Information and Privacy Commissioner,
Ontario, Canada

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

INTERIM ORDER MO-2721-I

Appeal MA10-218

Municipality of North Grenville

April 27, 2012

Summary: The appellant sought information relating to complaints and petitions filed against the Kemptville Fire Department and all draft notes and final reports written for or by the Municipality of North Grenville's Chief Administrative Officer in regard to the fire department. The municipality provided partial access to responsive records pursuant to sections 7(1) (advice or recommendations) and 14(1) (personal privacy) of the *Municipal Freedom of Information and Protection of Privacy Act.* The municipality located further records and provided partial access to them pursuant to sections 6(1)(b) (closed meeting) and 7(1) and 14(1) of the *Act*. The appellant appealed the municipality's decisions. During mediation, the appellant indicated that she was not satisfied with the municipality's search for records and the municipality asserted that the records at issue were excluded by section 52(3)3 (labour relations and employment) of the *Act*. The adjudicator issued an interim order, finding that the records at issue are excluded from the *Act* pursuant to section 52(3)3 and ordering the municipality to conduct a further search for responsive records.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 17, 52(3).

Cases Considered: *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.).

OVERVIEW:

[1] The Municipality of North Grenville (the municipality) received a request pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information:

> … any and all complaints and petitions filed against the Kemptville Fire Department [(the fire department)] or any individual within the department starting in January 2008 to today. I would also like any and all draft notes and final report(s) written for or by the Chief Administrative Officer [(the CAO)] in regards to any Kemptville Fire Department issues starting January 2008 to today.

[2] In response to the request, the municipality issued a decision letter that contained an index of records, indicating that it provided the appellant with partial access to responsive records. The index described the records at issue and cited the application of sections 7(1) (advice or recommendations) and 14(1) (personal privacy) of the *Act* as the basis for denying access to the withheld portions of the records. In support of its section 14(1) claim, the municipality also cited the application of the presumption in section 14(3)(g) (personal recommendations) and the factors in sections 14(2)(e) (pecuniary or other harm), (f) (highly sensitive), (g) (inaccurate or unreliable), (h) (supplied in confidence) and (i) (unfair damage to reputation).

[3] The appellant sent correspondence to the municipality in response to this decision to request a review of the records. The municipality subsequently issued a new decision, granting additional partial access to the responsive records, as well as citing sections 6(1)(b) (closed meeting), 7(1) and 14(1) of the *Act* in support of its denial of access to the remaining information. Some of the records identified under 'Complaints' in the decision letter were partially disclosed with the "removal of personal identifiers."

[4] The appellant appealed the municipality's decisions.

[5] During the mediation stage of the appeal process, the appellant clarified that she is not seeking access to the following:

- records identified under "Complaints" in the municipality's second decision letter
- a partially severed document titled "contact information for all officers" identified under "Consultation Process,"
- a document titled "Memo from CAO [Chief Administrative Officer] to Council dated March 15, 2010" identified under "Reports."

[6] The appellant confirmed that she is seeking the remainder of the records, namely:

- Handwritten notes from confidential meetings between the CAO and members of the fire department and Ontario Fire Marshal
- Confidential memo from the CAO to Council dated January 11, 2010
- Confidential report from the CAO to Council dated January 11, 2010
- Confidential report from the CAO to Council dated February 1, 2010

[7] The appellant also stated that she believes the municipality did not complete a reasonable search and that additional records responsive to her request should exist. The municipality, however, maintained that no additional records exist in response to the request. Accordingly, the reasonableness of the municipality's search is an issue in the appeal.

[8] The appellant raised the application of the section 16 public interest override as an issue in the appeal.

[9] During the mediation stage of the appeal, the mediator discussed with the parties the possible application of section 52(3) (labour relations and employment) of the *Act* to the records at issue. The municipality subsequently issued a third decision letter adding section 52(3)3 as an issue in the appeal and claiming it as an exclusion for all of the records remaining at issue. At that time, the municipality also issued a revised index of records (the index), which describes the records at issue and the application of the exemptions in sections 6(1)(b), 7(1), 14(1) to them. The index also confirms the municipality's reliance on the section 52(3)3 exclusion for all of the records at issue.

