Information and Privacy Commissioner,
Ontario, Canada

Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

# ORDER MO-2660

Appeal MA10-234

City of Toronto

October 24, 2011

**Summary:** The appellant sought access to the consultant's report on response times prepared for Toronto Fire Service. The city denied access to portions of the record. Access to three pages of the record was denied under sections 10(1) (third party information) and 11 (economic and other interests). Access was denied to the remaining portions under the exclusionary provision in section 52(3)3 (employment and labour relations) of the *Act*. In this order, neither the exclusion in section 52(3)3 nor the exemptions in sections 10(1)(b) and 11(g) applied and the information at issue was ordered to be disclosed.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 10(1)(b), 11(g), 42 , 52(3)3.

**Orders Considered:** MO-1690**,** MO-2332, MO-2455, PO-2507, PO-2928, PO-2913, PO-2157.

**Cases Considered:** *Snell v. Farrell*, [1990] 2 SCR 311, *Ministry of Attorney General and Toronto Star,* 2010 ONSC 991 (Div. Ct.), *Cecilio v. Tarion Warranty Corp.*, [2007] O.J. No. 1692 (Div. Ct.), *Ontario (Ministry of Correctional Services) v. Goodis*, (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.), *Reynolds v. Binstock*, 2006 CanLII 36624 (Div. Ct.).

## BACKGROUND:

[1] The City of Toronto (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) for the:

> …consultants report on response times prepared for Toronto Fire Service [TFS]. The Quality Assurance Review was done by [a named consultant]. Please also provide accounting of contract (dollar amounts, details) for report.

[2] The city located the responsive record and issued a decision letter granting partial access to the record, withholding some information under the mandatory exemptions in sections 10(1) (third party information) and 14(1) (personal privacy) and the exclusionary provision in section 52(3)3 (employment and labour relations) of the *Act*.

[3] The requester, now the appellant, appealed the denial of access, and raised the application of the public interest override in section 16 of the *Act*.

[4] During mediation, the mediator contacted the consulting firm which undertook the study, and obtained its consent for disclosure of its information in the record. As a result, section 14 is no longer at issue. The city issued a revised decision letter disclosing the information at issue in pages 2, 5, 9, 21 to 27, 89 to 92, 105 to 118 and 124 to 127 of the report.

[5] The city also advised that:

> Access is granted in part to pages 28 and 29. Access is denied to the remaining parts of pages 28 and 29 as it has been determined that section 52(3)3 applies to portions of the records (4.3.2. Dispatch Staff).
>
> Access is denied to pages 93 to 95 in their entirety under sections [10(1)(b) and 11(g)] of the *Act*.

[6] As mediation did not resolve the issues in this appeal, the file was transferred to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*. I sent a Notice of Inquiry, setting out the facts and issues in this appeal, to the city seeking its representations. I received representations from the city, which I sent to the appellant along with a Notice of Inquiry. Portions of the city's representations were withheld due to confidentiality concerns. The appellant provided representations, which I shared with the city. I asked the city to respond to the appellant's representations and to provide representations on the applicability of Order MO-1690 to the information in which the third party exemption at section 10(1) is claimed. The city provided representations in reply to the appellant's representations.

[7] At my request, the city also provided me with a copy of the email it sent to other fire service departments seeking their responses to a survey, as well as the survey responses received by it in response to this email. These survey responses were utilized by the consultant in the preparation of the record at issue in this appeal.

[8] Subsequently, I sought representations from all of the fire service departments referred to in pages 93 to 95 of the record on the mandatory exemption in section 10(1)(b) and the applicability of the public interest override in section 16. I only received a response from one fire service, which consented to the release of its third party information in the record.

[9] In this order, I determined that neither the exclusion in section 52(3)3 nor the exemptions in sections 10(1)(b) and 11(g) applied and ordered the information at issue to be disclosed.

## RECORD:

[10] At issue in this appeal is the withheld information from the city's 127 page "Toronto Fire Services Quality Assurance Review" Report.

[11] The city has claimed that section 52(3)3 excludes pages 58 to 71, 78, 79, 82, 83, 98 to 102, and portions of pages 10, 11, 28, 29, 84, 87 and 88 of the record from the *Act*.

[12] The city has claimed that sections 10(1)(b) and 11(g) apply to pages 93 to 95 of the record.

### PRELIMINARY ISSUE – BURDEN OF PROOF

[13] The Notice of Inquiry sent to the parties in this appeal states that:

> Please note that under section 42 of the *Act*, where an institution refuses access to a record or part of a record, the burden of proof that the record or part of the record falls within one of the specified exemptions in the Act lies upon the institution.

