



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER M-915

Appeal M_9700016

Township of West Carleton



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NATURE OF THE APPEAL:

The appellant is a former employee of the Township of West Carleton (the Township). He submitted a request to the Township under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The request related to allegations of workplace harassment on his part which were investigated by a consultant, and which resulted in a letter of reprimand being placed in his personnel file.

In particular, he requested access to:

- his personnel file;
- the consultant's report and background documentation such as the consultant's terms of reference and records which prompted the investigation;
- information about the selection of the consultant;
- all information given to the Township Council about the matter;
- all related correspondence from external sources including "the legal community";
- information relating to incidents involving another employee identified by position title in the request; and
- all other relevant information.

The Township granted the appellant access to his personnel file. It denied him access to the other documentation he requested, citing "Bill 7" as the basis for this decision.

Bill 7, the Labour Relations and Employment Statute Law Amendment Act, 1995, amended the Act by adding sections 52(3) and (4). If section 52(3) applies to a record, it has the effect of excluding that record from the scope of the Act unless it is a record described in section 52(4).

The appellant filed an appeal of the Township's decision. During mediation, the appellant indicated that the only record to which he continues to seek access is the consultant's investigation report. Accordingly, the report is the only record at issue in this appeal. The report contains appendices consisting of memoranda and notes referring to the subjects under investigation, prepared by various Township employees, as well as several policies considered by the consultant.

This office sent a Notice of Inquiry to the Township and the appellant. Both parties submitted representations.

DISCUSSION:

JURISDICTION

The only issue in this appeal is whether the record falls within the scope of sections 52(3) and (4) of the Act. These provisions read:

- (3) 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.
 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.
 3. Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.
- (4) 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.

The interpretation of sections 52(3) and (4) is a preliminary issue which goes to the Commissioner's jurisdiction to continue an inquiry.

Section 52(3) is record-specific and fact-specific. If this section applies to a specific record, in the circumstances of a particular appeal, and none of the exceptions listed in section 52(4) are present, then the record is excluded from the scope of the Act and not subject to the Commissioner's jurisdiction.

The Township submits that section 52(3)3 applies to the record at issue.

In Order M-830, former Assistant Commissioner Tom Mitchinson analysed the requirements of section 52(3)3 and concluded that the following requirements must be met in order for it to apply:

1. the record was collected, prepared, maintained or used by the Township or on its behalf; **and**
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 Township has an interest.

I agree with this analysis and adopt it for the purposes of this appeal.

Requirement 1

The Township retained the consultant to investigate the working relationship between the appellant and another employee. As a result of the report, a letter of reprimand was placed in the appellant's personnel file. I am satisfied that the consultant prepared the report and collected its appendices on behalf of the Township. I am also satisfied that the Township used the report. Requirement 1 is met.

Requirement 2

In Order P-1223, former Assistant Commissioner Tom Mitchinson commented on the meaning of "in relation to" in section 65(6) of the provincial Freedom of Information and Protection of Privacy Act, which is the equivalent of section 52(3) of the Act. He stated:

In the context of section 65(6), I am of the view that if the preparation (or collection, maintenance, or use) of a record was **for the purpose of, as a result of, or substantially connected to** an activity listed in sections 65(6)1, 2, or 3, it would be "in relation to" that activity. (emphasis added)

I agree with this interpretation and adopt it for the purposes of this appeal.

The Township submits that it used the report as a means of communicating the consultant's findings and recommendations to members of Council. It also submits that the report was used for the purpose of meetings with the employees who were the subject of the investigation. Accordingly, I find that the Township used the report "in relation to" both meetings and communications, and therefore, Requirement 2 has been met.

Requirement 3

This requirement is met if the Township can demonstrate that the meetings or communications referred to under Requirement 2 were about an employment-related matter in which it “has an interest”.

In its representations, the Township characterizes the investigation as a response to allegations of workplace harassment. Based on my review of the record, I agree with this characterization. In my view, the meetings and communications were “about” these allegations and the Township’s response to them, and this is clearly an employment-related matter.

In Order P-1242, former Assistant Commissioner Tom Mitchinson reviewed the authorities concerning the meaning of the phrase “has an interest”. He concluded his review with the following comment:

Taken together, these authorities support the position that an “interest” is more than mere curiosity or concern. An “interest” must be a legal interest in the sense that the matter in which the Ministry has an interest must have the capacity to affect the Ministry’s legal rights or obligations.

I agree with this interpretation and adopt it for the purposes of this appeal.

In this regard, the Township also submits that:

... it is a well-recognized common law principle that if an employee is continually harassed or treated abruptly and unfairly, he or she may acquire a right to resign the position and commence legal proceedings for constructive dismissal.

...

If an employee is subjected to abuse [sic] treatment by a co-employee, the employee must bring any complaint to the attention of the employer. Upon receipt of such a complaint, the employer has a positive obligation to act in a timely fashion to address the employee’s concerns. The manner in which the employer responds to the complaint will determine the extent of employer liability.

I agree with these submissions, and in my view, this indicates that the Township “has an interest” in the harassment complaint and its outcome within the meaning of section 52(3)3. I find that the Township has met Requirement 3.

Since all three requirements have been met, I find that section 52(3)3 applies. Since the record does not fall under any of the categories listed in section 52(4), I find that it is outside the scope of the Act under section 52(3)3.

In his letter of appeal and representations, the appellant makes eloquent arguments concerning his desire for access to additional information about the investigation. However, these arguments do not counter the application of section 52(3)3, and because of its application, the record at issue is not accessible under the Act.

ORDER:

I uphold the Township's decision.

Original signed by: _____
John Higgins
Inquiry Officer

_____ March 27, 1997