[10] The parties were unable to resolve the appeal during mediation and the file was moved to the adjudication stage for an inquiry.

[11] I commenced an inquiry by issuing a Notice of Inquiry, seeking representations from the municipality on the threshold jurisdictional issue [the application of the exclusion in section 52(3)] and reasonable search. The municipality chose to not submit representations.

[12] I then sought representations from the appellant on all issues, namely the application of the exclusion in section 52(3) to the records at issue, the application of the exemptions in sections 6(1)(b), 7(1) and 14(1) to the information at issue [on the basis that the section 52(3) exclusion does not apply] and whether the municipality has conducted a reasonable search for records responsive to the appellant's request.

[13] The appellant responded with representations.

[14] In this interim order, I find that the records at issue are excluded under the *Act* pursuant to section 52(3)3 and I order the municipality to conduct a further search for responsive records.

[15] As a preliminary matter, the appellant has made allegations in her representations that the municipality has not handled her access request in a professional manner. These include the alleged inappropriate sharing of the appellant's personal information with individuals connected to the municipality who were not involved with the processing of her request and suggestions that employees of the municipality had been told to cease putting information in writing in order to avoid the freedom of information request process under the *Act*. In light of these allegations, the appellant has asked that I recommend that municipality staff be required to take training on the privacy provisions and their duties under the *Act*.

[16] I acknowledge the appellant's concerns. With regard to allegations that her personal information was shared inappropriately, this office takes alleged breaches of privacy very seriously. If the appellant wishes to pursue the alleged breach of her privacy then the proper avenue would be for her to submit a privacy complaint to this office and a formal investigation will be undertaken into her allegations by this office, which is also responsible for handling privacy complaints. With respect to the appellant's allegations that employees of the municipality have been counselled to circumvent the access provisions of the *Act*, I would remind the municipality of the "purposes" of the *Act* as set out in section 1 "to provide a right of access to information under the control of institutions in accordance with the principles that […] information should be available to the public […]." I will not address these allegations further in this order.

RECORDS:

[17] The following records remain at issue in this appeal, as described in the index provided by the municipality:

- Handwritten notes from confidential meetings between the CAO, members of the fire department and the Ontario Fire Marshal
- Confidential memo from the CAO to Council dated January 11, 2010
- Confidential report from the CAO to Council dated January 11, 2010
- Confidential report from the CAO to Council dated February 1, 2010

ISSUES:

A. Does section 52(3)3 exclude the records at issue from the operation of the *Act*?

B. Did the municipality conduct a reasonable search for records responsive to the appellant's request?

DISCUSSION:

A. Does section 52(3)3 exclude the records at issue from the operation of the *Act*?

[18] 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:
>
> > Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

[19] If section 52(3)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*.

[20] For the collection, preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in paragraph 3 of this section, it must be reasonable to conclude that there is "some connection" between them.[1]

[21] The term "labour relations" can refer to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships. However, the meaning of "labour relations" is not restricted to employer-employee relationships. Its ordinary meaning can extend to relations and conditions of work beyond those relating to collective bargaining. In addition, to restrict the meaning of "labour relations" to employer/employee relations would render the phrase "employment-related matters" redundant.[2]

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

[2] *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.) (*Minister of Health and Long-Term Care*). See also Order PO-2157.

[22] 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.[3]

[23] If section 52(3)3 applied at the time the records were collected, prepared, maintained or used, it does not cease to apply at a later date.[4]

[24] 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 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 institution has an interest.

[25] As stated above, the municipality did not provide representations on the application of the section 52(3)3 exclusion despite being invited to do so. In addition, although the appellant did provide representations, I have found them to be of limited assistance in conducting my review of the application of the section 52(3)3 exclusion.

[26] The appellant indicates in both her letter of appeal and representations that the fire department is "volunteer-based" and that issues exist regarding the department's level of service, due to disparity in volunteer commitment and training. As the wife of one of the volunteer firefighters, she has concerns about her husband's safety due to these issues. The appellant believes that the community has a right to know about the issues surrounding the fire department and how it is being managed by the municipality.