[14] In its representations, the city states that the determination of the question of whether the exclusionary provision in section 52(3) applies to exclude the information in the record from the operation of *MFIPPA* is not "one of the specified exemptions" for which the burden of proof is explicitly placed on the head. The city submits that:

> …section 42 has no application to the determination of whether the city bears the burden of proof on this issue. The city notes that section 52(3) is a jurisdiction limiting provision upon which the IPC [Information and

> Privacy Commissioner/Ontario] must make a factually correct determination. With respect, it is the city's position that any evidentiary burden placed upon it with respect to the application of section 52(3) must recognize the responsibility of the IPC to be factually correct as to whether section 52(3) applies to a document. It is the city's submission that as a result any onus imposed upon it cannot be "absolute" and that it is the IPC's responsibility to review the records in question, and prior to any determination as to the applicability of section 52(3), the IPC must be satisfied that it has sufficient information to make a factually correct determination on the elements of section 52(3).

[15] This same argument was raised in Interim Order PO-2601-I, where Senior Adjudicator John Higgins stated that:

> …it is clear that section 53 [of the *Freedom of Information and Protection of Privacy Act* (the provincial *Act)*, the equivalent to section 42 of the *Act*] applies to the burden in relation to exemptions. However, it is also axiomatic in law that a party seeking to rely on a factual assertion bears the onus of proving it, and this is the case with all of the exclusions in section 65 [of the provincial *Act*, the equivalent to section 52 of the *Act*].

[16] I adopt this reasoning of Senior Adjudicator Higgins. Although I agree with the appellant that it is my responsibility to review the records in question and be satisfied that I have sufficient information to make a factually correct determination on the elements of section 52(3), nevertheless, the city bears the onus of proving that the exclusionary provision in section 52(3) applies to the information at issue in the record.

[17] The city created and used the record. Therefore, it has particular knowledge of the details as to how it was collected, prepared, maintained or used in relation to any meetings, consultations, discussions or communications about labour relations or employment related matters.[1]

[18] My finding that the city bears the onus in this case concerning the exclusionary provision in section 52(3) is supported by the findings in *Snell v. Farrell*, [2] of Mr. Justice Sopinka of the Supreme Court of Canada, where he stated that:

> In a civil case, the two broad principles are:
>
> 1. that the onus is on the party who asserts a proposition, usually the plaintiff;

[1] *Act*, section 52(3)3
[2] [1990] 2 SCR 311

2. that where the subject matter of the allegation lies particularly within the knowledge of one party, that party may be required to prove it.

[19] The city is in a far better position than the appellant to obtain the facts on which the decision concerning the application of section 52(3) could be made.[3] Accordingly, I find that the onus is on the city with respect to the application of section 52(3) as the information as to the application of this exclusion is within its knowledge.

## ISSUES:

**A.** Does section 52(3)3 exclude the information at issue in the record from the *Act*?

**B.** Does the mandatory third party exemption at section 10(1)(b) apply to pages 93 to 95 of the record?

**C**. Does the discretionary exemption at section 11(g) apply to pages 93 to 95 of the record?

## DISCUSSION:

### A. Does section 52(3)3 exclude the information at issue in the record from the *Act*?

[20] The city has claimed that section 52(3)3 excludes pages 58 to 71, 78, 79, 82, 83, 98 to 102, and portions of pages 10, 11, 28, 29, 84, 87 and 88 of the record from the *Act*.

[21] Section 52(3)3 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.

[22] 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*.

[23] For the collection, preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in paragraph 1, 2 or 3 of this section, it must be reasonable

[3] *Cecilio v. Tarion Warranty Corp.,* [2007] O.J. No. 1692 (Div. Ct.)

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.).]

[24] 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].

[25] 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].

[26] 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].

[27] The exclusion in section 52(3) does not exclude all records concerning the actions or inactions of an employee simply because this conduct may give rise to a civil action in which the Crown may be held vicariously liable for torts caused by its employees [see *Ontario (Ministry of Correctional Services) v. Goodis*].[4]

[28] 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].

**Section 52(3)3: matters in which the institution has an interest**

[29] 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

[4] (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.)

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*

[30] The record was prepared by external consultants hired by the city. The city submits that the information in the record was collected, maintained, and used by it (or on its behalf by the consultants) in meetings, consultations and communications about the city's operations of the Toronto Fire Service (TFS) dispatch centre and the employment/labour-relations considerations in the development of "initiatives" related to the operation thereof. The city states that it continues to maintain and use the record for further meetings, discussions, communications, etc., with respect to implementing many of the initiatives arising from the recommendations contained therein.

[31] The appellant confirms that the city hired a consultant to prepare the record. The appellant also states that the record was maintained and used by the city.

[32] Based upon my review of the entire record and the parties' representations, I find that part 1 of the test has been met as the record was collected, maintained and used by the city. As well, the record was prepared by the consultant on behalf of the city.

### *Part 2: meetings, consultations, discussions or communications*

[33] The city submits that the record was collected, maintained, and used by it in relation to meetings, consultations, discussions, or communications about TFS dispatch operations issues. The city provided two documents in support and states that it is continuing to maintain and use the record for "further discussions, meetings, communications, etc." with respect to the implementation of the various initiatives in the record concerning staffing issues.

