

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-3898

Appeal MA18-00838

The City of Thunder Bay

January 30, 2020

**Summary:** The City of Thunder Bay (the city) received an access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), for the job evaluation guide and job evaluation submissions with allocated scoring for specified positions. The city identified eight responsive records and issued an access decision to the appellant. The city initially withheld six records in whole or in part on the basis of a number of exemptions in the *Act* and/or the labour relations exclusion at section 52(3)3. The requester appealed and the city then claimed the exclusion over five records and disclosed the sixth to the appellant. In this order, the adjudicator upholds the city's decision that the remaining five records at issue are excluded from the scope of the *Act* under section 52(3)3, and dismisses the appeal.

**Statute Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 52(3)3.

**Orders Considered:** Orders PO-2613, MO-2426, and MO-3470.

### OVERVIEW:

[1] The City of Thunder Bay (the city) received an access request, under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA*, or the *Act*), for the following records:

Job evaluation guide, job evaluation submissions with allocated scoring for the following positions: Financial Process Supervisor, Coordinator-Parks Services, Supervisor Transit Operations, Supervisor Community Programs (older Adults). These all pertain to pay equity process.

[2] The city identified eight records responsive to the request (Records 1-8).

[3] In response to the request, the city issued an access decision to the requester, granting full access to two records, and partial access to one record; the city withheld five records in their entirety. Two of those records were withheld under the employment or labour relations exclusion at section 52(3)3 and one or more exemptions, and three records were withheld on the basis of the mandatory personal privacy exemption at section 14(1) of the *Act*. An index of records was included in the decision letter.

[4] The requester, now the appellant, appealed the city's access decision to the Office of the Information and Privacy Commissioner of Ontario (the IPC, or this office).

[5] During mediation, the city revised its position, as follows:

- the labour relations exclusion at section 52(3)3 of the *Act* was claimed over an additional four records;
- section 38(b) of the *Act* was claimed in relation to two records; and
- section 10(1) of the *Act* (third party information) was claimed, in the alternative, to a record.

[6] Mediation did not resolve the issues and the appeal moved to adjudication, where an adjudicator may conduct an inquiry.

[7] As the adjudicator of this appeal, I began an inquiry under the *Act* by sending a Notice of Inquiry, setting out the facts and issues on appeal, first to the city, and then to the appellant. I received written representations from the parties in response. During the inquiry, the city reconsidered its decision regarding Record 8 and disclosed it in full to the appellant. Therefore, Record 8 is no longer at issue in this appeal. Although the city claimed a number of exemptions in the alternative to the exclusion at section 52(3)3, due to my findings that the records are excluded, it is not necessary to discuss any of the mandatory or discretionary exemptions claimed by the city in this order.

[8] For the reasons that follow, I uphold the city's decision to withhold the remaining five records at issue in their entirety because I find that these records are excluded from the *Act* under section 52(3)3.

## **RECORDS:**

[9] Of the eight responsive records, the city released Records 6, 7, and 8 to the appellant in full.

[10] The city has claimed the labour relations exclusion at section 52(3)3 over Records 1-5, and a number of exemptions in the alternative. Given my finding that the

exclusion applies, the exemptions claimed are not listed below. The city describes Records 1-5 as follows:

<b>Record number</b>	<b>City description</b>
1	[Name of third party that developed the record] – Guide Chart for Evaluating: the job evaluation tool used by the city to ensure appropriate compensation and pay equity is maintained for all non-affiliated, non- union, and managerial positions.
2	Scoring of job evaluations: a score sheet of point allocations for positions as determined, in part, by answers to job questionnaires. Points then placed in corresponding pay band in accordance with [name of third party] Chart (Record 1).
3, 4, 5	Job questionnaires: completed by employees, other than the appellant, describing the key, ongoing responsibilities and conditions of their positions that were subject to a job evaluation.

## **DISCUSSION:**

### **Does section 52(3)3 exclude the records from the scope of the *Act*?**

[11] For the reasons that follow, I uphold the city's determination that Records 1-5 cannot be accessed through *MFIPPA* because the employment or labour relations exclusion at section 52(3)3 of the *Act* applies to these records.

#### ***General Principles***

[12] If the section 52(3)3 exclusion applies to the records and none of the exceptions found in section 52(4) apply, the records are excluded from the scope of the *Act*.

[13] If section 52(3)3 applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date.<sup>1</sup>

[14] Section 52(3)3 states:

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<sup>1</sup> *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.

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:

3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

[15] 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.<sup>2</sup>

[16] 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 to conclude that there is "some connection" between them.<sup>3</sup>

[17] 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.<sup>4</sup>

[18] 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.<sup>5</sup>

[19] 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.

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<sup>2</sup> *Ministry of Correctional Services*, cited above.

<sup>3</sup> Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

<sup>4</sup> *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.

