



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-1941

Appeal MA-040270-1

United Counties of Prescott and Russell



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NATURE OF THE APPEAL

A request was made to les Comtés Unis de Prescott et Russell (les Comtés) under the *Municipal Freedom of Information and Protection of Privacy Act* (the “Act”) to obtain access to the following information concerning an affected person:

- a) the date of dismissal of the affected person and the reasons given;
- b) dates and all of the clauses of the agreement between the affected person and les Comtés;
- c) amount and date of payment of any financial compensation to the affected person.

In its original decision letter les Comtés identified records responsive to the request and denied access to them on the basis of the exemption set out in section 52(3) of the *Act* (*Act* does not apply).

The requester (now the appellant) appealed the decision.

During mediation les Comtés advised that it was also relying on the application of the mandatory exemption set out in section 14 of the *Act* (Personal Privacy) with particular reference to section 14(3)(d). Also during mediation, the appellant clarified that he no longer sought the date of dismissal of the affected person or the reasons given. As a result this information is no longer at issue in this appeal.

When the mediator contacted the affected person to ask for their position on the request, they consented to the disclosure of the records to the appellant. Consequently, the mediator sent les Comtés a consent form signed by the affected person.

Despite the consent of the affected person, les Comtés maintained its refusal to grant access to the information requested.

The appeal could not be resolved at the mediation stage and moved to the adjudication stage.

I sent a Notice of Inquiry to les Comtés, initially, setting out the issues and seeking their representations. Les Comtés sent in their representations in response. A Notice of Inquiry was then sent to the appellant along with a copy of the representations that were filed by les Comtés. The appellant decided not to file any representations.

In their representations, les Comtés clarified that in addition to section 52(3), it relies on the mandatory exemption in section 14(1) (in conjunction with sections 14(2)(h) and 14(3)(d), (e) and (f)) of the *Act* to deny access to the records.

RECORDS

The records that remain at issue consist of the following:

Record 1	A letter dated January 29, 2004;
Record 2	A release agreement;
Record 3	A memorandum of agreement.

LABOUR RELATIONS AND EMPLOYMENT RECORDS

General Principles

Section 52(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:

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.

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 term “in relation to” in section 52(3) means “for the purpose of, as a result of, or substantially connected to” [Order P-1223].

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 [Order PO-2157].

If section 52(3) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date [*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. 507].

Les Comtés relies on the application of sections 52(3) 2 and 3 of the *Act* to deny access to the records.

Section 52(3)2: Negotiations

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 usage was in relation to negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution; and
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.

[Orders M-861, PO-1648]

Representations of Les Comtés

With respect to the application of section 52(3)2, in their representations, les Comtés submits as follows:

Record 1, a letter of termination of employment with an offer to settle, dated January 29, 2004, was prepared and used by the institution with the assistance of its legal counsel to terminate the employment of an employee of the institution. It was prepared and used by the institution, in part, to negotiate a severance package for the employee in question.

The institution had anticipated that giving this letter to the employee in question would lead to negotiations with her or her legal representative to enter into an agreement concerning her termination package. Negotiations did take place between the institution's lawyers and the employee's, resulting at length in the signing of an agreement between the parties in the summer of 2004 concerning the terms of her termination. [Translation]

Although referenced under the discussion relating to the application of section 52(3)3, les Comtés also submits:

Record 1 was prepared and used by the institution with the assistance of its legal counsel. It was used in discussions, meetings and communications to reach an agreement concerning the terms of the termination of employment of an employee of the institution.

The management team used this record following the employee's termination and opened negotiations with the employee and her lawyers based on this record. These decisions, meetings, discussions and communications directly concerned an employment-related matter in which the institution has an interest: the dismissal of an employee (Order MO-1654-I).

Records 2 and 3 are the result of meetings, discussions and communications concerning an employee's dismissal. Accordingly, these records also concern employment-related matters in which the institution has an interest. [Translation]

Part 1: collected, prepared, maintained or used by les Comtés or on its behalf

Based on my review of the contents of the records at issue, I am satisfied that they were prepared or used by les Comtés or on its behalf. The first part of the test under section 52(3)2 has, accordingly, been met with respect to the records.

Part 2: negotiations relating to employment

The records reflect the initiation and conclusion of negotiations of a severance agreement with a former employee of les Comtés. I find that the second part of the test under section 52(3)2 has also been met.

Part 3: between an institution and a person

The negotiations at issue in this appeal took place between a person and les Comtés. I find that the third part of the test under section 52(3)2 has been met with respect to the records.

Accordingly, I find that all of the elements required for the application of section 52(3)2 have been satisfied by les Comtés. Having reached this conclusion, it is not necessary for me to consider the application of section 52(3)3 of the *Act*. This, however, does not end the analysis.

Section 52(4)

Even if the dispositions in section 52(3)2 (or for that matter, 52(3)1 or 3) apply, if the records fall within any of the exceptions in section 52(4), the *Act* still applies to them.

Section 52(4) states:

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.

With respect to the application of section 52(4), in their representations, les Comtés submits as follows:

Record 1 does not fall within the scope of any of the exceptions in section 52(4). Records 2 and 3 may fall within the scope of the exception in provision 4 [sic] of section 52(4), given that they constitute the result of an agreement between an institution and an employee resulting from negotiations about her dismissal. The institution would like to emphasize, however, that these records were prepared on condition of the parties' strict mutual confidentiality. Moreover, the records contain personal information concerning the employee in question and it would therefore be in the public interest not to apply this exception to them, in view of the express intention of the contracting parties in the negotiation. [Translation]

Although the above excerpt cites section 52(4)4, the substance of the paragraph refers to some considerations in section 52(4)3, and none of the considerations listed in section 52(4)4. It would appear to me that les Comtés meant to cite section 52(4)3 in its submissions on this point and referred to section 52(4)4 in error.