[34] The appellant did not directly address this issue in its representations.

[35] Based upon my review of the record and the representations, I agree with the city that the record was used for meetings, consultations, discussions or communications about TFS dispatch operation issues. Therefore, I find that part 2 of the test has been met.

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

[36] 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.)].

[37] 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].

[38] 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)*, cited above].

[39] The records collected, prepared maintained or used by an institution are excluded only if the meetings, consultations, discussions or communications are about labour relations or "employment-related" matters in which the institution has an interest. Employment-related matters are separate and distinct from matters related to employees' actions [*Ministry of Correctional Services*, cited above].

[40] The city provided both confidential and non-confidential representations on part 3 of the test. In its non-confidential representations, it submits that its TFS division contains employees who are members of a workplace union ("unionized workers") subject to a collective agreement and managerial employees and city officials (such as the Fire Chief) who are not members of a workplace union ("non-unionized workers"). The collective agreement applicable to the unionized workers dictates the terms and conditions of employment for workers employed by the city and, more generally, governs a broad range of labour relations issues that arise in respect of their employment.

[41] The city states that the recommendations in the record with respect to the alterations to working conditions for staff raise considerable employee-employer issues.

[42] The city also submits that although the record may in part deal with general issues concerning the operation of the city, including comparisons to other municipalities, the record deals predominantly with issues concerning the management of the city's workforce, and not as a general "operational review" unrelated from employment issues.

[43] The city submits that the employment-related matters set out in the record have implications for both the city and its employees. These are not matters of idle curiosity, but rather are processes on how to fulfill the city's legal obligations as an employer, in making decisions on how to compensate its employees for their work, and the nature of the work required of specific employees. It states that:

> Although portions of this Labour Relations Record may be general in nature, dealing with a review of best practices and the experiences in other municipalities, the record directly addresses and reviews the city's operations and includes specific findings and recommendations relating to employment matters.

[44] The appellant submits that the record deals with how quickly the TFS communication system and responders advance a call through the system from 911 to arrival at the scene. It states that there is nothing in the report that deals with labour negotiations and that the THS hired a Fire Consultant, not a labour relations consultant, to review its system and prepare the report.

[45] In reply, the city states that although the topic of the record is not "labour negotiations", some of the matters which are the subject of the record are also matters which have been the subject of "negotiations, communications, meetings, etc." relating to the collective bargaining process. The city submits that section 52(3) would also address documents whose contents were used by the city as an employer in the collective bargaining process.

[46] The city states that the record is more than a "report on response times". It is a detailed review of the operations of the city's consolidated "communications centre" and the city's technology, staffing, training, policies, procedures, and management of personnel and technological assets to ensure prompt response by TFS.

[47] The city refers to its 2009 Annual Report (which was also referenced by the appellant) and states that the city used the record in the process of changing the testing applied to potential candidates in running job competitions for specific employment positions in the TFS communications division. The 2009 Annual Report states that the focus of the record was "operational efficiencies and best practices through statistical review and subsequent customer service initiatives". It quotes this annual report as follows:

> As a result of the Quality Assurance Review, the communications recruitment process was modified to include new testing that more closely simulates the current work environment. [Emphasis in original.]

[48] The city submits that although the record may, in part, deal with general issues concerning the operation of the city including comparisons to other municipalities, the record deals predominantly with issues concerning the management of the city's workforce, and not as a general "operational review" unrelated to employment issues.

*Analysis/Findings*

[49] As stated above, the city has applied section 52(3)3 to excludes pages 58 to 71, 78, 79, 82, 83, 98 to 102, and portions of pages 10, 11, 28, 29, 84, 87 and 88 of the 127 page record from the *Act*.

[50] Based upon my review of the entire record, I do not agree with the city that the information at issue comes within part 3 of the test. The record is titled, "Toronto Fire Services Quality Assurance Review" and is a general operational review of the city's fire dispatch system. The record was prepared for the city by a consultant and is described by the city in its representations as a:

> …detailed review of the operations of the city's consolidated "communications centre" and the city's technology, staffing, training, policies, procedures, and management of personnel and technological assets to ensure prompt response by Toronto Fire Services.

[51] The disclosed portions of the record contain the following information, which supports my view that this record is not about labour relations or employment-related matters in which the city has an interest:

**Project Scope**

The need to develop a Quality Assurance [QA] program was identified in the 2007 TFS Master Fire Plan.

