

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3316

Appeal MA15-88

Corporation of the City of Clarence-Rockland

May 27, 2016

Summary: The city received a request under the *Act* for access to correspondence between two named city employees. The city granted partial access to the responsive records, claiming that two records fell outside of the scope of the *Act*, pursuant to the exclusion for records relating to a prosecution at section 52(2.1) and the exclusion for records relating to labour relations at section 52(3) of the *Act*. The city claimed, in the alternative, that portions of the two records, as well as portions of other records, are exempt pursuant to the mandatory exemptions at sections 10(1)(a) and (c) (third party information) and the discretionary exemptions at sections 7(1) (advice or recommendations) and/or 11(c) (economic and other interests) of the *Act*. In this order, the adjudicator finds that the city has not established that any of the exclusions or the exemptions claimed apply to the records and orders the city to disclose the information that remains at issue to the appellant.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 7(1), 10(1), 11(c), 52(2.1), and 52(3).

OVERVIEW:

[1] The Corporation of the City of Clarence-Rockland (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

Copies of emails and all written correspondence between [two named city employees] from July 2013 to March 2014.

[2] The city located 10 records responsive to the request and granted partial access

to them. The city claimed that records 4 and 5 were excluded from the scope of the *Act* by virtue of the application of the exclusion for records relating to a prosecution at section 52(2.1) or the exclusion for records relating to labour relations at section 52(3) of the *Act*. Despite this claim, the city disclosed portions of records 4 and 5 to the appellant. The city claimed that the severed portions of records 4, 5, 6, 9, and 10 were exempt pursuant to the discretionary exemptions at sections 7(1) (advice and recommendations) and/or 11(c) (economic and other interests), as well as the mandatory exemption for third party information at section 10(1)(a) and (c) of the *Act*.

[3] The requester, now the appellant, appealed the city's decision.

[4] During mediation the appellant advised that he wishes to pursue access to the information that has been withheld from records 4 and 5. However, he clarified that he is not seeking access to any phone numbers that were withheld in record 4. Additionally, he confirmed that he is not seeking access to any of the information that has been withheld from records 6, 9, and 10.

[5] The city advised that it continues to claim that all of the exclusions and exemptions identified in the decision letter apply to record 5 but that it was no longer claiming that sections 10(1)(a) and (c), and 11(c) apply to record 4.

[6] As a mediated resolution could not be reached, the appeal was transferred to the adjudication stage of the appeal process where an adjudicator conducts an inquiry into the appeal. Representations were sought, initially, from the city. The city did not provide representations in response. In the circumstances, I decided that it was not necessary for me to seek representations from the appellant.

[7] In this order, I do not uphold the city's decision and order it to disclose the withheld portions of records 4 and 5 to the appellant.

RECORDS:

[8] Records 4 and 5 remain at issue in this appeal. Portions of them have been withheld. The appellant seeks access to the portions of information that have been withheld.

ISSUES:

- A. Does section 52(2.1) apply to exclude the records from the application of the *Act*?
- B. Does section 52(3) exclude the records from the application of the *Act*?
- C. Does the discretionary exemption at section 7(1) apply to the records?
- D. Does the discretionary exemption at section 11(c) apply to record 5?

DISCUSSION:

Preliminary Issue: Possible application of mandatory exemptions

[9] I have considered the possible application of the two mandatory exemptions found at section 14(1) (personal privacy) which was not raised by the city, and section 10(1) (third party information) which was raised by the city.

[10] Commenting first on the personal privacy exemption at section 14(1), on my review of the records at issue, the only information that can be described as “personal information” are two telephone numbers found in record 4. As the appellant has confirmed that he does not seek access to these telephone numbers they are not issue in this appeal. With respect to the remaining information, I am satisfied that the exemption at section 14(1) cannot apply to it, as all of the individuals identified in the records are identified in a professional or business capacity. Section 2(3) of the *Act* makes a distinction between personal information and professional information. That section states:

(3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

[11] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be “about” an individual.¹ As it is clear that any information relating to individuals in the information remaining at issue appears in a professional or business capacity, section 14(1) does not apply.

[12] With respect to the exemption that addresses third party information, I am satisfied that section 10(1) cannot apply to the information in record 5. Section 10(1) is designed to protect the “informational assets” of businesses or other organizations that provide information to government institutions.² The information relating to a third party found in the records simply describes the third party’s actions in response to directions from city staff. As a result, I find that the section 10(1) interests are not engaged.

