

Information and Privacy Commissioner,  
Ontario, Canada



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

---

## ORDER MO-2773

Appeal MA10-315

Municipality of Sioux Lookout

July 30, 2012

**Summary:** The municipality received a request for certain records in the possession of a municipal councillor, and responded by indicating that the requested records were not in the municipality's custody or control. During the inquiry, the municipal councillor identified the specific records in the municipality's possession, and those in the councillor's possession. This order determines that the identified records relating to the performance and performance appraisal of a municipal employee fall outside the scope of the *Act* because of the exclusionary provision in section 52(3)3 (employment-related matters), and that the councillor's personal records relating to a harassment complaint made against him/her are not in the custody or control of the municipality.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 4(1), 52(3)3.

### OVERVIEW:

[1] The Municipality of Sioux Lookout (the municipality) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), for the following information:

Any and all documents/records in the possession of [a named councillor]  
... which relate or refer to [a named individual], [a named employee],  
Senior Management, performance or harassment.

[2] Following receipt of the request, the municipality contacted the appellant to clarify the request. The appellant clarified what he meant by the terms "senior management," "performance" and "harassment" as set out in his request.

[3] The municipality then notified the named councillor whose interests may be affected by disclosure of the record (the affected party), and subsequently issued a decision to the appellant, denying access to the requested records because they are not in the custody or under the control of the municipality.

[4] The requester (now the appellant) appealed the municipality's decision.

[5] During the intake stage of the appeal process, the appellant provided the intake analyst with an additional clarification of the information he was seeking, and confirmed that it was for the following as described by the intake analyst to the appellant:

... the records you are attempting to obtain relate to a performance evaluation of [the named individual] by the performance appraisal Evaluation Committee that [the named councillor] sits on. You are also looking for any general information relating to a harassment charge that [was] laid against [the named councillor], as well as any other information concerning the performance of [the named individual in his job with] the Municipality.

It was also discussed that you believe that the day to day notes regarding employees of the Municipality [and specifically the named individual] should be available under the *Act*.

[6] During the mediation stage of the process, the clarification referred to above was confirmed. Also during mediation, the Freedom of Information Coordinator for the municipality issued a supplementary decision letter to the appellant which read, in part:

You have requested records in the possession of [a named councillor]. ... [The named councillor] is not an officer of the corporation and [the councillor's] records are not subject to the *Act*. Nor are [the councillor's] records in the custody or under the control of the municipality. ...

Also, through mediation, you have identified documents which are related to the harassment complaint and [identified performance appraisal(s)] that you believe [the named councillor] has and ... you feel that these documents ... should be released. It sounds like these records are copies of documents that the municipality has provided to [the named councillor]....

If this is the case and the originals of these documents are official municipal documents, they would most likely be subject to and possibly available from the municipality. However, [the named councillor's] copies of these documents would not be. They would be considered to be [that councillor's] personal records or papers, not subject to the *Act*, and also not in the custody or under the control of the municipality.

[7] The municipality also indicated that the named councillor was appointed deputy mayor for a period of time, and was also the acting mayor at various times. The municipality then reviewed previous orders of this office concerning custody and control issues and stated that, notwithstanding the councillor's role with the municipality, the records would still be considered the councillor's personal papers, and not in the custody or under the control of the municipality.

[8] Mediation did not resolve this appeal, and it was transferred to the inquiry stage of the process. I sent a Notice of Inquiry, identifying the facts and issues in this appeal, to the municipality and the affected party, initially.

[9] Both the municipality and the affected party provided representations in response to the Notice of Inquiry. The municipality provided extensive representations on the custody and control issue. The affected party provided detailed information about the records that exist and are responsive to the request. This included information identifying the specific records that the municipality has in its custody, and the specific records that are solely in the possession of the affected party.

[10] The issue of whether certain records are excluded from the scope of the *Act* because of the operation of section 52(3) (employment-related matters) was not raised earlier in this appeal. However, based on the affected party's detailed description of certain records, I decided that some of the records may fall outside of the scope of the *Act* as a result of the operation of the exclusionary exemption in section 52(3) of the *Act*.