> *Quality Assurance has been identified as an issue within the Communications section, with a request in the operating budget for a staff person for this purpose in both 2006 and 2007 with no approval. As part of the 2006 Capital Budget, funding was approved to undertake a Quality Assurance Study.* ***This study will assess the current technology in use in the Communications Centre to validate the systems and determine if these systems are being leveraged to effectively support TFS processes.*** *The effectiveness of internal policies, procedures and staff training will also be included in this review. The audit will determine the degree to which Communications section staff are meeting the requirements of the citizens of Toronto and other Fire Service divisions, primarily Operations division staff. This study is expected to be completed in 2007, and will form the basis for a new business case for an additional staff person in the 2008 Operating Budget cycle*[5] [emphasis added]…

**Methodology**

The QA review was conducted along a number of tracks including a **detailed review of data from the Computer Aided Dispatch (CAD) system, and from the 9-1-1 call management system in addition to observation of staff at each of the site visits. Also included was a detailed review of standing orders, the training material and operational guidelines**… [emphasis added].

The current standards that apply to emergency communications in the North American fire service were also reviewed and used as a comparison between what was observed and measured within the TFS. An attempt to understand current best practices was undertaken using a survey of peer departments in Canada and the United States. Finally, a literature survey of all relevant material was conducted to clarify industry trends...

[5] Toronto Fire Services, Master Fire Plan 2007, page 62.

**Metrics**

The metrics that allow for an analysis of the call taking and dispatch processes include each step from the time an emergency occurs, until the emergency responders—in this case Toronto Fire Services—arrive at the scene and commence operations. These steps are dealt with in more detail in other sections, but at a macro level the goal is to measure and understand the following measurement points.

1. The time at which a call for emergency services is first placed—usually to 9-1-1;
2. The time it takes for the 9-1-1 call answering point to ascertain which emergency service is required and then to successfully complete the transfer;
3. The time it takes for the required emergency service to answer the phone;
4. The time it takes the emergency service to correctly question the caller and 'create' an incident for dispatch;
5. The time it takes the emergency service to dispatch the incident to the emergency responders;
6. The time it takes for the emergency responders to commence their response; and
7. The time it takes for the emergency responders to travel and arrive at the scene of the emergency and commence action…

[52] Based upon my review of the entire record and the parties' representations, I find that this record is an organizational review. As stated above, this office has generally found that organizational reviews are not subject to the exclusionary provision in section 52(3)3. The city relies on Order MO-2332, where one of the records at issue was a review of the organization and structure of the City of Hamilton's Legal Services Department. In that order, Adjudicator Frank DeVries found that the record also addressed "… (in considerable detail) matters such as workload issues, workload management, staff management, working relationships, compensation plans, remuneration, and performance initiatives." Adjudicator DeVries stated:

> Although former Assistant Commissioner Mitchinson stated in MO-1654-I that "The fact that a review of this nature involves organizational issues and job design is not, in my view, sufficient to alter the purpose of the review and the nature of the records produced in that context", the records at issue in this appeal, in my view, do more than simply "involve organizational issues and job design", they address a number of employment-related issues in considerable detail.

[53] In Order MO-2332, Adjudicator DeVries considered the wording of the appellant's request that sought:

> All reports and presentations by [the consulting firm], with respect to the compensation structures, salary classifications, remuneration and related matters for the position of lawyers employed in the City of Hamilton Legal Services Division…

[54] In determining that the exclusion in section 52(3)3 applied, he found that:

> …the appellant's request was for matters that are integral to the employment relationship between the city and its own workforce.

[55] In my view, the record in Order MO-2332 clearly relates to employment-related matters and the institution's relationship with its workforce, given its emphasis on classifications and remuneration, and for that reason, is distinguishable from the record at issue here, which is an operational review.

[56] The city also relies on Order MO-2455, which dealt with the application of section 52(3)3 to two reports reviewing the city's compensation program for identified employee groups. In that order, Adjudicator DeVries found that these two reports directly address and review the city's compensation program, and also include specific findings and recommendations relating to the city's compensation program for identified employee groups. Although one record did include some general information about the compensation programs in other institutions, he determined that the focus of this record was the city's compensation program. As a result, Adjudicator DeVries was satisfied that the two records related directly to the compensation matters relating to the city's workforce, and fit within the exclusionary provision in section 52(3)3.

[57] Again, this record is distinguishable as it clearly relates to employment-related matters such as employee compensation.

[58] The city also refers to Order PO-2507. The record in that appeal was a report prepared by a Human Resource Consultant and a Risk and Assurance Consultant, Audit Services Branch of the Ministry of Public Safety and Security. Adjudicator Laurel Cropley found that the record related to a review conducted by the Ministry to examine workload and workforce issues. She stated that:

> It is apparent from the submissions of both parties that the Ministry initiated the Joint Review in response to workload and other human resources concerns raised by employees of the Probation office. I accept that the Ministry, as an employer, has an interest in addressing and resolving these issues as part of the overall management of its workforce.