In Order MO-1622, Adjudicator Donald Hale made certain findings with respect to the application of section 52(4)3 to severance agreements involving former employees of the City of London Ontario. He found that:

In my view, the fully executed Agreements and Release which form part of

Record 1 and all of Record 13 represent “agreements between an institution and one or more employees”. The records reflect the fact that the information contained in these documents was arrived at following negotiations between the individuals involved and the City. In addition, I have found above that the agreements and the negotiations which gave rise to them were “about employment-related matters between the institution and the employees”. In my view, the Agreements which comprise part of Record 1 and all of Record 13 fall within the ambit of the exception in section 52(4)3.

I find support for this view in the decision in Order M-797 where Assistant Commissioner Tom Mitchinson found as follows:

Sections 52(3) and (4) are record-specific and fact-specific. If a record which would otherwise qualify under any of the listed paragraphs of section 52(3) falls within one of the exceptions enumerated in section 52(4), then the record remains within the Commissioner’s jurisdiction and the access rights and procedures contained in Part 1 of the *Act* apply.

The Board’s representations state:

Although this document constitutes a communication made in the course of negotiations relating to [the Superintendent’s] employment, it also constitutes the final agreement between the school Board and [the Superintendent] resulting from those negotiations. The document requested by the appellant would appear to fall within the ambit of paragraph 52(4)3 of the *Act*, and is therefore subject to the application of the *Act*.

Having reviewed the records and the Board’s representations, I agree. In my view, the two records at issue in this appeal, considered together, constitute the agreement between the Board and the Superintendent with respect to his early retirement. This agreement resulted from negotiations about a matter which clearly relates to the Superintendent’s employment with the Board. I find that the records fall within the scope of the exception to the section 52(3) exclusion found in paragraph 3 of section 52(4), and are therefore subject to the *Act*. Accordingly, I have jurisdiction to consider the issue of denial of access by the Board, and I will now determine whether these records qualify for exemption under section 14(1) as claimed by the Board.

I adopt the reasoning expressed by the Assistant Commissioner in Order M-797 for the purposes of this appeal. I find, therefore, that the Agreements which comprise part of Record 1 and all of Record 13 fall within the exception in section 52(4)3 and that I have jurisdiction to determine whether these records are properly exempt under the *Act*. I will, accordingly, order the City to issue a decision letter to the appellant with respect to access to the Agreements.

I agree with the preceding analysis and find nothing material to distinguish records 2 and 3 from the records under consideration in Order MO-1622. Based on my review of the records, and in light of the admission made by les Comtés in their representations, I therefore find that records 2 and 3 fall within the scope of an "agreement" as discussed in the exception in section 52(4)3, and that the *Act* applies to these records.

Record 1, however, does not fall within the exception. This is because in my opinion Record 1 is merely the first step in the negotiation that led to the creation of Records 2 and 3 and does not fall within the scope of an "agreement" discussed in the exception in section 52(4)3, nor does it otherwise fall within any other part of section 52(4). Therefore, the *Act* does not apply to Record 1.

As I have found that the *Act* applies to records 2 and 3, I must now consider whether these records contain personal information and if the section 14(1) exemptions claimed by les Comtés apply.

PERSONAL INFORMATION

Under section 2(1) of the *Act*, the term "personal information" is defined as recorded information about an identifiable individual, including information relating to the employment history of the individual or information relating to financial transactions in which the individual has been involved (paragraph (b) of the definition), and the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual (paragraph (h) of the definition).

Previous orders of this office have considered the contents of various types of agreements, such as employment contracts or settlement and/or employment severance agreements (Orders MO-1184, MO-1332, MO-1405, MO-1749 and P-1348). These orders have consistently held that information about the individuals named in such agreements, which include, amongst other things, their name, address, terms, date of termination and terms of settlement concern these individuals in their personal capacity and thus qualifies as personal information. I am satisfied that the same considerations apply in the circumstances of this appeal, and that the records at issue contain the personal information of the affected party who was a former employee of les Comtés.

The records at issue do not contain the appellant's personal information.

PERSONAL PRIVACY

Where a requester seeks personal information of another individual, section 14(1) of the *Act* prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 14(1) applies.

Section 14(1)(a) provides that one such exception is when there is the prior written consent of the individual to whom the information relates, if the record is one to which the individual is entitled to have access. As set out in Order PO-1723, for section 14(1)(a) to apply, the consenting party must provide a written consent to the disclosure of his or her personal information in the context of an access request.

In my opinion, as records 2 and 3 are those which the affected party is entitled to have access, the written consent of the affected party in this appeal fulfills the requirements of section 14(1)(a). As section 14(1)(a) is an exception to the section 14(1) exemption, I find that the exemption does not apply to records 2 and 3. It is therefore unnecessary for me to consider the other provisions of sections 14(1), 14(2), 14(3) or the public interest override in section 16 referred to by les Comtés in their representations.

As a result, records 2 and 3 shall be ordered to be disclosed.

ORDER:

1. I uphold les Comtés' decision with respect to its determination that record 1 falls outside the scope of the *Act*.
2. I order les Comtés to disclose the unhighlighted portions of records 2 and 3 to the appellant no later than, August 12, 2005 but not before July 29, 2005.
3. In order to verify compliance with provision 2 of this order, I reserve the right to require les Comtés to provide me with a copy of records 2 and 3, as disclosed to the appellant.

Steven Faughnan
Adjudicator

July 6, 2005