[11] I then sent the Notice of Inquiry, along with a complete copy of the representations of the municipality (without attachments and with some identifiers removed), and a severed copy of the representations of the affected party (without attachments), to the appellant. In addition, in the Notice of Inquiry I sent to the appellant, I invited the appellant to address the issue of the possible application of the exclusionary exemption in section 52(3) to some of the records.

[12] The appellant did not provide representations to me.

[13] In this order I find that the identified responsive records relating to the performance and/or performance appraisal of the named employee with the municipality fall outside the scope of the *Act* because of the operation of section 52(3)3. I also find that the identified responsive records in the possession of the municipal councillor relating to a harassment complaint against that councillor are not in the custody or control of the municipality.

### **Preliminary issue - identification of the records at issue**

[14] As I indicated above, the request specifies that the appellant is only seeking records in the possession of a named municipal councillor. Although the municipality provided extensive representations on the issue of the custody and control of a municipal councillor's records, these representations are fairly general, as the municipality indicated that it did not know whether records exist, nor the nature of any records that might exist.

[15] The municipal councillor, however, has provided detailed information describing the responsive records that exist, including where they are located and whether the municipality has possession of them. The councillor has also described the records which the municipality does not have possession of, and has provided me with copies of certain records, including memos, correspondence, reports and notes. In addition, although the councillor has indicated that his/her personal computer is used for a number of purposes and contains numerous received and sent emails, the councillor has also identified the nature of the responsive emails that are located on the municipality's server. The councillor has stated that these emails (which, by definition, are between two or more parties) would therefore be in the custody and/or control of the municipality.

[16] The councillor's detailed representations on the actual records that exist and that are responsive to the request are of great assistance in deciding the issues in this appeal. Furthermore, in the absence of representations from the appellant responding to the councillor's description of the records, in this order I will only address the records that have been identified and described by the councillor. As a result of this decision, the findings in this appeal are restricted to those set out below which address the actual records identified by the councillor.

### **ISSUES:**

- A. Are the identified records relating to the performance and/or performance appraisal of an employee of the municipality excluded from the scope of the *Act* based on section 52(3)3?

- B. Are the identified records that are in the possession of the municipal councillor relating to a harassment complaint against that councillor “in the custody” or “under the control” of the municipality pursuant to section 4(1)?

## **DISCUSSION:**

### **Issue A. Are the identified records relating to the performance and/or performance appraisal of an employee of the municipality excluded from the scope of the *Act* based on section 52(3)3?**

[17] Section 52(3)3 of the *Act* excludes certain records from the scope of the *Act*. It reads:

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.

[18] If section 52(3)3 applies to the record, and none of the exceptions found in section 52(4) apply, the record is excluded from the scope of the *Act*.

[19] The term “in relation to” in section 52(3) means “for the purpose of, as a result of, or substantially connected to.”<sup>1</sup>

[20] The term “labour relations” refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships. The meaning of “labour relations” is not restricted to employer-employee relationships.<sup>2</sup>

[21] 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.<sup>3</sup>

---

<sup>1</sup> Order P-1223.

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

<sup>3</sup> Order PO-2157.

[22] If section 52(3)3 applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date.<sup>4</sup>

[23] The type of records excluded from the *Act* by s. 52(3) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees' actions.<sup>5</sup>

### ***Nature of the records***

[24] As indicated above, the appellant clarified a portion of his request to be for records that:

... relate to a performance evaluation of [a named individual] by the performance appraisal Evaluation Committee that [the named councillor] sits on. ... as well as any other information concerning the performance of [the named individual in his job with] the Municipality.