<sup>5</sup> Order PO-2157.

***Background about the city's job evaluation program***

[20] It is helpful to begin my assessment of whether the city has established the above three-part test by summarizing the city's description of its job evaluation process and the responsive records.

[21] The city states that Record 1 is "central" to its job evaluation program and is used by the city's job evaluation committee (the committee) to determine a point allocation for each position undergoing a job evaluation, based on four factors (Know How, Accountability, Problem Solving, and Working Conditions). The committee, which is made up of city staff, ranks these four factors with other jobs in relation to each other in Record 1 and places them within the corresponding pay band. The stated goal is to provide "an equitable, just, non-personal basis for establishing salary levels across the city." The city states that Record 1 was prepared by the third party on behalf of the city, after the third party succeeded in a request for proposals (RFP) process to develop a new job evaluation system and pay scale for all of the city's non-affiliated, non-union, and managerial positions.

[22] The city describes job questionnaires (such as Records 3 to 5) as the main vehicle by which the city collects relevant information from its staff regarding the four factors laid out in Record 1 (mentioned above), specific to a city job. Job questionnaires are maintained by the city's HR department, but a blank copy (developed by the same third party that created Record 1) is available to city staff on the city's intranet for their information and use when seeking an evaluation or re-evaluation of their job (for instance, where there has been a change to their major duties and responsibilities).

[23] Once completed, the staff member submits their job questionnaire to the city's job evaluation committee for deliberation and evaluation. Based on those deliberations and evaluations, the city's job evaluation committee allocates points to each of the four factors (as determined by Record 1). The committee then tallies the points and places them within the corresponding pay band appropriate to the position.

[24] The city's job evaluations committee prepares a scoring of job evaluations document (such as Record 2) containing the total points (as determined by Records 1 and the relevant job questionnaires, in this case Records 3 to 5) allocated to certain positions and their corresponding positions on the pay band. Such an evaluation record is described by the city as recording the end result of the committee's deliberations and evaluations of each position and its corresponding levels of compensation. The city confidentially maintains these scores within its HR division, for the committee's use.

[25] With this factual background in mind, I will turn to the question of whether the records at issue meet the three-part test for section 52(3)3.

***Part 1: collected, prepared, maintained or used***

[26] The appellant's brief representations relevant to section 52(3)3 appear to dispute

the city's position that the collection, preparation, maintenance, or use of the records at issue were "on behalf of" the city. She states that she compiled and submitted "the initial package with comments provided by [her] [m]anager" on her own behalf. However, based on my review of the records themselves and the city's detailed evidence, I do not accept that Records 1-5 were collected, prepared, maintained, or used on the appellant's behalf.

[27] Rather, it is clear from the records themselves and the city's detailed evidence describing them, that the collection, preparation, maintenance, or use of each of these records was on behalf of the city. Record 1 was *prepared* by the third party *on behalf of the city*, pursuant to the above-noted RFP. Record 2 was *prepared* by the city's job evaluation committee to allocate points for various positions. Records 3 to 5 are the job questionnaires of city staff other than the appellant, which were *collected* and *used* by the committee for evaluation. These facts persuade me that the records at issue qualify as records *collected, prepared, or used*, on behalf of the city, and therefore, meet part one of the test for section 52(3)3. Although I appreciate that the appellant disputes the points allotted to her (and other staff members) by the committee, as described in her representations, the records at issue still qualify as having been *prepared* or *used* by or on behalf of the city, as contemplated by section 52(3)3.

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

[28] The city submits, and I find, that the collection, preparation, maintenance, and usage of the records was in relation to meetings, consultations, discussions, and communications.

[29] I accept the city's evidence that Record 1 is a central document to the *meetings, consultations, discussions, or communications* of the city's job evaluation committee in carrying out its role, so Record 1 meets part two of the test.

[30] With respect to Records 3 to 5, the city submits, and I find, that these records were direct *communications* from staff to their supervisors and the job evaluations committee who were seeking evaluation or re-evaluation of their positions. The city further explains that the answers (as staff recorded them) in Records 3 to 5 were then *discussed* by members of the committee at a committee meeting, to determine the appropriate level of compensation in conjunction with Record 1 for the specific positions mentioned in Records 3 to 5. Therefore, Records 3 to 5 meet part two of the test.

[31] As mentioned, the committee prepared Record 2 (a point allocation document regarding certain positions and their corresponding places on the pay band). The city submits, and I accept, that Record 2 records the end result of the committee's deliberations and evaluations. I find that this means Record 2 meets part two of the test in that it relates to *meetings, consultations, discussions, or communications* of the city's job evaluation committee. As the city submits, this conclusion is consistent with a previous IPC decision regarding similar records that were the subject of *discussions* on the points to be allocated to, and the corresponding compensation for, a certain

position.<sup>6</sup>

[32] For these reasons, I am satisfied that Records 1 to 5 were the subject of meetings, discussions, and communications of the city, and therefore, meet part two of the test.

