



**Information and Privacy
Commissioner/Ontario**

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

ORDER M-1161

Appeal MA-980127-1

Town of Oakville



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NATURE OF THE APPEAL:

The Town of Oakville (the Town) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The request was for access to:

... all my personal records that exist - to include notes, personnel files, records, meetings and notes that may have been taken by staff at these meetings (solicitor's notes or letters), etc. In addition, any correspondence any members of the Corporation's staff issued about [me]. Also I require any staff notes or correspondence on the re-organization of the Program Division that may have included my previous position. In this regard please send a copy of all work evaluations, job descriptions and any revised such description.

Please note, do not limit your search to the above mentioned documents because I have no knowledge where all these documents would be.

The requester is an employee of the Town who has been on long-term disability since 1994.

The Town responded by disclosing information regarding the organizational structure of the Parks and Recreation Department to the appellant. The Town denied access to the information responsive to the remainder of the request, claiming that, under section 52(3) of the Act, it fell outside the ambit of the Act.

The requester, now the appellant, appealed the Town's decision to deny access to the records.

In a second decision letter, provided to the appellant within the time prescribed by the Confirmation of Appeal, the Town also raised the application of the following exemptions to the responsive records:

- closed meeting - section 6(1)(b)
- advice or recommendations - section 7(1)
- solicitor-client privilege - section 12
- invasion of privacy - section 14(1)
- evaluative or opinion material - section 38(c)

A Notice of Inquiry was provided to the appellant and the Town. Because the records appeared to contain the personal information of the appellant, the parties to the appeal were also asked to consider the possible application of sections 38(a) and (b) to the personal information in the records, in addition to those exemptions described above. Submissions were received from both the appellant and the Town.

As a result of the issuance of several recent orders by the Commissioner's office which addressed the issue of "time sensitivity" in relation to sections 52(3)1 and 3, a Supplementary Notice of Inquiry was sent to the parties. Additional submissions were received from both parties.

The records at issue in this appeal consist of 37 letters, memoranda and notes. The Town provided the appellant with an index describing each of the records which remain at issue and the exemptions which have been applied to each. During the inquiry stage of the appeal, the Town decided to disclose all of the information in Records 41, 114, 124 and 125, as well as portions of Records 40 and 117. Because it is

unclear if these records or parts of records have yet been released to the appellant, and section 52(3) of the Act does not apply to them, I will order the Town to disclose them to the appellant.

DISCUSSION:

JURISDICTION

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

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 Town states that all of the records fall outside the ambit of the Act because of the application of either section 52(3)1 or 3.

Section 52(3)1

In order for a record to fall within the scope of section 52(3)1, the Town must establish that:

1. the record was collected, prepared, maintained or used by the Town or on its behalf; **and**
2. this collection, preparation, maintenance or usage was in relation to proceedings or anticipated proceedings before a court, tribunal or other entity; **and**
3. these proceedings or anticipated proceedings relate to labour relations or to the employment of a person by the Town.

The Town submits that Records 3, 6, 7, 18, 19, 22, 108, 111, 112, 115, 120, 121, 122, 123, 127, 128, 129, 130, 131 and 133 were prepared, maintained or used by it in relation to anticipated proceedings before a court which related to the appellant's employment by the Town. It argues that at the time the records were prepared, maintained or used by the Town, the appellant had retained counsel and that a civil action against the Town alleging workplace harassment was threatened.

The appellant has not addressed the application of section 52(3)1 to the records.

On February 21, 1994, the appellant advised the Town that he had retained the services of counsel and that he intended to initiate an action in court against the Town alleging that he had been harassed by his supervisors. From this time, the Town made efforts to compile information in response to these allegations. The Town also sought and received legal advice from its legal counsel as to the appropriate response to the appellant's allegations. Many of the records identified as responsive to the request resulted from these efforts by the Town to answer the appellant's allegations.

I have reviewed each of the responsive records bearing this fact in mind. I find that Records 3, 6, 7, 18, 19, 22, 111, 112, 113, 115 (which is the same as Record 130), 120, 123, 128, 129, 131 and 133 were collected, prepared, maintained or used by the Town in relation to the threatened legal action initiated by the appellant. In my view, this collection, preparation, maintenance or usage was in relation to the anticipated proceedings before a court which were to be brought by the appellant. In addition, I find that the allegations which form the basis for the appellant's proceeding relate to his employment with the Town.