[25] The councillor has identified the nature of the records requested, and provided a list of documents that "concern 'performance' ... relevant to the [named individual in his job with the municipality]." Specifically, the councillor identifies the following documents as the responsive records:

- the employee's performance appraisal for a previous year;
- the councillor's confidential notes sent to the Mayor in response to the Mayor's request to council members who were participating in the performance appraisal (the purpose of which was to develop directions for the employee in his pending performance appraisal);
- the first draft of the employee's performance appraisal, which was circulated to participating members for comment, and the councillor's comments to the Mayor in response to the first draft;
- correspondence containing information that was referred to in the employee's performance appraisal; and
- responsive emails on the municipality's server containing information such as discussions of dates for meetings.

---

<sup>4</sup> *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].

<sup>5</sup> *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.).

## **Section 52(3)3: matters in which the institution has an interest**

### ***Introduction***

[26] 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.

### ***Requirement 1: Were the records collected, prepared, maintained or used by the municipality or on its behalf?***

[27] The records at issue are identified above, and consist of a completed yearly performance appraisal, a draft performance appraisal, correspondence between the councillor and the Mayor relating to the performance appraisal, emails regarding meetings and correspondence containing information referred to in the employee's performance appraisal. All of these records relate specifically to the preparation or review of the municipal employee's performance appraisal, which was conducted by the individuals, including the Mayor, who participated in the employee's performance appraisal process. It is clear from the description of the responsive records that they were collected, prepared, maintained and/or used by the municipality or on its behalf.

### ***Requirement 2: Were the records collected, prepared, maintained and/or used in relation to meetings, consultations, discussions or communications?***

[28] Based on the description of the records, I am satisfied that they were prepared, maintained or used in relation to consultations, discussions or communications. The records themselves either consist of the performance appraisal of the individual (including a copy of the completed appraisal for an earlier year, and the draft performance appraisal which was circulated to members), correspondence or notes sent to the Mayor relating to the performance appraisal, information relating to meetings or correspondence referred to in the performance appraisal.

[29] Based on the records as described and their connection to the performance appraisal, I find that the records relate to communications and consultations between individuals who participated in the employee's performance appraisal.

***Part 3: Were the meetings, consultations, discussions or communications about labour relations or employment-related matters in which the municipality has an interest?***

[30] The type of records excluded from the *Act* by section 52(3) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees' actions in the context of the institution's possible vicarious liability in relation to those actions, as opposed to the employment context.<sup>6</sup>

[31] The phrase "labour relations or employment-related matters" has been found to apply in the context of:

- a job competition<sup>7</sup>
- an employee's dismissal<sup>8</sup>
- a grievance under a collective agreement<sup>9</sup>
- disciplinary proceedings under the *Police Services Act*<sup>10</sup>
- a "voluntary exit program"<sup>11</sup>
- a review of "workload and working relationships"<sup>12</sup>
- the work of an advisory committee regarding the relationship between the government and physicians represented under the *Health Care Accessibility Act*.<sup>13</sup>

[32] The phrase "labour relations or employment-related matters" has been found *not* to apply in the context of:

- an organizational or operational review<sup>14</sup>
- litigation in which the institution may be found vicariously liable for the actions of its employee<sup>15</sup>

---

<sup>6</sup> (See, *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 Div. Ct.).

<sup>7</sup> Orders M-830, PO-2123.

<sup>8</sup> Order MO-1654-I.

<sup>9</sup> Orders M-832, PO-1769.

<sup>10</sup> Order MO-1433-F.

<sup>11</sup> Order M-1074.

<sup>12</sup> Order PO-2057.

<sup>13</sup> *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.).

<sup>14</sup> Orders M-941, P-1369.

<sup>15</sup> Orders PO-1722, PO-1905.



[33] The phrase "in which the institution has an interest" means more than a "mere curiosity or concern," and refers to matters involving the institution's own workforce [*Solicitor General* (cited above)].

