November 20, 2007 for alleged breaches by the appellants of a memorandum of settlement between the city and the appellants. According to the city, the June 22, 2006 memorandum of settlement was signed between the parties to address issues raised in a civil action filed by the appellants against the city seeking damages for, among other causes, the wrongful dismissal of one of the appellants from employment with the city.

Respecting the first two parts of the test for the application of section 52(3)1, the city submits that the records were either prepared by its staff, or on their behalf, or collected by the city in relation to the employment-related litigation described above. Further, the city submits that all of the responsive records have been maintained in the city's litigation file relating to this action. Accordingly, the city argues that all of the responsive records were collected, prepared, maintained or used in relation to this employment-related litigation.

The appellants dispute the city's position, arguing that the records ought to be characterized as having been created as a result of them bringing taxpayer issues or community concerns to the attention of the city. The appellants also submit that seeking the redress of these taxpayer issues or other community concern matters was the "dominant purpose" of the records.

In its reply representations, the city urges me to reject the appellants' submission respecting the "dominant purpose" of the records. The city notes that in Order P-1252, this office rejected a "dominant purpose" test in interpreting section 52(3). The city sets out the following excerpt from Order P-1252, a submission made by the institution in that appeal:

> … in order for a record to be maintained "in relation to" a proceeding, it is not necessary to establish that the sole purpose nor even the primary purpose or initial purpose for maintaining the record is related to the proceeding. It is sufficient to demonstrate that, at some point in time, a record <u>became</u> related to (or substantially connected to) a proceeding (or an anticipated proceeding).

I have reviewed the records at issue in this appeal. Based on the content of those records and the 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)1 exclusion, set out above.

This office has interpreted the word "proceedings" to mean a dispute or complaint resolution process conducted by a court, tribunal or other entity which has the power, by law, binding agreement or mutual consent, to decide the matters at issue. Further, for proceedings to be "anticipated", they must be more than a vague or theoretical possibility. There must be a reasonable prospect of such proceedings at the time the record was collected, prepared, maintained or used (Orders P-1223 and PO-2105-F).

In the case of the records before me in this appeal, I am satisfied that the collection, preparation, maintenance and use of these records was in relation to court proceedings, both actual and anticipated. On my review of the content of the records, I specifically reject the appellants' submission that the "dominant purpose" of these records is to seek redress for taxpayer issues or community concerns. In reviewing these records, I accept that, at all material times, a civil action against the appellants for the alleged breach of the 2006 settlement agreement between the parties was either reasonably contemplated or already initiated. Some records were collected or prepared in anticipation of the city initiating the proceedings against the appellants, while others were clearly collected, prepared, maintained or used following the filing of these proceedings.

While I accept the city's submission that the "dominant purpose" of the records is not determinative of the issue of whether records were created "in relation to" proceedings, I note that Order P-1252 is cited as the basis for rejecting a "dominant purpose" test in determining whether records are "in relation to" the proceedings. This 1996 order holds that for the purposes of section 52(3), "… it is sufficient to demonstrate that, at some point in time, a record became related to (or substantially connected to) a proceeding (or an anticipated proceeding)."[7] However, as outlined in the introductory section to my review of this issue, the "substantial connection" approach has itself recently been rejected by the Ontario Divisional Court as the standard for determining whether a record is found to be "in relation to" the subject matter of an exclusion.[8]

Indeed, in my view, following *Toronto Star*, the determination of "in relation to" in section 52(3)1 rests on whether it is reasonable to conclude that there is some connection between the record and the proceedings or anticipated proceedings. This office has previously applied *Toronto Star* in interpreting "in relation to" in section 52(3), with the result being that records

[7] In Order P-1252, former Assistant Commissioner Tom Mitchinson referred to Order P-1223 in making this finding. Senior Adjudicator John Higgins provided further elaboration for the "substantial connection" interpretation of "in relation to" in section 52(3) in Order MO-2024-I. The Court in *Toronto Star* specifically rejected this approach on the basis that importing a requirement that the connection be "substantial" was incorrect and "inconsistent with the plain unambiguous meaning of the words of the statute" (para. 45). This may be held to apply to other listed events in section 52(3) or its provincial equivalent in section 65(6).

[8] *Toronto Star, supra,* footnote 2.

were found to be excluded from the *Act* under section 52(3)1 because they bore some connection to proceedings or anticipated proceedings.[9]

In the present appeal, with respect to the more than 1400 pages of records at issue in the Correspondence and Council parts of the city's litigation file, I am satisfied that the records would not have been created but for the identified civil litigation proceedings. In my view, therefore, it is reasonable to conclude that the records bear some connection to the court proceedings or anticipated court proceedings. In the circumstances, I find that the records meet the second requirement for the application of section 52(3)1 of the *Act*.

On the third part of the test, the city submits that review of the records demonstrates a clear link with the litigation previously described. According to the city, there is a clear and direct connection between the employment (and termination) of one of the appellants by the city and the consequences flowing from it, namely the litigation. The city confirms that:

> At the time of the request, this litigation had indeed been initiated and was not merely a "theoretical possibility." Moreover, it is clear on the face of the Statement of Claim that it has been initiated before the Superior Court of Ontario and is therefore "before a court."

The appellants argue that because the individual who brought the "taxpayer issues" to the attention of the city is not, and never has been, employed by the city, the exclusion cannot apply. Further, the appellants point out that the "community concerns" raised by the appellant who had been employed by the city were communicated by that individual to the city after her employment had ceased.

In reply, the city remarks that the appellants do not dispute the past employment relationship of one of them with the city. According to the city, this connection forms a sufficient nexus between the employment of that individual and the proceedings for the purpose of the third requirement under section 52(3)1.

Respecting this third part of the test for exclusion under section 52(3)1, I am satisfied that the proceedings or anticipated proceedings relate to the employment of a person by the institution. As suggested previously, the proceedings to which the paragraph refers are proceedings related to employment, including litigation relating to terms and conditions of employment. In other words, it excludes records relating to matters in which the institution has an interest as an employer. In this appeal, I am satisfied that the proceedings that form the subject matter of the records relate directly to the city's relationship to one of the appellants as that individual's employer. I agree with the city that the fact that the individual is not employed by the city at present does not alter the finding. In the circumstances, I find that the third requirement for the application of section 52(3)1 is met.

[9] Indeed, Order MO-2537 addressed an access request by the same appellants to the same institution as in the present appeal. On the basis of the same civil litigation proceedings identified in this appeal, Adjudicator Diane Smith found that certain email records were excluded under section 52(3)1.

All three parts of the test for exclusion under section 52(3)1 of the *Act* have been established. Neither the city nor the appellants argued that any of the exceptions in section 52(4) apply, and I find that section 52(4) has no application in the circumstances of this appeal. Accordingly, I find that section 52(3)1 applies and that the records are excluded from the *Act*.

In view of my finding that the responsive records are excluded from the *Act*, it is not necessary for me to consider whether the exemptions claimed to deny access to them apply.

ORDER:

I uphold the city's decision and dismiss the appeals.

Original signed by: January 13, 2011
Daphne Loukidelis
Adjudicator