[59] In its representations, the city quotes disclosed portions of the record that refer to its preparation:

> Over a period of nearly 12 months, the consultants worked in close cooperation with TFS staff to review Toronto's call management metrics for fire in light of the NFPA [National Fire Protection Association] standard. This required a full review of the CAD [Computer Aided Dispatch] system data in addition to reviewing 9-1-1 call management data. The consultants also spent extensive time sitting with the staff while they performed their duties, clarifying the ways in which work was completed. Training material was reviewed and feedback sought from the trainers and personnel with regard to how effective this was.
>
> The consultants also met with senior fire management personnel on a regular basis and included them in the review process. The disaster recovery strategy for TFS was reviewed and this included a detailed review of the primary and secondary alternate sites; it also included a real-time recovery from the backup centre to the principal centre at [address].

[60] Both parties refer to the 2009 Toronto Fire Services Annual Report, which states that:

> The Communications Division Quality Assurance Review continued throughout 2009, with a strategic planning session conducted with staff in January. The recommendations were presented to staff in December, with a focus on operational efficiencies and best practices through statistical review and subsequent customer service initiatives. The final report will be released early in 2010.
>
> As a result of the Quality Assurance Review, the communications recruitment process was modified to include new testing that more closely simulates the current work environment. Changes were also made to the recruit training schedule, by developing separate call taker and dispatcher modules, and scheduling practical training after each module. Four new recruits were hired in November 2009, with an additional three new recruits slated to begin in early 2010.

[61] In this appeal, the appellant's request was for the consultant's report on response times prepared for Toronto Fire Service. As described above, the record is titled "Quality Assurance Review" and is an operational review report of Toronto Fire Service's call management system. Neither the report, nor the information the city has withheld from it, contain matters that are integral to the employment relationship between the city and its own workforce, as was the case in Orders MO-2332, MO-2455 and PO-2507.

[62] Based upon my review of the information at issue in the record, I find that it concerns generic training or operational issues. Concerning this type of information, in Order PO-2928, I stated that:

> In Order PO-2913 Adjudicator Laurel Cropley considered the application of section 65(6)3 [of the *Freedom of Information and Protection of Privacy Act* (the provincial *Act*), the equivalent to section 52(3)3 of the *Act*] to training materials prepared for use at the OPP Academy in training police officer recruits, instructing them on the safe use of firearms, tasers and restraints. She found that that the *Act* applies to these and other generic training materials. She determined that whether or not section 65(6) applies to a record rests with the nature of circumstances in which the particular record is used.
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> In particular, Adjudicator Cropley found the records would be excluded under section 65(6)3 of the *Act* (or its municipal *Act* equivalent, section 52(3)3) if they were prepared or used in relation to communications about the employment-related training or qualifications of a particular individual. In that situation, their use was, therefore, about the employment of the individual by an institution. She found that records relating to matters in which the institutions are acting as employers and the terms and conditions of the employment of specifically identified individuals are at issue fall within the ambit of the section 65(6)3 exclusion.
>
> With respect to generic training materials that are similar to the record at issue in this appeal, Adjudicator Cropley found section 65(6)3 is not directed at records of this nature because these records are communications about operational procedures to be followed by the institution's employees generally, and do not relate to specific employees. She determined that the training materials at issue in that appeal contained information about:
>
> > …OPP-wide procedures used to establish consistency in, and adequacy of training. As well, they are tools for ensuring that the OPP as an organization meets its statutory mandate as a police agency, as noted by the Ministry. In addition, although not determinative of the issue, I would suggest that the establishment of training standards is one facet of holding the police accountable to the public with respect to the overall performance and behaviour of its officers, and particularly with respect to the use of force, including the use of firearms, tasers and restraints.

> Previous orders have found that where records are prepared in the course of routine procedures, such as police officers' notes or occurrence reports, they would not typically fall under the exclusion in section 65(6). However, when allegations of misconduct are made, the records subsequently retrieved from the case file for the purposes of the investigation have been excluded from the *Act* [See, for example: Orders MO-2428 and PO-2628]. I accept that once a performance issue arises as a result of a particular police officer's actions, records that describe the training that the officer received may well engage the interests of the institution in its capacity as employer.
>
> However, I am not persuaded that the records at issue, which consist of generic training materials, relate to matters in which the Ministry is acting as an employer and the terms and conditions of the employment of specifically identified individuals are at issue. For this reason, the communications represented by the records are not "about" employment-related matters" within the meaning of section 65(6)3. Accordingly, I find that the records at issue do not meet the requirements of part 3 of section 65(6)3 and they are subject to the *Act*.

I agree with and adopt Adjudicator Cropley's findings in Order PO-2913. The DVD at issue in this appeal is a generic tool for police officers. Therefore, it is more accurately described as a communication about operational procedures to be followed by the institution's employees. As a result, the record is not "about employment-related matters" within the meaning of section 65(6)3, and it does not meet the requirements of part 3 of section 65(6)3. Accordingly, I find that the DVD is subject to the *Act* and I must determine whether it is exempt under sections 14(1), 18(1) or 21(1).