[34] With respect to the scope of the exclusionary provision, Swinton J. for a unanimous Court, wrote in *Ontario (Ministry of Correctional Services) v. Goodis*<sup>16</sup> that:

In *Reynolds v. Ontario (Information and Privacy Commissioner*, [2006] O.J. No. 4356, this Court applied the equivalent to s. 65(6) found in municipal freedom of information legislation to documents compiled by the Honourable Coulter Osborne while inquiring into the conduct of the City of Toronto in selecting a proposal to develop Union Station. The records he compiled in interviewing Ms. Reynolds, a former employee, were excluded from the *Act*, as Mr. Osborne was carrying out a kind of performance review, which was an employment-related exercise that led to her dismissal (at para. 66). At para. 60, Lane J. stated,

It seems probable that the intention of the amendment was to protect the interests of institutions by removing public rights of access to certain records relating to their relations with their own workforce.

[35] Cautioning that there is no general proposition that all records pertaining to employee conduct are excluded from the *Act*, even if they are in files pertaining to civil litigation or complaints by a third party, Swinton J. also pointed out that "(w)hether or not a particular record is 'employment related' will turn on an examination of the particular document."

[36] I agree with and adopt the analysis set out above for the purpose of making my determinations in this appeal.

[37] In this appeal, one of the categories of requested records consists of records in the possession of an identified councillor relating to a specific employee's performance appraisal. The councillor has identified the records at issue, and described them in some detail (and has confirmed that the municipality has all the records relating to the performance appraisal in its possession).

[38] Based on the detailed description of the records responsive to this part of the appellant's request, I am satisfied that these records were prepared and maintained by the municipality with regard to consultations and communications concerning the performance of an employee. In my view, the completed and draft performance appraisals, information about meetings, and the notes and correspondence relating to

---

<sup>16</sup> Cited above.

the performance appraisal, are directly related to the municipality's relations with its own workforce, and I find that these records are about employment-related matters for the purpose of section 52(3)3. In addition, I am satisfied that the municipality has an interest in these records, as they relate to matters involving the municipality's own workforce. In these circumstances, I find that the exclusionary wording in section 52(3)3 applies to the records, and they fall outside the scope of the *Act*.

[39] I have also considered whether the exception to section 52(3) found in section 52(4) may apply to the records. Based on the description of the responsive records, I am not satisfied that they fit within the exception found in section 52(4). As a result, I find that the requested records are excluded from the scope of the *Act*.

[40] Having found that the requested records are excluded from the scope of the *Act*, there is no purpose served in determining whether or not copies of these records in the possession of the councillor are or are not in the custody or under the control of the municipality for the purpose of the *Act*.

**Issue B. Are the identified records that are in the possession of the municipal councillor relating to a harassment complaint against that councillor "in the custody" or "under the control" of the municipality pursuant to section 4(1)?**

[41] Section 4(1) of the *Act* reads, in part:

Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless . . .

[42] Under section 4(1), the *Act* applies only to records that are in the custody or under the control of an institution.

[43] A record will be subject to the *Act* if it is in the custody or under the control of an institution; it need not be both.<sup>17</sup>

[44] A finding that a record is in the custody or under the control of an institution does not necessarily mean that a requester will be provided access to it.<sup>18</sup> A record within an institution's custody or control may be excluded from the application of the *Act* under one of the provisions in section 52, or may be subject to a mandatory or discretionary exemption (found at sections 6 through 15 and section 38).

---

<sup>17</sup> Order P-239, *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).

<sup>18</sup> Order PO-2836.

[45] The courts and this office have applied a broad and liberal approach to the custody or control question.<sup>19</sup>

[46] Based on the above approach, this office has developed a list of factors to consider in determining whether or not a record is in the custody or control of an institution, as follows.<sup>20</sup> The list is not intended to be exhaustive. Some of the listed factors may not apply in a specific case, while other unlisted factors may apply.

- Was the record created by an officer or employee of the institution?<sup>21</sup>
- What use did the creator intend to make of the record?<sup>22</sup>
- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record?<sup>23</sup>
- Is the activity in question a “core”, “central” or “basic” function of the institution?<sup>24</sup>
- Does the content of the record relate to the institution’s mandate and functions?<sup>25</sup>
- Does the institution have physical possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?<sup>26</sup>
- If the institution does have possession of the record, is it more than “bare possession”?<sup>27</sup>
- If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee?<sup>28</sup>
- Does the institution have a right to possession of the record?<sup>29</sup>
- Does the institution have the authority to regulate the record’s content, use and disposal?<sup>30</sup>

---

<sup>19</sup> *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 4072, *Canada Post Corp. v. Canada (Minister of Public Works)* (1995), 30 Admin. L.R. (2d) 242 (Fed. C.A.), and Order MO-1251.

