

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3904

Appeal MA18-61

The City of Windsor

February 14, 2020

Summary: This is an appeal of the city's decision to deny access to a consultant's report under the exclusion at section 52(3)3 (employment or labour relations) of the *Municipal Freedom of Information and Protection of Privacy Act*. The adjudicator finds that the report—which reviews two programs of the city's employment and social services, and provides recommendations on staffing, workloads and working relationships—meets the requirements of section 52(3)3, which excludes the report from the application of the *Act*. The adjudicator upholds the city's decision.

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

Orders and Investigation Reports Considered: Orders MO-2660, PO-3029-I, PO-3326-I, MO-3496 and PO-3684.

Cases Considered: *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

OVERVIEW:

[1] The appellant submitted a request to the City of Windsor (the city) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a specific consultant's report (the report) concerning the city's provision of Family Support Services. In its access request, the appellant wrote that the report "relates to client services and implications for staffing." In response, the city issued a decision stating that the report is excluded from the application of the *Act* by virtue of section 52(3) of the *Act*.

[2] The appellant disagreed with the city's decision and appealed it to the Office of the Information and Privacy Commissioner (the IPC). The IPC attempted to mediate the appeal. During mediation, the city issued a revised decision in which it confirmed its reliance on the section 52(3)3 exclusion and added the discretionary exemption in section 6(1)(b) of the *Act* as an alternative basis for its denial of access.

[3] There was no mediated resolution of the appeal and it was transferred to the adjudication stage of the appeal process. Another IPC adjudicator conducted the inquiry, inviting and receiving representations from the parties. The appeal was then transferred to me to continue the adjudication process. In this order, I find that section 52(3)3 applies to exclude the report from the application of the *Act*.

RECORD:

[4] At issue is a 33-page report titled "Review of the City of Windsor Employment & Social Services Family Support Worker Program & Eligibility Review Officer Program."

DISCUSSION:

Does the exclusion at section 52(3)3 of the Act apply to the report?

[5] The exclusion at section 52(3)3 of the *Act* is record-specific and fact-specific. If the report, as a whole, falls within the requirements of section 52(3)3, and none of the exceptions in section 52(4) applies to it, then it is excluded from the application of the *Act*. 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:

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

[6] For section 52(3)3 to apply, the report must satisfy the following three-part test:

1. the report was collected, prepared, maintained or used by the city or on its behalf;
2. this collection, preparation, maintenance or use 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 city has an interest.

[7] The parties agree, and I find, that the report satisfies parts 1 and 2 of the section 52(3)3 test. The report was prepared on the city's behalf by a consultant and used by the city in relation to meetings, consultations, discussions or communications. The parties also agree, and I find, that none of the exceptions to section 52(3), found in section 52(4) of the *Act*, applies.

Were the city's meetings, consultations, discussions or communications about labour relations or employment-related matters in which the city has an interest?

[8] In order for the last requirement of section 52(3)3 to be met—for the city's collection, preparation, maintenance or use of the report to be "in relation to" labour relations or employment-related matters in which the city has an interest—it must be reasonable to conclude that there is "some connection" between them.¹ The parties disagree on whether the report has the requisite connection to labour relations or employment-related matters for section 52(3)3 to apply.

The city's representations

[9] The city asserts that the report has more than "some connection" to labour relations or employment-related matters in which it has an interest, and accordingly, part 3 of section 52(3)3 is met. It submits the report's workload and working relationships content makes it more than a broad organizational or operational review of the type that the IPC has found in the past did not qualify as labour relations or employment-related matters. It states that the objective of the report was to "plan and operationalize impending and emerging Provincial changes in the delivery of Family Support services and supports to Ontario Works clients" and to "examine the core duties of Eligibility Review Officers' responsibilities and functionalities." The city explains that the report contains direct and comprehensive information about labour relations or employment-related matters, including:

- recommendations specific to job functions
- recommendations on how the specific employee complement should be deployed and the corresponding duties
- addressing specific (not general) jobs and making specific recommendations regarding the continuation of those jobs and reassigning/realigning the responsibilities of those jobs
- identifying workloads and working relationships.

¹ Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.). (*Toronto Star*)

[10] In support of its submissions, the city provides a copy of the report in which it highlights the specific content that it claims addresses labour relations or employment-related matters.

[11] Finally, the city argues that after the *Toronto Star*² decision, it is not reasonable to conclude that labour relations or employment-related matters do not apply in the context of an organizational review. It cites Orders MO-3496 and PO-3684 as examples of the IPC acknowledging, post-*Toronto Star*, that labour relations or employment-related matters can and do apply in the context of an organizational or operational review.

The appellant's representations

[12] The appellant submits the report is primarily an organizational review focusing on the provision of Family Support services, and the inclusion of recommendations on job duties and functions does not give it a sufficient connection to "labour relations or employment-related matters in which the city has an interest" to be excluded by section 52(3)3 of the *Act*. The appellant acknowledges that there may be aspects of the report that touch on certain limited employment-related issues. However, it states its understanding is that the report only touches on staffing in a generic manner.

[13] The appellant asserts that the Divisional Court's ruling in *Toronto Star*, that a record need only have "some connection" to excluded activities, did not invalidate the proposition that organizational reviews do not fall under the section 52(3)3 exclusion when they do not have a sufficient connection to labour relations or employment-related matters. It argues that the city is attempting to expand the interpretation of the test in *Toronto Star* so that a record that has any connection to employment-related matters, no matter how incidental, will be excluded. The appellant contends that the principle that organizational or operational reviews are not excluded by the *Act* remains an important legal principle to distinguish between records about the general deployment of public services—which are not excluded and should be open to the public—and those records that relate to matters in which the institution is acting as the employer.