It should be noted, however, that the appellant did not proceed with the legal action. Since that time, the appellant has been on long-term disability from his position with the Town. I have not been provided with any evidence that the appellant has indicated his intention to proceed with the legal action which he initially threatened against the Town or with any other proceeding arising from the events which took place in 1994.

In Order P-1618, Assistant Commissioner Tom Mitchinson considered whether the provision in section 65(6)1, which is the equivalent section in the provincial Act to section 52(3)1, is “time sensitive”. He found that:

... in order for section 65(6)1 to apply to these records in the context of the present appeal, it must be established that the proceedings or anticipated proceedings referred to are current or are in the reasonably proximate past so as to have some continuing potential impact for any ongoing labour relations issues which may be directly related to the records.

As previously stated, the OPP's investigation into the appellant's husband's complaint and the subsequent complaint made by appellant and her husband to the PCC took place six years ago.

The Town submits that without knowing the nature of the claim which might still be advanced by the appellant, it cannot give a definitive opinion on whether the appellant's action might be barred by reason of a limitation period or whether the Town continues to have a current legal interest in the matter. It adds that limitation periods can be extended if a party is “under a disability”, as is the case with the appellant and that the general limitation period of six years has not yet expired. The Town also reiterates the arguments raised by the Ministry of the Solicitor General and Correctional Services in Order P-1618 that the legislation itself does not contain any mention of “time sensitivity”. It adds that:

... the purpose of section 52 is not merely to protect the municipality from legal challenges from their employees, but also to permit the Town to investigate, discuss and respond to such situations internally with candour in a manner similar to non-public sector employers which are not required to disclose such discussions and investigations to the employees which are the very subject of the discussions and investigations.

I adopt the approach outlined by the Assistant Commissioner to the application of section 52(3)1 for the purposes of the present appeal. In my view, based on the submissions of the parties and the fact that four and a half years have elapsed since the threat of legal action was raised by the appellant, the proceedings which had been threatened by the appellant in 1994 cannot reasonably be said to be anticipated and are not in the reasonably proximate past. In Order P-1618, Assistant Commissioner Mitchinson addressed the fact that the legislation which gave rise to section 65(6) of the provincial Act and section 52(3) of the municipal Act makes no reference to a “time sensitive” consideration. He found that:

I am also not persuaded by the Ministry's argument that because the wording in the section does not expressly say so, there can be no time limitations associated with section 65(6). In my view, section 65(6) must be understood in context, taking into consideration both the stated intent and goal of the Labour Relations and Employment Statute Law Amendment Act (Bill 7) - to restore balance and stability to labour relations and to promote economic prosperity; and overall purposes of the Act - to provide a right of access to information under the control of institutions and to protect the privacy of and provide access to personal information held by institutions. When proceedings are current, anticipated, or in the reasonably proximate past, in my view, there is a reasonable expectation that a premature disclosure of the type of records described in section 65(6)1 could lead to an imbalance in labour relations between the government and its employees. However, when proceedings have been completed, are no longer anticipated, or are not in the reasonably proximate past, disclosure of these same records could not possibly have an impact on any labour relations issues directly related to these records, and different considerations should apply.

Because I have concluded that no "proceedings or anticipated proceedings before a court, tribunal or other entity" exist, I find that requirements 2 and 3 for section 52(3)1 have not been established. For this reason, I find that the records do not fall within the ambit of the exclusion in section 52(3)1.

Section 52(3)3

In order for a record to fall within the scope of paragraph 3 of section 52(3), the Town must establish that:

1. the record was collected, prepared, maintained or used by the Town 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 Town has an interest.

[Order P-1242]

The Town submits that Records 17, 22, 37, 38, 40, 43, 105, 106, 107, 108, 110, 116, 117, 121, 122 and 127 fall within the scope of section 52(3)3 and are, therefore, excluded from the ambit of the Act. The Town argues that each of these records was collected, prepared, maintained or used by the Town in relation to meetings or discussions about employment-related matters in which it has an interest.

Again, the appellant has not addressed the possible application of section 52(3)3 to the records.

