

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3945

Appeal MA19-00007

The Corporation of the City of North Bay

August 19, 2020

Summary: The appellant submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the city for records relating to certain aspects of the position of Corporate Advisor at the city. The appellant's request resulted in two prior orders of this office. In Order MO-3684-I the city was ordered, among other things, to conduct a further search that was upheld as reasonable by Order MO-3838-F.

As a result of the further search ordered in MO-3684-I, the city located responsive records but decided to withhold them on the basis of the section 12 (solicitor-client privilege) exemption. The appellant appealed the city's decision, which is the subject of this order.

During the inquiry, the parties were invited to make supplementary representations about the possible application of the employment or labour relations exclusion in section 52(3) of the *Act*. The city claimed that section 52(3) applied to exclude the records from the scope of the *Act*.

In this order, the adjudicator finds that the records are excluded from the *Act* because of section 52(3) and dismisses the appeal.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M56, 52(3) and 52(3)2.

Orders and Investigation Reports Considered: Interim Order MO-3684-I, Order MO-3838-F.

OVERVIEW:

[1] The appellant submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Corporation of the City of North Bay (the city) for all records relating to "the job, job description, powers, duties of possible 'Corporate Advisor' and/or 'Corporate Adviser' including initial advertisement/posting/offering."

[2] The appellant's request resulted in two prior orders of this office: Orders MO-3684-I and MO-3838-F. The initial search resulted in one record, which was withheld by the city on the basis of several exemption and exclusion claims. The appellant appealed the city's decision and claimed that the search was unreasonable. In Interim Order MO-3684-I, the adjudicator ordered the city to conduct a further search and to disclose the record that it had withheld. The record that was ordered to be disclosed is a final agreement between the city and the corporate advisor (the "final agreement").

[3] In compliance with Order MO-3684-I, the city conducted a further search and located additional responsive records. The city issued a decision denying access to the newly-located records on the basis of section 12 (solicitor-client privilege). In Order MO-3838-F, the adjudicator upheld the city's further search as reasonable. The appellant appealed the city's decision to withhold the records pursuant to section 12, resulting in the present appeal.

[4] During mediation, the city confirmed its position that the records are exempt under section 12 of the *Act*. The mediator notified the affected party of the appeal and the affected party advised that the records should not be disclosed to the appellant.

[5] The appellant confirmed his interest in pursuing access to the records. Mediation did not resolve the issues and the appeal was transferred to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry.

[6] The city and the appellant submitted representations; the affected party did not, although he was invited to do so. The city and the appellant were then invited to make supplementary representations about the possible application of the employment or labour relations exclusion in section 52(3) of the *Act*.

[7] All representations made in the inquiry were shared in accordance with the *Office's Code of Procedure* and Practice Direction 7.

[8] In this order, I find that the records are excluded from the *Act* because of section 52(3) and I dismiss the appeal on this basis. In light of this finding, it is not necessary for me to consider the city's claim that the section 12 (solicitor-client privilege) exemption applies.

RECORDS:

[9] The records all relate to the final agreement described above. They consist of:

- draft versions of the final agreement between the affected party and city staff,
- emails between city staff including the city solicitor regarding the terms of the final agreement,
- emails between city staff and the affected party about the terms of the final agreement,
- emails between city staff to arrange meetings with each other and the affected party to discuss the final agreement, and,
- calendar entries for meetings involving city staff with and without the affected party to discuss the final agreement.

DISCUSSION:

[10] The only issue in this appeal is whether section 52(3) excludes the records from the *Act*. As a result of my finding on that issue below, it is not necessary to make findings on the exemption claimed by the city.

[11] Certain records that deal with labour relations or employment matters are excluded from the *Act*, meaning that although institutions may choose to disclose them, there is no general right of access to them under the *Act*.¹ The city asserts that sections 52(3)2 and 52(3)3 apply to the records.

[12] The relevant parts of section 52(3) state (emphases added):

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. ...

2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.

¹ For a general discussion about section 52(3) and its provincial equivalent, section 65(6), see the Labour Relations and Employment Exclusion Guide issued June 2020: <https://www.ipc.on.ca/wp-content/uploads/2020/06/labour-relations-employment-exclusion.pdf>

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

[13] If section 52(3) 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*. One of the 52(4) exceptions is,

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.

[14] Although section 52(4) is not applicable to the records at issue in this appeal, it was applicable to the final agreement, which was the record at issue in Interim Order MO-3684-I, which I will discuss further below.

[15] For the collection, preparation, maintenance or use of a record to be “in relation to” the subjects mentioned in paragraphs 2 or 3 of section 52(3), it must be reasonable to conclude that there is “some connection” between them.²

[16] 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.³

[17] 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.