A. Does section 52(2.1) apply to exclude the records from the application of the Act?

[13] The city submits that records 4 and 5 are excluded from the scope of the *Act* by virtue of the application of the exclusion at section 52(2.1) that deals with records relating to a prosecution. Specifically, section 52(2.1) states:

¹ Orders P-257, P-427, P-1412, P-1612, R-980015, MO-1550-F and PO-2225.

² *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.).

This Act does not apply to a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed.

[14] The purposes of section 52(2.1) include maintaining the integrity of the criminal justice system, ensuring the accused and the Crown's right to a fair trial is not infringed, protecting solicitor-client privilege and litigation privilege, and controlling the dissemination and publication of records relating to an ongoing prosecution.³

[15] The term "prosecution" in section 52(2.1) of the *Act* means proceedings in respect of a criminal or quasi-criminal charge laid under an enactment of Ontario or Canada and may include regulatory offences that carry "true penal consequences" such as imprisonment or a significant fine.⁴

[16] The words "relating to" require some connection between "a record" and "a prosecution." The words "in respect of" require some connection between "a proceeding" and "a prosecution."⁵

[17] Only after the expiration of any appeal period can it be said that all proceedings in respect of the prosecution have been completed. This question will have to be decided based on the facts of each case.⁶

Analysis and finding

[18] In order for the exclusion at section 52(2.1) to apply, the city must establish that:

1. there is a prosecution;
2. there is some connection between the record and the prosecution; and
3. all the proceedings with respect to the prosecution have not been completed.⁷

[19] Previous orders have established that with respect to exclusionary provisions, such as section 52(2.1), the city bears the onus of proof to establish that they apply to exclude the records from the scope of the *Act*.⁸ Failure by the city to establish the application of an exclusion will result in a finding that the *Act* applies. In my view, as the city has not provided sufficient evidence to establish that the requirements for the application of section 52(2.1) have been met, it has not discharged its evidentiary burden and the exclusion does not apply.

[20] In the absence of representations, I do not accept that the city has provided

³ *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991, March 26, 2010, Tor. Doc. 34/91 (Div. Ct.).

⁴ Order PO-2703.

⁵ *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, note 3.

⁶ Order PO-2703.

⁷ Order PO-3260.

⁸ Order MO-2439, MO-3139-I, and MO-3294-I.

sufficient evidence to suggest that records 4 and 5 relate to a prosecution. Specifically, it has not established that there is a prosecution, that there is some connection between the information in records 4 and 5 and the prosecution, and that all the proceedings with respect to the prosecution have not been completed. Additionally, in my view, the information at issue, on its face, does not appear to relate to a prosecution.

[21] As mentioned above, the law of evidentiary burdens places the onus of proof to establish that section 52(2.1) applies on the city. In my view, in the circumstances of this appeal, the city has not provided me with sufficient evidence to discharge its burden with respect to any of the requirements of the three-part test to determine the application of the exclusion at section 52(2.1). I find that it does not apply in the circumstances of this appeal.

B. Does section 52(3) exclude the records from the application of the Act?

[22] The city also submits that records 4 and 5 are excluded from the scope of the *Act* by virtue of the application of the exclusion for labour relations and employment related information at section 52(3). Specifically, the city submits that sections 52(3)1 and 3 apply in the circumstances of this appeal. Those portions 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.

[23] 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*.

Section 52(3)1: Court or tribunal proceedings

[24] For section 52(3)1 to apply, the institution must establish 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 related 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.

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

[25] 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.

Analysis and findings

[26] Similar to section 52(2.1) discussed above, sections 52(3)1 and 52(3)3 are exclusionary provisions. If they apply, the records are excluded from the scope of the *Act* and I do not have jurisdiction to determine whether any portions of them should be disclosed. The city bears the onus of proof to establish whether they apply and failure to do so will result in a finding that the *Act* applies. For reasons similar to those set out above on my discussion on section 52(2.1), I find that the city has not provided sufficient evidence to establish that either of the exclusions at section 52(3)1 or 52(3)3 applies in the circumstances of this appeal.

[27] In the absence of representations, the city has not provided evidence to suggest that records 4 and 5 were collected, prepared, maintained or used by or on its behalf in relation to either 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. It also has not provided evidence to suggest that they were collected, prepared, maintained or used in relation to meetings, consultations discussions or communications about labour relations or employment related matters in which the institution has an interest. Additionally, in my view, the information at issue, on its face, does not appear to relate to labour relations or employment matters within the meaning of any of the paragraphs in section 52(3).

[28] As the city has not established that the requirements for either of the three-part tests to determine whether the exclusions at section 52(3)1 or 52(3)3 apply to records 4 and 5, I find that it has not discharged its evidentiary burden and neither of them apply in the circumstances of this appeal.