Based on my review of the information contained in the records and the submissions of the Town, I find that Records 17, 105, 106, 108, 116, 117, 122 and 127 were collected, prepared, maintained or used by the Town in relation to various meetings, discussions and consultations which took place concerning the appellant's employment with the Town. I also find that because these meetings, discussions and consultations were concerned with the appellant's continued employment by the Town, they were clearly about an employment-related matter.

I must now determine whether these records concern an employment-related matter in which the Town "has an interest". Previous orders of the Commissioner's office have held that an interest is more than mere curiosity or concern. An "interest" for the purposes of section 52(3)3 must be a legal interest in the sense that the matter in which the Town has an interest must have the capacity to affected the Town's legal rights or obligations [Orders P-1242 and M-1147].

As noted above, at the time that these records were created, the appellant had retained counsel with a view to initiating an action to recover damages for activities which he felt constituted harassment on the part of his supervisors. Clearly, the Town's legal interests were at stake in the action contemplated by the appellant. In my view, at the time that they were created, the employment-related matters which were the subject of Records 17, 105, 106, 108, 116, 117, 122 and 127 fell within the description of a "legal interest" for the purposes of section 52(3)3.

I further find that Records 22, 37, 38, 40, 43, 107 and 121 do not contain information which may properly be characterized as relating to an employment-related matter in which the Town has a legal interest for the purposes of section 52(3)3. These records are administrative in nature and contain information relating to the appellant's pension and long-term disability eligibility. I find that this information does not relate to the appellant's legal proceeding in which the Town had an interest.

In Order M-1128, Adjudicator Laurel Cropley reviewed several past orders of the Commissioner's office which address the application of section 65(6)6 of the provincial Act, which is the equivalent to section 52(3)3 of the Act. She found that:

In Order P-1586, the Assistant Commissioner [Tom Mitchinson] examined whether Ontario Hydro (Hydro) had an interest in records relating to matters regarding the resignation of a named individual. He expressed his view that:

... the routine discharge of responsibilities imposed by statute is not, in and of itself, sufficient to constitute an ongoing legal intent. The statutory responsibility must be considered in context.

In considering Hydro's legal obligations to properly discharge its responsibilities under the Power Corporation Act, he found:

... several months have passed since the affected person's employment with Hydro ended, and the matters under consideration at the time the meeting minutes were created have concluded. In other words, the context has changed. There is no evidence before me to suggest that there is an ongoing dispute or other employment-related matter involving Hydro and the affected person that has the capacity to affect Hydro's legal rights or obligations.

In my view, the reasoning in these two orders can be similarly applied to the circumstances of the present appeal. In considering whether the Police have a "legal interest" in the matter, that is, the appellant's application for employment and subsequent hiring, in my view, there must be a reasonable prospect that this interest will be engaged.

The records at issue in this discussion were collected and used by the Police over ten years ago. There is no indication from either the appellant or the Police that the hiring process has been challenged or is at issue in any way. The fact that no action has been taken in this regard since the appellant was hired leads me to conclude that there is no reasonable prospect that the institution's legal interest in the circumstances of his hiring would be engaged in the future.

As I noted above, section 52(3) is record specific and fact specific. In the circumstances of this case, there is no matter pending or reasonably foreseeable which has the capacity to affect their legal rights or obligations. Therefore, I find that the Police have not demonstrated that they have sufficient legal interest in the appellant's application records to bring the records within the ambit of section 52(3)3.

Accordingly, as the interest of the Police in the subject matter of the records in package one does not qualify as a "legal interest" for the purposes of section 52(3)3, these documents are within the scope of the Act.

I adopt the approach taken by both Adjudicator Cropley and Assistant Commissioner Mitchinson with respect to the analysis of the impact which the passage of time may have on the question of whether an institution continues to have a legal interest in a matter. I note again that four and a half years have elapsed from the time that the appellant threatened to take legal action against the Town. Since that time, the appellant has not taken any further steps to bring his complaints to an appropriate forum for resolution. Because of this inaction on the part of the appellant with respect to his threatened legal action, and based on the evidence provided to me by the parties, I find that there no longer exists any matter, either pending or reasonably foreseeable, which has the potential capacity to affect the legal interests or obligations of the Town. I find that the Town has not demonstrated that it has sufficient legal interest in Records 17, 105, 106, 108, 116, 117, 122 and 127 to bring those records within the scope of section 52(3)3. These records are, accordingly, within the ambit of the Act.