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

[33] Records 1 to 5 also meet part three of the test, as set out below.

*Employment-related matter*

[34] The city submits that Records 1 to 5 relate to an "employment-related matter."

[35] The phrase "labour relations or employment-related matters" has been found to apply in the context of many types of situations such as: a job competition,<sup>7</sup> an employee's dismissal,<sup>8</sup> a grievance under a collective agreement,<sup>9</sup> and a review of "workload and working relationships."<sup>10</sup> However, this is a non-exhaustive list of examples.

[36] As the city submits, this office has also found that the phrase "employment-related matters" applies to records similar to those in this appeal, such as:

- job evaluation records for pay equity purposes - the summary of the point scores for a position and the corresponding compensation recommendations and discussions relating to that position;<sup>11</sup>
- results of job evaluations for pay equity purposes - the final points total assigned to each non-union position for implementation of a specified pay equity plan;<sup>12</sup> and
- job classification standards and job evaluations – a database of job positions, job descriptions, and classification standards, and job evaluations (which consist of a

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<sup>6</sup> Order MO-3470.

<sup>7</sup> Orders M-830 and PO-2123.

<sup>8</sup> Order MO-1654-I.

<sup>9</sup> Orders M-832 and PO-1769.

<sup>10</sup> Order PO-2057.

<sup>11</sup> Order MO-3470.

<sup>12</sup> Order MO-2426.

written rationale as to why a particular position was assigned to a particular classification level).<sup>13</sup>

[37] Given these IPC decisions and my own review of the records at issue, I find that Records 1 to 5 relate to an "employment-related matter" for the purpose of section 52(3)3.

*In which the city has an interest*

[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.<sup>14</sup>

[39] The records collected, prepared, maintained, or used by the 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.

[40] Furthermore, the IPC has long held that the remuneration of staff is an integral part of the employment relationship, "of vital importance in defining the relationship between employer-employee,"<sup>15</sup> and is also clearly related to "labour relations."<sup>16</sup>

[41] Here, the city submits, and I find, that Records 1 to 5 qualify as records in which the city has an interest that is employment-related because they each directly relate to the workforce of the city, and in particular, to the remuneration of its staff. Furthermore, I agree with the city that its interest in Records 1 to 5 amount to more than a "mere curiosity or concern" due to the city's position as an employer with legal rights and obligations, including under Ontario's *Pay Equity Act*.<sup>17</sup> Based on my review of the records, I am satisfied that they relate to the city's management of its own workforce, as claimed. The city has demonstrated, as discussed above, that it maintains and uses (or has used, as the case may be), each of the records at issue for the purposes of implementing a job evaluation program, meant to ensure appropriate levels of compensation and pay equity amongst certain positions across the city, in compliance with the city's legal obligations. I find that this evidence is sufficient for me to determine that the records meet part three of the test.

[42] While I appreciate that the appellant disagrees with the city's job evaluation committee on the substantive pay equity issues involved in her circumstances, whether or not the city's job evaluation committee came to the right decision(s) is not relevant

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<sup>13</sup> Order PO-2613.

<sup>14</sup> *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above.

<sup>15</sup> Order MO- 1264.

<sup>16</sup> *Ibid.*

<sup>17</sup> R.S.O. 1990, c. P.7.



to whether the records at issue meet part three of the test. What is relevant here is that there is clear evidence that each of the records at issue was maintained and used by the city for *employment-related matters* in which the city has an *interest*, relating as they do, to the city's own workforce.

***No section 52(4) exceptions to section 52(3) apply***

[43] If the records fall within any of the exceptions in section 52(4), the *Act* applies to them. Section 52(4) states:

This Act applies to the following records:

1. An agreement between an institution and a trade union.
2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.
3. An agreement between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees.
4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment.

[44] Based on my review of the records, I agree with the city's submission that none of the records at issue fall within any of the exceptions listed in section 52(4), as they are not agreements or expense accounts. Therefore, none of 52(4) exceptions to section 52(3)3 apply.

[45] Since Records 1 to 5 each meet all three parts of the test for section 52(3)3, they are excluded from the scope of the *Act*. This means that the appellant has no right of access to them under the *Act*.<sup>18</sup>

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<sup>18</sup> This does not mean that the city is prevented from disclosing records excluded under the *Act* outside the scheme of the *Act*. According to the city, it did so regarding Records 6 and 7 in response to this request.

**ORDER:**

I uphold the city's decision to withhold Records 1 to 5 under the exclusion at section 52(3)3, and dismiss the appeal.

Original Signed By

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Marian Sami  
Adjudicator

January 30, 2020