[63] Similarly, the record in this appeal contains generic training and operational procedure information. The review that resulted in the record in this appeal was not initiated in response to workload and other human resources concerns raised by the city's employees as in Order PO-2507. As the record itself states, it contains a "full review of the CAD system data in addition to reviewing 9-1-1 call management data".

[64] The information in the record in this appeal was also not prepared as a result of a labour dispute about employment conditions as was the case in Order PO-2157; another order relied upon by the city. In Order PO-2157, the records were institutional review reports prepared by the Office of the Child and Family Service Advocacy during

March to May 2002 in relation to a number of youth facilities under the jurisdiction of the ministry. The reports were prepared during the course of a labour dispute between the Ontario Public Service Employees Union (OPSEU) and the provincial government.

[65] In Order PO-2157, Adjudicator Sherry Liang found that an important purpose of the reviews contained in the records was to document the effects of the labour dispute on the conditions at young offender facilities. Rather than touching generally on matters of labour relations, the reviews focused on the labour dispute and its impact on the delivery of services at these facilities. As the labour dispute arose out of an impasse in collective agreement negotiations between OPSEU and the provincial government, Adjudicator Liang determined that the information in the records was collected and used in relation to a "labour relations" matter for the purposes of section 65(6)3 of the *Freedom of Information and Protection of Privacy Act* (*FIPPA*), which is the equivalent of section 52(3)3 of the *Act*.

[66] The information in the record in this appeal was also not prepared as a result of an examination into the conduct of city personnel as was the case in *Reynolds v. Binstock*,[6] another case relied upon by the city. In *Reynolds*, the terms of reference of the investigation were to examine the conduct of the city personnel in the preparation of a specific Request for Proposals (RFP), the evaluation of the responses and the selection of the preferred proponent. The court found that this was "…beyond doubt an employment-related exercise." By contrast, in this appeal, the terms of reference were to examine the call dispatch system of the TFS, both the computer aided system and the 911 system. The purpose of the report was not to examine whether there was misconduct by specific employees.

[67] The city also relies on the case of *Ministry of Attorney General and Toronto Star,* 2010 ONSC 991 (Div. Ct.) as to the meaning of "relating to" in section 52(3)3. As stated above, this section provides that, subject to section 52(4), the *Act* does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

[68] In the *Toronto Star* case, the court determined that the words "relating to" in section 65(5.2) of the provincial *Act* (the equivalent to section 52(2.1) of the *Act*) require some connection between "a record" and "a prosecution". It is the city's position that for purposes of section 52(3)3, the term "in relation to" requires the city to establish that only that there is some relationship between the creation, preparation, maintenance, and/or use of the records and the labour relations or employment-related matter in question. As stated above, in Order MO-2589, this office determined that in order for the collection, preparation, maintenance or use of a record to be "in relation

[6] 2006 CanLII 36624 (Div. Ct.)

to" the subjects mentioned in paragraph 1, 2 or 3 of section 52(3), it must be reasonable to conclude that there is "some connection" between them.

[69] However, although I agree with the city's interpretation of the phrase "in relation to", it is also necessary to examine the purpose of the section 52(3) exclusion. In *Ontario (Ministry of Correctional Services) v. Goodis* (cited above), the Divisional Court determined that section 65(6) of *FIPPA* (which, as already noted, is the equivalent to section 52(3) of the *Act*) should be interpreted in light of the purpose of the *Act*, which is found in section 1 which states:

> (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
>
> (i) information should be available to the public,
>
> (ii) necessary exemptions from the right of access should be limited and specific, and
>
> (iii) decisions on the disclosure of information should be reviewed independently of the institution controlling the information; and
>
> (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

[70] In that same decision, the court determined that not all records pertaining to employee conduct are excluded from the *Act*, even if they are in files pertaining to civil litigation or complaints brought by a third party. Whether or not a particular record is "employment-related" will turn on an examination of the particular document. It found that the type of records excluded from the *Act* by section 65(6) 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.

[71] All institutions operate through their employees. Employees are the means by which all institutions provide services to the public. In this appeal, the record was not created to address matters in which the institution is acting as an employer, and the terms and conditions of employment or human resources questions are at issue, in the sense intended by section 52(3). The record is an operational review of the Toronto Fire Service's dispatch system focusing on the efficient and timely response to communications from an operational standpoint.

[72] Taking into account both the confidential and non-confidential representations of the city and the jurisprudence cited above, I find that this record is not excluded from

the application of the *Act* by reason of section 52(3)3. Accordingly, pages 58 to 71, 78, 79, 82, 83, 98 to 102, parts of pages 28 and 29, parts of pages 10 and 11, parts of page 84, and part of pages 87 and 88 of the record are subject to the *Act*. As no exemptions have been claimed for this information, I will order it to be disclosed.

[73] I will now proceed to determine whether the mandatory exemption in section 10(1)(b) or the discretionary exemption in section 11(g) applies to pages 93 to 95 of the record.