I have found that Records 17, 22, 37, 38, 40, 43, 105, 106, 107, 108, 110, 116, 117, 121, 122 and 127 fall within the scope of the Act. The Town has not claimed that Records 22, 37, 38, 40, 43, 105, 107, 110, 116, 121, 122 and 127 are subject to any of the exemptions contained in the Act. I have reviewed each of these documents and, as no mandatory exemptions apply to the information which they contain, they should be disclosed to the appellant. I will now review the application of the exemptions to the remaining records.

PERSONAL INFORMATION

Under section 2(1) of the Act, "personal information" is defined, in part, as "... recorded information about an identifiable individual". I have reviewed each of the remaining records and find that, as they pertain to the appellant's threatened legal action and other events involving the appellant which transpired during the relevant time periods, they each contain his personal information.

In addition, Records 3, 6, 7, 17 and 120 describe the impressions and opinions of several other individuals about certain events which took place involving the appellant. Because these records contain the opinions of these individuals about the appellant, I find that they qualify as the personal information of the appellant, under the definition contained in section 2(1)(g). I also find each of these records contains other personal information which relates to the individuals, along with their names, and that they qualify, accordingly, as their personal information as defined by section 2(1)(h). Record 117 also contains the name and home telephone number of a member of the Town Council. In my view, the home telephone number of the Councillor qualifies as his personal information under section 2(1)(d).

INVASION OF PRIVACY

Where a record contains the personal information of both the appellant and another individual, section 38(b) allows the Town to withhold information from the record if it determines that disclosing that information would constitute an unjustified invasion of another individual's personal privacy. On appeal, I must be satisfied that disclosure **would** constitute an unjustified invasion of another individual's personal privacy. The appellant is not required to prove the contrary.

Sections 14(2) and (3) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 14(2) provides some criteria for the head to consider in making this determination. Section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy.

The only way in which a section 14(3) presumption can be overcome is if the personal information at issue falls under section 14(4) of the Act or where a finding is made under section 16 of the Act that there is a compelling public interest in disclosure of the information which clearly outweighs the purpose of the section 14 exemption.

The Town submits that the information which pertains to the individual named in Records 3, 6, 7, 17 and 120 was provided to it with an expectation that it would be treated confidentially. Following my review of these documents and based on their contents, it is clear that the individuals who expressed their views in each of these records intended that the information would be treated confidentially and not be disclosed to the appellant. This is a consideration favouring the non-disclosure of this information under section 14(2)(h). In addition, considering the circumstances surrounding the creation of these records, I also find that the information which they contain is highly sensitive within the meaning of section 14(2)(f), as they describe in detail certain events involving the appellant and a number of other identifiable individuals.

The Town also suggests that the home telephone number of the Councillor referred to in Record 117 be severed, and that the remaining information in this document be disclosed to the appellant. I find that the Councillor's personal telephone number was supplied to the Town in confidence within the meaning of section 14(2)(h). Again, owing to the unique circumstances surrounding the events occurring at the time this record was created, I also find that the telephone number may be considered to be "highly sensitive information" within the meaning of section 14(2)(f).

The appellant has not addressed the possible application of section 38(b) to the records.

Balancing the appellant's right of access to his own personal information against the privacy interests of the individuals named in these documents, I find that the only applicable factors present in these circumstances are those favouring privacy protection. I find, therefore, that the disclosure of Records 3, 6, 7, 17 and 120, in their entirety, and the personal telephone number in Record 117, would constitute an unjustified invasion of the personal privacy of the individuals referred to therein. As such, I find that this information is properly exempt from disclosure under section 38(b).

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

Under section 38(a) of the Act, the Town has the discretion to deny access to an individual's own personal information in instances where certain exemptions, including sections 6(1)(b) and 12, would apply to the disclosure of that personal information.

CLOSED MEETING

The Town submits that Records 106, 108, 115 (which is the same as Record 130) and 131 are exempt under section 6(1)(b) of the Act. This section states that:

A head may refuse to disclose a record,

that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public.

In order to qualify for exemption under section 6(1)(b), the Town must establish that:

1. a meeting of a council, board, commission or other body or a committee of one of them took place; **and**
2. that a statute authorizes the holding of this meeting in the absence of the public; **and**
3. that disclosure of the record at issue would reveal the actual substance of the deliberations of this meeting.

