

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4323

Appeal MA20-00129

City of Thunder Bay

January 30, 2023

Summary: The City of Thunder Bay received an access request for records relating to its master plan to improve fire rescue services. The city located responsive records which the appellant was granted partial access. However, the city claimed that certain emails exchanged between city employees were excluded from the scope of the *Act* on the basis of the exclusion in section 52(3) (labour relations and employment) and the appellant appealed the city's decision. In this order, the adjudicator upholds the city's decision that the emails are excluded from the application of the *Act* by section 52(3)3 and dismisses the appeal.

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

OVERVIEW:

[1] This order resolves an appeal of an access decision issued by the City of Thunder Bay (the city) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for communications sent or received by two named city employees, relating to the Fire Underwriters Survey 2017 and the Strategic Master Fire Plan 2018-2019.¹

¹ The request originally sought access to for all communications, sent or received by several individuals related to the Fire Underwriters survey 2017, the Strategic Master Fire Plan 2018-2019, Ontario Professional Fire Fighter Association 2018-2019, AMD Emergency Services Steering Committee 2018-2019 and the Fire Fighter/Paramedic Trial Ontario 2018-2019. However, during the request stage, the appellant narrowed to the request as stated above.

[2] The background of the appeal is that the city initiated a 10-year, community-driven master plan to guide operational improvements and enhance how Thunder Bay Fire Rescue's service is provided.²

[3] The city issued a decision letter granting the appellant partial access to responsive records. The city also took the position that record 4 which consists of emails exchanged between city employees fell outside the ambit of the *Act* under section 52(3). The city also noted its decision on three further records was pending third party consultations.

[4] The appellant filed an appeal with the Information and Privacy Commissioner (IPC) and a mediator was assigned to explore settlement with the parties. During mediation, the city issued a revised decision to the appellant, granting partial access to the three further records. The appellant is not pursuing the withheld information in those records.

[5] The city maintained that the emails constituting record no. 4 fell outside the ambit of the *Act* under section 52(3). The appellant continues to question the city's claim that record 4 falls outside the scope of the *Act*.³

[6] No further mediation was possible and the file was transferred to the adjudication stage of the appeals process where an adjudicator may decide to conduct an inquiry. I decided to conduct an inquiry and invited the written representations of the parties. The parties submitted representations in response. The parties' representations were shared with one another in accordance with the IPC's *Code of Procedure and Practice Direction 7*.

[7] In this order, I find that the emails are excluded from the scope of *Act* under section 52(3)3 and dismiss the appeal.

RECORDS:

[8] The records at issue consist of emails between the General Manager of the Development and Emergency Services Department of the City (General Manager) and human resources staff, identified as record 4 in the city's decision letter to the appellant, dated February 21, 2021.

² City of Thunder Bay Corporate Report, R102/2020.

³ The appellant also questioned the reasonableness of the city's search and the city agreed to conduct a further search. The city's further search resulted in one further record being located, which was disclosed to the appellant in a further access decision. At the end of mediation, the appellant confirmed he was satisfied with the city's search, and the reasonableness of the city's search was not an issue before me. Though the parties' representations revisited the search issue, I make no determination as to whether the city conducted a reasonable search as that issue was removed at mediation.

DISCUSSION:

[9] The sole issue I have to determine is whether the section 52(3)3 exclusion applies to record 4. In its representations, the city describes record 4 as emails between the city's General Manager and human resources department "sent and received in relation to the Fire Underwriter's Survey 2017 and the Strategic Master Fire Plan 2019." For the remainder of this order, I will refer to these two reports as the survey and master plan.

[10] Section 52(3) of the *Act* excludes certain records held by an institution that relate to labour relations or employment matters. If the exclusion applies, the record is not subject to the access scheme in the *Act*, although the institution may choose to disclose it outside of the *Act's* access scheme.⁴

[11] The purpose of this exclusion is to protect some confidential aspects of labour relations and employment-related matters.⁵ If section 52(3) applied at the time the record was collected, prepared, maintained or used, it does not stop applying at a later date.⁶

[12] The type of records excluded from the *Act* by section 52(3) are those relating to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue.⁷

[13] The city claims that the exclusion at section 52(3)3 applies. 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.

[14] 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*. The city says that none of the exceptions apply and I am satisfied that none apply.

[15] For the collection, preparation, maintenance or use of a record to be "in relation to" one of the three subjects mentioned in this section, there must be "some

⁴ Order PO-2639.

⁵ *Ontario (Ministry of Community and Social Services) v. John Doe*, 2015 ONCA 107 (CanLII).

⁶ *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. 509.