## B. Does the mandatory third party exemption at section 10(1)(b) apply to pages 93 to 95 of the record?

[74] Section 10(1)(b) states:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,
>
> > result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;

[75] Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)], leave to appeal dismissed, Doc. M32858 (C.A.)]. Although one of the central purposes of the *Act* is to shed light on the operations of government, section 10(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, and MO-1706].

[76] For section 10(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 10(1) will occur.

**Part 1: type of information**

[77] The city submits that pages 93 to 95 of the record contain detailed information on the particulars of processes prepared by fire service professionals and, therefore, is technical information. The appellant did not provide representations on part 1 of the test under section 10(1)(b). Furthermore, as stated above, none of the third party fires service departments provided representations. One of these fire service departments even consented to the disclosure of its information in the record.

[78] The term "technical information" has been found to apply to information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing [Order PO-2010].

[79] In this appeal, the information at issue on pages 93 to 95 of the record consists of the interpretation of fire dispatch systems survey results provided to the consultant who prepared the record. I agree with the city that part 1 of the test has been met, as this information is technical information as defined above (see Orders PO-2010 and PO-2557). This information has been compiled by the consultant, an expert in the field of fire dispatch systems, and describes the operation and maintenance of these systems.

**Part 2: supplied in confidence**

***Supplied***

[80] The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties [Order MO-1706].

[81] Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party [Orders PO-2020, PO-2043].

[82] The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 10(1). The provisions of a contract, in general, have been treated as mutually generated, rather

than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party. This approach was approved by the Divisional Court in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, cited above. [See also Orders PO-2018, MO-1706, PO-2496, upheld in *Grant Forest Products Inc. v. Caddigan,* [2008] O.J. No. 2243 and PO-2497, upheld in *Canadian Medical Protective Association v. John Doe,* [2008] O.J. No. 3475 (Div. Ct.)].

[83] There are two exceptions to this general rule which are described as the "inferred disclosure" and "immutability" exceptions. The "inferred disclosure" exception applies where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the affected party to the institution. The "immutability" exception applies to information that is immutable or is not susceptible of change, such as the operating philosophy of a business, or a sample of its products. [Orders MO-1706, PO-2384, PO-2435, PO-2497 upheld in *Canadian Medical Protective Association v. John Doe*, (cited above)].

[84] The city submits that the information at issue was supplied directly to the city or to its external consultants. The city refers to a copy of an email it sent to other cities' fire departments asking them to participate in a survey to provide information for the TFS' quality assurance review.

[85] Based upon my review of the information at issue, I find that only part of this information was supplied by the other cities' fire departments to the city or its consultants. The remaining information is background information or information that the city itself provided in response to the survey questions. This information would not reveal or permit the drawing of accurate inferences with respect to information supplied by these other cities' fire departments. These fire departments provided specific information in response to the survey about its own fire dispatch system.

[86] Therefore, as part 2 of the test has not been met for certain information in pages 93 to 95 of the record, I find that this information is not exempt under section 10(1)(b). I will consider below whether this information is subject to section 11(g).

[87] I will now consider whether the information in pages 93 to 95 of the record that I have found to have been supplied by other cities' fire departments, was supplied to the city or its consultant in confidence.

### *In confidence*

[88] In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier had a reasonable expectation of

confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis [Order PO-2020].

[89] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential
- treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure [Orders PO-2043, PO-2371, PO-2497]

[90] The city submits that its Fire Chief sought responses from other cities fire department chiefs that are members of the Association of Metro Fire Chiefs. It is the city's submission that as a member of this association, the Fire Chief believed that such communications would be exchanged with the expectation of confidentiality and that the city has consistently treated the information as confidential.

[91] Based upon my review of the information at issue, the city's representations, and the city's email sent to the other fire departments soliciting their responses to the survey, I find that the information that I have found to have been supplied, was not supplied in confidence. The email sent to the other fire departments in the United States and Canada, does not refer to the responses to the survey being confidential.

[92] I have also reviewed a copy of the survey results of the responding cities, which were provided to me by the city at my request. Nothing in these responses indicates that the survey responses were being communicated to the city in confidence or were to be kept confidential. Nor do they contain any information that indicates that the survey responses were prepared for a purpose that would not entail disclosure. In addition, some of the information at issue reflects publicly available information concerning population size and call volumes, or information required as a result of the NFPA "Standard for the Installation, Maintenance, and Use of Emergency Services Communications Systems".

[93] On the evidence, I am not satisfied that the respondents to the survey would have had an expectation that their identity as respondents, and the specific information

which comprised their individual responses, would remain confidential, and that this expectation was reasonable and had an objective basis (Orders M-169 and MO-1690).

[94] Therefore, part 2 of the test has been not been met for the information that I have found to have been supplied to the city in pages 93 to 95 of the record.

[95] As all three parts of the test must be met, I find that section 10(1)(b) does not apply.