[27] Having reviewed the records, I find that they were prepared by the municipality as part of a comprehensive review of the fire department's management and organization structure, including its practices, procedures, policies and protocols. Based on the contents of the records, I am also satisfied that the preparation and use of these records was in relation to meetings, consultations, discussions and communications regarding this review process. Accordingly, the first two requirements set out above for the application of section 52(3)3 are met.

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[3] Order PO-2157.

[4] *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.

[28] Turning to requirement 3, I concur with the appellant that the fire department is staffed by volunteer firefighters. This is confirmed on the municipality's website,[5] where the following information regarding the fire department[6] appears:

> Our Fire Department is comprised of 41 volunteer firefighters and one full time Fire Chief. We service the 160 square mile area of the Municipality of North Grenville and provide emergency assistance to our neighboring communities in time of need.

[29] With the exception of the Fire Chief, the firefighters are not employees of the municipality. However, the fact they are not employees does not preclude the possibility that the meetings, consultations, discussions or communications in question are about "labour relations" in which the municipality has an interest.

[30] As referenced above, the Court of Appeal in *Minister of Health and Long-Term Care* stated that the meaning of "labour relations" is not restricted to employer-employee relationships and that its ordinary meaning can extend to relations and conditions of work beyond those relating to collective bargaining. In addition, the Court of Appeal added that to restrict the meaning of "labour relations" to employer/employee relations would render the phrase "employment-related matters" redundant.

[31] In *Minister of Health and Long-Term Care*, the Court of Appeal overturned the decision of former Assistant Commissioner Tom Mitchinson in Order PO-1721. In that order, the Assistant Commissioner held that records relating to the Physician Services Committee, an ongoing advisory body that dealt with the relationship between the province's physicians and the Ministry of Health and Long-Term Care, were not about labour relations within the meaning of section 65(6)3.[7] His decision was based on the lack of an employer-employee relationship between the Government of Ontario and physicians. Order PO-1721 was upheld at the Divisional Court[8] but set aside by the Ontario Court of Appeal in *Minister of Health and Long-Term Care.*

[32] In making its determination, the Court of Appeal stated:

> It is common ground that physicians are not "employees" of the provincial government. In our view, however, in reaching the conclusion they did, the Assistant Information and Privacy Commissioner and the Divisional Court read the phrase "labour relations" in s. 65(6)3 of the Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31 ("the Act"), too narrowly. The phrase is not defined in that Act, and its ordinary meaning can extend to relations and conditions of work beyond those

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[5] www.northgrenville.ca
[6] Now known as the North Grenville Fire Service (NGFS).
[7] The provincial *Act* equivalent of section 52(3)3.
[8] [2002] O.J. No. 4769.

> relating to collective bargaining. Nor is there any reason to restrict the meaning of "labour relations" to employer/employee relations; to do so would render the phrase "employment-related matters" redundant.
>
> The relationship between the government and physicians, and the work of the Physician Services Committee in discharging its mandate on their behalf, including provisions for the remuneration of physicians, falls within the phrase "labour relations", and the meetings, consultations, discussions and communications that take place in the discharge of that mandate fall within that phrase as it appears in s. 65(6)3. The result is that the Act does not apply to the records the production of which was ordered by the respondent.

[33] In my view, although the circumstances in this case are different from those in *Ministry of Health and Long-Term Care*, the analysis conducted by the Court of Appeal is relevant to this case.

[34] The Court of Appeal's judgment in *Minster of Health and Long-Term Care* indicates that finding a group of professionals not to be involved in "labour relations" with the government, because they are not its employees, is reading section 65(6)3 too narrowly. The Court also indicates that "labour relations" has a meaning that goes beyond the confines of collective bargaining.

[35] Applying the Court of Appeal's reasoning in *Minister of Health and Long-Term Care*, finding a group of individuals not to be involved in "labour relations" with the municipality, because they are neither its employees nor involved in collective bargaining, is reading section 52(3)3 too narrowly. In my view, the meetings, consultations, discussions or communications that are documented in the records are clearly about "labour relations" matters, to the extent that they focus on a comprehensive review of the fire department's operations and structure, including the services provided by the volunteer fire fighters and the future management and staffing of the department. Accordingly, I find that requirement 3 is met.