[14] In support of its position, the appellant submits that a number of IPC orders have considered and applied *Toronto Star* and concluded that organizational reviews are not captured by section 52(3)3, for example, Orders MO-2660, PO-3029-I and PO-3326-I.

[15] Regarding Order MO-2660, the appellant notes that the city was the institution in that appeal as well. The city argued, as it does in this appeal, that the record at issue

² See footnote 1.

should be excluded because it contained recommendations to change staff working conditions and dealt with the management of its own workforce; however, Adjudicator Diane Smith found this was not sufficient to exclude the record. Adjudicator Smith determined that the record was an organizational review that did not contain matter that was integral to the employment relationship between the city and its workforce; rather, it contained primarily generic information about training or operational procedural information. The appellant noted that Adjudicator Smith considered *Toronto Star* and its application and wrote that the section 52(3)3 exclusion must be interpreted in light of the purpose of the *Act*, which focuses on making information available to the public and ensuring that exemptions are limited and specific. The appellant urges me to adopt the reasoning in Order MO-2660 and find that the report is not excluded. The appellant cites paragraphs 41-43, 52, 61 and 63 of Order MO-2660 in support of its submission. The appellant notes Adjudicator Smith concluded Order MO-2660 by emphasizing the following at paragraph 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.

[16] Regarding Order PO-3029-I, the appellant notes the finding at paragraph 31 that the records at issue—prepared by a consultant retained to review the organizational structure of the Alcohol and Gaming Commission of Ontario—concerned a general operational review and were not excluded. Regarding Order PO-3326-I, the appellant notes the finding that while certain records were properly excluded, others formed part of an operational or organizational review and were not.

[17] The appellant states that the “some connection” test should be applied to, and analyzed against, the report as a whole; on this basis, it argues it is not enough that only part of the report is connected to employment-related matters. The appellant asserts that the city has not provided sufficient facts to support that the portions of the report that discuss job duties do so in the city's role as an employer—relating to human resources issues—as opposed to discussing job duties generically—in respect of service delivery— in the nature of an organizational review. The appellant argues that the report does not canvass the types of topics that would bring it within the section 52(3)3 exclusion, such as salary and compensation, evaluations of employees, the identification of specific employees, or other similar human resources issues. In this regard, the appellant argues that Order MO-3496, relied on by the city, is distinguishable because it focussed on a number of employment-related issues, such as salary and job evaluations, and contained confidential interviews from a number of municipal employees about the structure of their workplace and their compensation.

[18] The appellant adds that the advice or recommendations exemption at section 7(1) of the *Act* bolsters its position. It states that although institutions may withhold records that reveal advice or recommendations of a consultant retained by the institution, section 7(2) precludes them from relying on section 7(1) to refuse access to records like the one at issue here. Specifically, the appellant points to section 7(2)(e), which excepts a report or study on the performance or efficiency of an institution from being withheld, and to section 7(2)(h), which excepts a final plan or proposal to change a program of an institution from being withheld. The appellant concludes by stating that the core purpose of the *Act*—public access to government records—should be kept in mind in this appeal, and the city should not be permitted to keep the report out of the public eye just because some aspects of the report may also touch on employment-related issues.

Analysis and Finding

[19] Having reviewed the report and considered all of the representations of the parties, I agree with the city that the report satisfies part 3 of the section 52(3)3 test. Applying the test to the report, I agree that it has some connection to employment-related matters in which the city has an interest as required to bring it within the section 52(3)3 exclusion.

[20] The report reviews two specific programs within the city's Employment & Social Services Department, and certain positions, workloads and working relationships within the two programs. It is not a report on efficiency and service levels, and it is not limited to an organizational and operational review in the same way that the records considered in Orders MO-2660, PO-3029-I and PO-3326-I, and relied on by the appellant, were. I agree with the reasoning in Order MO-2660. Applying it to the report before me, I am satisfied that the report, as a whole, was created to address matters in which the city is acting as an employer and the terms and conditions of employment are at issue.

[21] The report is similar to the records considered in Orders PO-3684 and MO-3496 that addressed organizational or operational matters in addition to employment-related issues. Applying *Toronto Star*, Order PO-3684 held that a report could have some aspects that deal with general organizational matters and still meet the requirements for exclusion. Order MO-3496 adopted the same approach, as do I. The report here deals with general organizational matters and still meets the requirements for exclusion under section 52(3)3 of the *Act*. It meets the requirements because the report, as a whole, addresses staffing, job duties and functions, and other employment-related issues—these topics and the related content in the report are sufficient to satisfy the last requirement for the application of section 52(3)3.

[22] The city's use of the report—its consideration of the report's recommendations on specific jobs and job functions, the deployment of certain parts of the city's workforce, and which specific jobs and job responsibilities should be continued/reassigned/realigned within two specific city programs—clearly has some

connection to employment-related matters in which the city has an interest. The city is acting as an employer in respect of these matters because it is determining whether and how to implement the report's employment-related recommendations. As a result, I am satisfied that the city has an interest in these employment-related matters and I find that part 3 of the test for the application of section 52(3)3 is met. Having found that all three parts of the section 52(3)3 test have been met, I find that the report is excluded from the application of the *Act*.

ORDER:

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

Original Signed By: _____
Stella Ball
Adjudicator

February 14, 2020 _____