[96] Although part 2 of the test has not been met, for the sake of completeness, I will consider whether part 3 of the test has been met with respect to the information on pages 93 to 95 of the record.

**Part 3: harms**

[97] To meet this part of the test, the institution and/or the third party must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)]. The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus [Order PO-2020].

[98] The need for public accountability in the expenditure of public funds is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 10(1) [Order PO-2435].

[99] Parties should not assume that harms under section 10(1) are self-evident or can be substantiated by submissions that repeat the words of the *Act* [Order PO-2435].

[100] The city submits that it has a reasonable basis to believe that the disclosure of the information in question would result in further information of this type not being provided to the city. It states it is the position of the Fire Chief, as a member of the Metro Fire Chiefs Association, that if such communications were to be publicly exposed, contrary to the expectations of the parties, the city would no longer receive such information. As a member of this organization, the Fire Chief is in a position to understand the views of its members and the result in response to future requests of this type, if information sought under confidential communications would be publicly distributed.

[101] Based upon my review of the information at issue in pages 93 to 95 of the record, I find that disclosure of this information could not reasonably be expected to result in similar information no longer being supplied to the city where it is in the public interest that similar information continue to be so supplied.

[102] As stated above, there is no indication in either the email to the responding cities that the survey results would be kept confidential, nor is there any information in the survey questions or responses that these responses would be kept confidential. The survey comprises over 300 questions. Pages 93 to 95 of the record do not contain the survey responses, but a limited amount of information summarizing certain responses per responding city.

[103] The information at issue was provided by these other fire departments on a voluntary basis, in order to assist the city's consultant in preparing a portion of the quality assurance review of the TFS dispatch system. Furthermore, none of the third party fire service departments provided representations objecting to the disclosure of their third party information in the record. In fact, one fire service department even consented to the release of its third party information in the record. I do not accept the city's claim that the fire service departments that chose to respond to the survey would not provide similar information to the city in future.

[104] Accordingly, even if I had found that part 2 of the test had been met, I would not have found that part 3 of the test under section 10(1)(b) had been met.

[105] I will now consider whether section 11(g) applies to the information on pages 93 to 95 of the record.

## C. Does the discretionary exemption at section 11(g) apply to pages 93 to 95 of the record?

[106] Section 11(g) states:

> A head may refuse to disclose a record that contains,
>
> > information including the proposed plans, policies or projects of an institution if the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person;

[107] The purpose of section 11 is to protect certain economic interests of institutions. The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) explains the rationale for including a "valuable government information" exemption in the *Act*:

> In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

[108] For sections 11(g) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

[109] The need for public accountability in the expenditure of public funds is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 11 [Orders MO-1947 and MO-2363].

[110] In order for section 11(g) to apply, the institution must show that:

1. the record contains information including proposed plans, policies or projects of an institution; and

2. disclosure of the record could reasonably be expected to result in:

   (i) premature disclosure of a pending policy decision, or

   (ii) undue financial benefit or loss to a person.

[Order PO-1709, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Goodis*, [2000] O.J. No. 4944 (Div. Ct.)]

[111] For this section to apply, there must exist a policy decision that the institution has already made [Order P-726].

[112] The city submits that pages 93 to 95 of the record contain information concerning the city's proposed plans, policies or projects to establish a quality assurance program and defined standards for fire call taking and dispatch, and that these pages reveal the standards with respect to the initiatives that will be applied. The city also submits disclosure could reasonably be expected to result in premature disclosure of a pending policy decision. This information has not yet been disclosed as certain elements of these plans and standards require further approvals, or negotiations, i.e., budget approvals, or resolution of labour-relations matters.

[113] The appellant did not provide representations on this issue.

[114] Based upon my review of pages 93 to 95 of the record, I do not agree with the city that these pages contain information concerning the city's proposed plans, policies or projects with respect to the standards to be applied by the city for fire call tracking and dispatch. As stated above, these pages contain the consultant's interpretation of certain results of the survey. This survey was undertaken by the city and the other city fire. The survey consisted of over 300 survey questions. These questions have already been disclosed to the appellant.

[115] The city has also not provided in its representations specific information as to which pending policy decision would be prematurely disclosed by which particular information in these pages of the record. From my review of the information at issue and the city's representations, I am not satisfied that disclosure of the information in pages 93 to 95 of the record could reasonably be expected to result in premature disclosure of a pending policy decision.

[116] Accordingly, I find that section 11(g) does not apply to pages 93 to 95 of the record. As no other exemptions have been claimed, I will order this information to be disclosed to the appellant.

## ORDER:

1. I order the remaining portions of the record to be disclosed to the appellant **by November 29, 2011 but not before November 23, 2011.**

2. In order to verify compliance with this order, I reserve the right to require a copy of the information disclosed by the city pursuant to order provision 1 to be provided to me.

Original signed by: October 24, 2011
Diane Smith
Adjudicator