



**Information and Privacy
Commissioner/Ontario**
**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER M-960

Appeal M_9700104

Township of Carlow



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NATURE OF THE APPEAL:

The appellant submitted a request to the Township of Carlow (the Township) under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The request was for access to records relating to the selection process for the Township's Road Superintendent.

The Township identified a number of responsive records and denied access to the records in their entirety. The Township took the position that the records fall outside the scope of the Act by virtue of section 52(3). The appellant appealed the Township's decision.

During the mediation stage of the appeal, the Township informed the Appeals Officer that some of the responsive records (specifically, the evaluation sheets for the applicants that were interviewed) had been destroyed.

This office sent a Notice of Inquiry to the appellant and the Township. The Township submitted representations. The appellant requested that I refer to the information he provided to this office during the course of the appeal, and I have done so.

The records at issue in this appeal total 199 pages and consist of Council resolutions, the list of applicants, an interview schedule, application forms, interview questions and answers, blank evaluation sheets and various internal documents, all of which are related to the job competition for the Township's Road Superintendent.

DISCUSSION:

JURISDICTION

The sole issue to be determined in this appeal is whether the records fall 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 has provided me little in the way of representations but submits that "job competition files are not subject to the Act" pursuant to section 52(3) and refers me to Appeal M_9600167 (Order M-830) in which the City of Hamilton's decision under section 52(3)3 was upheld with respect to job competition records.

Section 52(3)3

In Order P-1242, former Assistant Commissioner Tom Mitchinson held that in order for a record to fall within the scope of paragraph 3 of section 65(6) of the provincial Freedom of Information and Protection of Privacy Act, which is the equivalent provision to section 52(3)3 of the Act, the Township must establish that:

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.

Requirements 1 and 2

The records relate to the job competition for the position of the Township's Roads Superintendent.

In my view, it is clear that the records were either collected, prepared, maintained or used by the Township, and in many cases, all four. Therefore, requirement 1 has been established.

In the context of the job competition process, I also find that:

- an employment interview is a "meeting"; and
- deliberations about the results of a competition among the interview panel members are "meetings, discussions or communications", and sometimes all three.

Moreover, the records generated with respect to these activities would be either for the purpose of, as a result of, or substantially connected to these meetings, discussions or communications, and therefore properly characterized as being "in relation to" them (Order P_1242). Therefore, requirement 2 has also been established.

Requirement 3

Upon reviewing the records, I am satisfied that they relate to the job competition. It is self-evident that a job competition is an employment-related matter. I must now determine whether the Township "has an interest" in this employment-related matter.

In Order P-1242, former Assistant Commissioner Tom Mitchinson reviewed a number of legal sources regarding the meaning of "has an interest", as well as several court decisions which considered its application in the context of civil proceedings. He concluded by stating:

Taken together, these [previously discussed] 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 will apply it in this appeal.

In Order M-830, former Assistant Commissioner Mitchinson found that a job competition process involves certain legal obligations which an employer must meet under the Ontario Human Rights Code. These involve a duty not to discriminate in selecting an employee in a job competition. On this basis, he went on to find that the institution in that case "had an interest" in the job competition.

I concur with this conclusion and in my view, it applies in this appeal as well. I find that in the present circumstances, the Township has an interest in the job competition involving the appellant. Requirement 3 has, accordingly, been established.

In summary, I find that the records were collected, prepared, maintained and/or used by the Township, in relation to meetings, discussions and consultations about an employment-related matter in which it has an interest. All of the requirements of section 52(3)3 of the Act have therefore been established by the Township. None of the exceptions contained in section 52(4) are present in the circumstances of this appeal. I find that the records fall within the parameters of section 52(3)3, and therefore, are excluded from the scope of the Act.

As I indicated in the opening section of this order, the Township informed the Appeals Officer that the evaluation sheets for the applicants that were interviewed had been destroyed. Clearly, these would have been records responsive to the request and, in addition, would have contained the personal information of the persons interviewed. Section 30(1) of the Act (which forms part of the “privacy rules” in Part II of the Act) states:

Personal information that has been used by an institution shall be retained after use by the institution for the period prescribed by regulation in order to ensure that the individual to whom it relates has a reasonable opportunity to obtain access to the personal information.

Section 5 of O. Reg 517/90 provides:

Personal information that has been used by an institution shall be retained by the institution for the shorter of one year after the use or the period set out in a by-law or resolution made by the institution or made by another institution affecting the institution, unless the individual to whom the information relates consents to its earlier disposal.

The Township’s job competition in this matter concluded in January, 1997 and the Township informed the Appeals Officer in a letter dated May 1, 1997 that the above-described records had been destroyed.

Generally speaking, when an issue involving a possible contravention under Part II of the Act and/or the corresponding Regulations arises during an appeal, such matters are referred to our Compliance Department for investigation. However, in this case, I have found that the records which still exist are excluded from the scope of the Act. This finding would also have applied to the records which were destroyed, and the Act therefore does not apply to them. Accordingly, in the particular circumstances of this case, I will not forward the matter to the Compliance Department.

ORDER:

I uphold the decision of the Township.

Original signed by: _____

John Higgins
Inquiry Officer

_____ July 8, 1997