[36] I am satisfied that none of the exceptions in section 52(4) applies and I conclude that the records at issue in this appeal are excluded from the Act under section 52(3)3.

[37] In light of my finding regarding the application of the section 52(3)3 exclusion, I need not examine the application of the exemptions in sections 6(1)(b), 7(1) and 14(1) to the records.

B. Did the municipality conduct a reasonable search for records responsive to the appellant's request?

[38] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.[9] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[39] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.

[40] Where a requester provides sufficient detail about the records that he/she is seeking and the institution indicates that records do not exist, it is my responsibility to ensure that the institution has conducted a reasonable search to identify any records that are responsive to the request. The *Act* does not require the institution to prove with absolute certainty that the records do not exist. However, in order to properly discharge its obligations under the *Act*, the institution must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request.[10]

[41] A reasonable search would be one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request.[11]

[42] In conducting this inquiry, I initially sought representations from the municipality. In the Notice of Inquiry I requested the municipality to provide a written summary of all steps taken in response to the appellant's request. In particular, I requested the municipality to respond to the following four points by way of affidavit:

1. Did the institution contact the requester for additional clarification of the request? If so, please provide details including a summary of any further information the requester provided.

2. If the institution did not contact the requester to clarify the request, did it:

   (a) choose to respond literally to the request?

[9] Orders P-85, P-221, PO-1954-I.
[10] Order P-624.
[11] Order M-909.

(b) choose to define the scope of the request unilaterally? If so, did the institution outline the limits of the scope of the request to the requester? If yes, for what reasons was the scope of the request defined this way? When and how did the institution inform the requester of this decision? Did the institution explain to the requester why it was narrowing the scope of the request?

3. Please provide details of any searches carried out including: by whom were they conducted, what places were searched, who was contacted in the course of the search, what types of files were searched and finally, what were the results of the searches? Please include details of any searches carried out to respond to the request.

4. Is it possible that such records existed but no longer exist? If so please provide details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.

[43] With regard to the affidavit, I stated that it should be signed by the person or persons who conducted the actual searches.

[44] As set out above, the municipality chose to not submit representations outlining its search efforts. While I acknowledge that the appellant has not provided representations that assist me in my determination of the search issue, I am satisfied that her request was sufficiently clear and detailed to enable the municipality to conduct a reasonable search and report on its efforts. It may well be that the municipality has conducted a reasonable search; however, due to its complete absence of representations I must conclude that it has failed to *demonstrate* that it has conducted a reasonable search for records responsive to the appellant's request.

[45] Accordingly, I will order the municipality to conduct a further search and to report on all of its search efforts (both past and present) in affidavit form.

ORDER:

1. I uphold the decision of the municipality that the *Act* does not apply to the records.

2. I order the municipality to conduct a further search for records responsive to the appellant's request, dated March 25, 2010.

3. I order the municipality's CAO and Director of Corporate Services/Clerk to prepare and submit affidavits by **May 18, 2012** setting out the details of all searches completed, including the following:

    a) information about all employee(s) who conducted searches, describing their qualifications, position and responsibilities;

    b) a statement describing each employee's knowledge and understanding of the subject matter of the request;

    c) the date(s) each employee conducted his or her search and the names and positions of any individuals who were consulted;

    d) information about the type of files searched, the nature and location of the searches, and the steps taken in conducting each search;

    e) the results of each search; and

    f) if as a result of these searches it appears that responsive records existed but no longer exist, details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.

4. If further responsive records are located as a result of any new searches completed pursuant to Provision 1, I order the municipality to provide a decision letter to the appellant regarding access to those records in accordance with the provisions of the *Act*, considering the date of this order as the date of the request.

5. The affidavits referred to in Provision 2 should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 2 Bloor Street East, Suite 1400, Toronto, Ontario, M4W 1A8. The affidavits provided to me may be shared with the appellant, unless there is an overriding confidentiality concern. The procedure for the submitting and sharing of representations is set out in *IPC Practice Direction 7*, which is available on our website.

6. I remain seized of this appeal in order to deal with any other outstanding issues arising from this order.

Original signed by: April 27, 2012
Bernard Morrow
Adjudicator