C. Does the discretionary exemption at section 7(1) apply to the records?

[29] The city submits that the discretionary exemption at section 7(1) applies to the information that has been withheld from records 4 and 5. Section 7(1) states:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

[30] The purpose of section 7 is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.⁹

[31] "Advice" and "recommendations" have distinct meanings. "Recommendations" refers to material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised, and can be express or inferred.

[32] "Advice" has a broader meaning than "recommendations." It includes "policy options," which are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made, and the public servant's identification and consideration of alternative decisions that could be made. "Advice" includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.¹⁰

[33] "Advice" involves an evaluative analysis of information. Neither of the terms "advice" or "recommendations" extends to "objective information" or factual material.

[34] Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations, or
- the information, if disclosed, would permit the drawing of accurate inference as to the nature of the actual advice or recommendations.¹¹

[35] The application of section 7(1) is assessed as of the time the public servant or consultant prepared the advice or recommendations. Section 7(1) does not require the institution to prove that the advice or recommendation was subsequently communicated. Evidence of an intention to communicate is also not required for section 7(1) to apply as that intention is inherent to the job of policy development whether by a public servant or consultant.¹²

Analysis and finding

[36] In the circumstances of this appeal, I do not accept that any of the information that is at issue in records 4 or 5 qualifies as either "advice" or "recommendations" as those terms have been interpreted for the purposes of section 7(1).

⁹ *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para 43.

¹⁰ See above, at paras. 26 and 47.

¹¹ Order P-1054.

¹² *John Doe v. Ontario (Finance)*, cited above, at para. 51.

[37] The city has not provided any representations that explain how the information at issue falls within the definition of either "advice" or "recommendations." From my review of the information, I do not accept that, on its face, it can be described as material "that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised." Additionally, I do not accept that the information includes alternative courses of action to be accepted or rejected in relation to a decision that is to be made, nor do I accept that it contains the view or opinions of a public servant as to the range of policy options to be considered by the decision maker. In my view, the information at issue amounts to information that is better described as "objective information" or "factual information" neither of which qualify as "advice" or "recommendations."

[38] Accordingly, I find that the city has not established that the discretionary exemption at section 7(1) applies to the information that remains at issue in records 4 and 5.

D. Does the discretionary exemption at section 11(c) apply to record 5?

[39] The city submits that section 11(c) applies to the withheld portions of record 5. Section 11(c) states:

A head may refuse to disclose a record that contains,

Information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution.

[40] The purpose of section 11 is to protect certain economic interests of institutions. Generally, it is intended to exempt commercially valuable information of institutions to the same extent that similar information of non-governmental organizations is protected under the *Act*.¹³

[41] For section 11(c) to apply, the institution must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type or issue and seriousness of the consequences.¹⁴

[42] The failure to provide detailed and convincing evidence will not necessarily defeat the institution's claim for exemption where harm can be inferred from the surrounding circumstances. However, parties should not assume that the harms under section 11 are self-evident or can be proven simply by repeating the description of

¹³ *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (the Williams Commission Report) Toronto: Queen's Printer 1980.

¹⁴ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-54.

harms in the *Act*.¹⁵

[43] The purpose of section 11(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.¹⁶ The exemption requires only that disclosure of the information could have reasonably been expected to prejudice the institution's economic interests or competitive position.¹⁷

Analysis and finding

[44] As noted above, record 5 is an email between the individuals identified in the request. In the absence of representations on how the disclosure of its content could reasonably be expected to prejudice the city's economic interests or competitive position, I find that the city has not provided the requisite detailed and convincing evidence to establish that the discretionary exemption at 11(c) applies.

[45] While I acknowledge that, as indicated above, the failure to provide detailed and convincing evidence will not necessarily defeat a claim that the exemption applies, in the circumstances of this appeal I do not accept that harm to the city's economic interests or competitive position is self-evident or can be inferred from the specific information contained in the email or the surrounding circumstances that were communicated to this office during the course of this appeal.

[46] Accordingly, I find that the discretionary exemption at section 11(c) does not apply to record 5.

ORDER:

1. I order the city to disclose to the appellant the information that remains at issue in records 4 and 5 by **July 4, 2016** but not before **June 27, 2016**.
2. In order to verify compliance with order provision 1, I reserve the right to require the city provide me with a copy of the information provided to the appellant.

Original Signed By: _____

Catherine Corban
Adjudicator

_____ May 27, 2016

¹⁵ Order MO-2363.

¹⁶ Orders P-1190 and MO-2233.

¹⁷ Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758.