⁷ *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.). The CanLII citation is "2008 CanLII 2603 (ON SCDC)."

connection" between them.⁸

[16] The "some connection" standard must, however, involve a connection relevant to the scheme and purpose of the *Act*, understood in their proper context. For example, given that accountability for public expenditures is a core focus of freedom of information legislation, accounting documents that detail an institution's expenditures on legal and other services in collective bargaining negotiations do not have "some connection" to labour relations.⁹

[17] 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 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 institution has an interest.

[18] The city takes the position that all parts of the three-part test in section 52(3)3 have been met. In support of its position, the city provided an affidavit with its representations. The city says that the emails in record 4:

- consist of communications exchanged between the General Manager of the Development and Emergency Services Department and its human resources department, and
- "amount to communications and consultations regarding the implications of the Plan in relation to the collective agreement in place with the [Thunder Bay Professional Fire Fighters (TBPFFA)] who are employees of the City. Discussions within an institution regarding the impact of actions undertaken and obligations which must be fulfilled in relation to a collective bargaining agreement are inherently labour relations matters."

[19] The city also states:

Additionally, as an employer, the City clearly has an interest in the impact changes will have on the relationship and the duties they must fulfil which go well beyond a "mere curiosity or concern". By nature of the relationship between the City as an employer and the TBPFFA as a collective bargaining unit, the City has a clear and cogent interest in these

⁸ Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

⁹ Order MO-3664, *Brockville (City) v. Information and Privacy Commissioner, Ontario*, 2020 ONSC 4413 (Div. Ct.).

labour relations matters. The City's interest in the Records is engaged as a result of being the institution employing persons subject to the TBPFFA collective agreement. As an employer and a service provider, the City has a significant interest in the Records and the labour relations matters they relate to.

[20] The city provided me with an additional affidavit and chart which identified the dates of the six emails exchanged between city employees comprising record 4.

[21] In his representations, the appellant says that the survey and master plan were prepared by consultants who addressed "efficiency and effectiveness" issues regarding the operation of Thunder Bay Fire Rescue. The appellant takes the position that the "...preparation of these reports would qualify as an organizational or operational review, rather than labour relations or employment related matters." The appellant argues that the city can not deny access to a report regarding the performance or efficiency of an institution. The appellant goes on to state that "emails" concerning the survey and plan exchanged between the city "would certainly fall within that definition."

Analysis and findings

[22] To satisfy parts 1 and 2 of the 3-part test set out above, the city must establish that the emails were collected, prepared, maintained or used by it or on its behalf, in relation to meetings, consultations, discussions or communications. Based on the representations of the parties, I am satisfied that the emails were prepared and exchanged between city staff in relation to consultations, discussions or communications between city staff. Accordingly, I am satisfied that the first and second parts of the test in section 52(3)3 has been met.

[23] To satisfy part 3 of the test, the city must also establish that the consultations, discussions or communications that took place were about labour relations or employment-related matters in which it has an interest.

[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 similar relationships. The meaning of "labour relations" is not restricted to employer- employee relationships.¹⁰

[25] 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.¹¹

[26] The phrase "labour relations or employment-related matters" has been found not

¹⁰ *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.

¹¹ Order PO-2157.

to apply in the context of an organizational or operational review.¹² The appellant in his representations asserts that the emails relate to the performance or efficiency of the city's fire rescue program. However, based on my review of the city's affidavits along with its representations, I am satisfied that the emails go beyond exchanging copies of the plan and/or survey and do not relate to the performance or efficiency of the city's program solely. Instead, I am satisfied that the emails capture communications exchanged between city staff having "some connection" to labour relations or employment-related matters in which the city has an interest. Specifically, I find the emails relate to the city's obligations as an employer and how these obligations may be affected by the plan.

[27] There is no dispute that the survey and master plan identified in the request impact individuals employed by the city, and it stands to reason that there would be communications about those impacts. The city says that it has an interest in any proposed changes that may impact individuals subject to the TBPFFA collective agreement. I agree with the city's argument that its interest in the labour relations issues that may arise from the proposed changes is significant. Accordingly, I am satisfied that the city has demonstrated that its interest amounts to more than a "mere curiosity or concern," and refers to matters involving its own workforce.¹³

[28] Accordingly, I am satisfied that part three of the test has been met for record 4. I have also considered whether any of the exceptions listed in section 52(4) applies to record 4 and find that none do.

[29] As all three parts of the three-part test have been met, I find that the emails are excluded from the *Act* under section 52(3)3 and dismiss the appeal.

ORDER:

I find that record 4 is excluded from the scope of the *Act* and dismiss the appeal.

Original signed by: _____

Jennifer James
Adjudicator

January 30, 2023

¹² Orders M-941 and P-1369.

¹³ *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above.