Section 52(3)2 – Negotiations or Anticipated Negotiations

[18] For section 52(3)2 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 use was in relation to negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution; and

² Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.) (*Attorney General and Toronto Star*).

³ Order PO-2157.

3. these negotiations or anticipated negotiations took place or were to take place between the institution and a person, bargaining agent or party to a proceeding or anticipated proceeding.⁴

Related Background – Interim Order MO-3684-I

[19] In Interim Order MO-3684-I, the city was ordered to disclose the final agreement. In that appeal, the city argued, among other things, that the agreement was excluded due to section 52(3). On that issue, the adjudicator concluded that on the basis of section 52(4)3, one of the exceptions to the exclusion, the agreement was “an agreement between the city and an employee resulting from negotiations about employment-related matters between the city and the employee” and that therefore the record was subject to the *Act*.

Representations

[20] The city describes the records as emails between city staff about the drafting of the final agreement, Outlook appointment entries for meetings about the final agreement and draft versions or language to be included in the final agreement. The city submits that these records were all prepared, maintained and used by the city in satisfaction of the first part of the test for section 52(3)2.

[21] Regarding the second part of the test, the city submits that the records were so prepared, maintained and used in relation to the negotiations between the city and the former CAO for the city for the CAO’s future employment as a corporate advisor. The city relies on *Attorney General and Toronto Star*,⁵ which it says establishes that “relating to” means “some connection” and it argues that in this case, there is “far more than simply ‘some connection’ between the preparation, maintenance and use of the records and the negotiations.”

[22] The city submits finally that the third part of the test is met because there were in fact negotiations between the former CAO and city, represented by the city’s Managing Director of Corporate Services and the City Solicitor.

[23] As a general response, the city draws a distinction between the record in Order MO-3684-I – the final agreement – and the records at issue in this appeal. The city explains that in contrast to the final agreement, the records at issue in the present appeal,

... are the documents that were prepared, maintained and used by the [c]ity and the former [CAO] in the course of and for the very purpose of negotiations that led to the resulting employment agreement. The document that resulted from the negotiations was required to be disclosed

⁴ Orders M-861 and PO-1648.

⁵ Cited above.

under section 52(4)3; however, the draft precursors to the resulting document, the communications about the drafts and negotiations... are not.

[24] In response to the city's section 52(3) representations, the appellant states that he believes that there is a public interest in transparency that should prevail in favour of disclosure.

Analysis and Finding

[25] I have carefully reviewed the records and the prior orders issued by this office in relation to this matter.

[26] I find that the first part of the section 52(3)2 test is met – the records were prepared, maintained and used by the city.

[27] For the following reasons, I find that the second and third parts of the section 52(3)2 test are also met.

[28] I agree with and adopt the finding of the adjudicator in Order MO-3684-I that the final agreement resulted from negotiations about employment related matters between the city and the former CAO, who became the corporate advisor pursuant to the terms of the final agreement. The records in the current appeal are a draft agreement and various communications relating to the final agreement. Based on my review of these records, I agree with the city that the records are those that were prepared, maintained and used by the city *for the purpose of* negotiations with the CAO that led to the agreement.

[29] Based on these findings, I conclude that all the records at issue in this appeal relate to or have "some connection" to the negotiation of that agreement between the city and the employee, in this case the former CAO and future Corporate Advisor.

[30] To summarize, I find the records were prepared, maintained or used by the city, in relation to the future employment of the former CAO as a corporate advisor and there were, indeed, negotiations about the terms which were eventually agreed in the form of the final agreement that was ordered to be disclosed in Order MO-3684-I. All three requirements to establish the section 52(3)2 exclusion have been met and I find that it therefore applies to the records.

[31] As I note above, unlike the final agreement which was at issue in Order MO-3684-I, the records before me do not fall within the exception to the exemption at section 52(4)3.

[32] I have considered the appellant's main argument that there is a public interest that ought to prevail in favour of disclosure. Arguments like the appellant's are relevant when considering whether the public interest override in section 16 of the *Act* applies to

override some of the exemptions in the *Act*. However, section 16 arguments are not available or able to be considered by this office when the records at issue are excluded from the *Act* because of one of the exclusions, like section 52(3).

[33] As a result, the records are excluded from the *Act* because of section 52(3)2 and it is not necessary to consider the possible application of section 52(3)3 or the city's alternative exemption claims.

ORDER:

I find that the exclusion in section 52(3) applies to the records and the appeal is therefore dismissed.

Original signed by: _____

Valerie Jepson
Adjudicator

_____ August 19, 2020