[Order M-64]

The first and second parts of the test for exemption under section 6(1)(b) require the Town to establish that a meeting was held **and** that it was held in camera.

[Order M-102]

The Town submits that Records 106, 108, 115 (which is the same as Record 130) and 131 contain information relating to a meeting of the Town Council which took place in the absence of the public on November 1, 1994. It also submits that section 55 of the Municipal Act, which applied at the time of the meeting, authorized the Town to hold meetings in camera. Accordingly, I am satisfied that the first two requirements of the section 6(1)(b) exemption have been met with respect to these records.

The Town submits that the disclosure of Records 106, 115 and 131 would reveal the actual substance of the deliberations of the November 1, 1994 meeting, as well as other procedural matters which arose from the appellant's request to meet with the Council. It further indicates that Record 108 is a set of notes prepared by the Town's Manager of Human Resources for a presentation which he was to make to the November 1, 1994 Council meeting.

I find that Records 106, 108, 115 and 131 meet the requirements for the third part of the section 6(1)(b) test. The disclosure of the information contained in these records would reveal the substance of the deliberations of the in camera Council meeting held on November 1, 1994. As all three parts of the section 6(1)(b) test have been satisfied, I find that these records are properly exempt under section 38(a).

SOLICITOR-CLIENT PRIVILEGE

The Town submits that Records 18, 19, 111, 112, 113, 128, 129 and 133 are subject to the exemption in section 12. It suggests that they represent either communications between Town staff and counsel retained by the Town to defend the legal action which the appellant indicated he intended to initiate or they contain references to the legal advice which was obtained by staff from counsel. Accordingly, the Town argues that these records are exempt from disclosure under the solicitor-client privilege exemption in section 12.

This section consists of two branches, which provide a head with the discretion to refuse to disclose:

1. a record that is subject to the common law solicitor-client privilege (Branch 1); and
2. a record which was prepared by or for counsel employed or retained by the Town for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the Town must provide evidence that the record satisfies either of the following tests:

1. (a) there is a written or oral communication, **and**
(b) the communication must be of a confidential nature, **and**
(c) the communication must be between a client (or his agent) and a legal advisor, **and**
(d) the communication must be directly related to seeking, formulating or giving legal advice;

OR

2. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.

[Orders 49, M-2 and M-19]

Two criteria must be satisfied in order for a record to qualify for exemption under Branch 2:

1. the record must have been prepared by or for counsel employed or retained by the Town; and
2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

[Order 210]

Solicitor-client communication privilege

At common law, solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining

[IPC Order M-1161/November 13,1998]

professional legal advice. The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].

This privilege has been described by the Supreme Court of Canada as follows:

... all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attaching to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship ...

[Descôteaux v. Mierzwinski (1982), 141 D.L.R. (3d) 590 at 618, cited in Order P-1409]

Records 18, 19 and 113 are letters from staff of the Town to its solicitors seeking advice on a legal question pertaining to the appellant's threatened legal action. Records 111 and 123 are memoranda from Town staff to the Mayor which include certain legal advice received from counsel. Records 112, 128, 129 and 133 are notes taken in the course of various telephone conversations between the Town's staff and its legal counsel pertaining to the appellant's threatened action.

I find that the disclosure of all of these records would reveal the contents of confidential communications which took place between a solicitor and client and were directly related to the seeking, formulating or giving of legal advice. Accordingly, I find that these records qualify for exemption under the first part of Branch 1 of the section 12 exemption. Therefore, these records are exempt under section 38(a).

The Town has also claimed the application of section 7(1) of the Act to Record 113. Because I have found this record to be exempt under sections 12 and 38(a), it is unnecessary for me to consider whether it also qualifies for exemption under section 7(1).

ORDER:

1. I uphold the Town's decision not to disclose Records 3, 6, 7, 17, 18, 19, 106, 108, 111, 112, 113, 115 (which is the same as Record 130), the telephone number in Record 117, Records 120, 123, 128, 129, 131 and 133.
2. I order the Town to disclose the remaining records to the appellant by providing him with copies not later than **December 18, 1998** but not before **December 14, 1998**.
3. In order to verify compliance with the terms of this order, I reserve the right to require the Town to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 2.

Original signed by: _____

Donald Hale
Adjudicator

_____ November 13, 1998