<sup>20</sup> Orders 120, MO-1251, PO-2306 and PO-2683.

<sup>21</sup> Order P-120.

<sup>22</sup> Orders P-120 and P-239.

<sup>23</sup> Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, cited above at note 3.

<sup>24</sup> Order P-912.

<sup>25</sup> *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above at note 1; *City of Ottawa v. Ontario*, 2010 ONSC 6835 (Div. Ct.), leave to appeal refused (March 30, 2011), Doc. M39605 (C.A.); Orders P-120 and P-239.

<sup>26</sup> Orders P-120 and P-239.

<sup>27</sup> Order P-239; *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above at note 1.

<sup>28</sup> Orders P-120 and P-239.

<sup>29</sup> Orders P-120 and P-239.

<sup>30</sup> Orders P-120 and P-239.

- Are there any limits on the use to which the institution may put the record, what are those limits, and why do they apply to the record?<sup>31</sup>
- To what extent has the institution relied upon the record?<sup>32</sup>
- How closely is the record integrated with other records held by the institution?<sup>33</sup>
- What is the customary practice of the institution and institutions similar to the institution in relation to possession or control of records of this nature, in similar circumstances?<sup>34</sup>

### ***Nature of the records and representations***

[47] As identified above, except for the records addressed under Issue A, the remaining records covered by the request are records in the possession of the named councillor relating to a harassment complaint against that councillor.

[48] The councillor has provided detailed representations identifying the records responsive to this part of the request. The councillor begins by reviewing the nature of the responsive documents that have been provided to the municipality and are in the municipality's custody and control. The councillor identifies that these include:

- a binder with numerous documents used in the investigation;
- a specifically dated report to the Mayor;
- two confidential memos to the Mayor; and
- emails containing information such as discussions of dates of meetings, which may be on the municipality's server.

[49] The councillor then identifies the records which are in the councillor's sole possession, and not in the municipality's possession, as follows:

- notes prepared by the councillor for the councillor's own use in a meeting to discuss the allegations against him/her;
- a typed list of points from the councillor's hand-written notes of a meeting regarding the allegations;
- drafts of memos or letters created by the councillor relating to this matter;
- documents stored in a personal e-file relating to this matter; and
- correspondence between the councillor and his/her personal legal advisor (paid for by the councillor personally).

---

<sup>31</sup> *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above at note 1.

<sup>32</sup> *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above at note 1; Orders P-120 and P-239.

<sup>33</sup> Orders P-120 and P-239.

<sup>34</sup> Order MO-1251.

[50] The municipality provides lengthy and detailed representations concerning the issue of whether or not the responsive documents are or are not in the municipality's custody and/or control. These representations reflect the position taken in the municipality's decision letter, and include extensive representations on:

- record-holdings of councillors, and whether or not they are in the municipality's custody or control;
- references to previous orders of this office concerning the issues;
- a detailed review of the factors evidencing custody and control, (as set out above) and detailed discussions regarding the impact of each of these factors on the circumstances in this appeal;
- the municipality's historic practice concerning the records of a councillor;
- a detailed review of the record-holdings of the Mayor; and
- a review of the role of the named municipal councillor during the time period covered by the request.

[51] The appellant did not provide representations in response to the Notice of Inquiry, nor did he respond to information contained in the representations of the municipality and the affected party which were shared with him.

### ***Analysis and findings***

[52] The issue in this appeal is whether the requested records that are in the possession of the municipal councillor relating to a harassment complaint against that councillor are "in the custody" or "under the control" of the municipality pursuant to section 4(1).

[53] Based on the nature of the records requested, I find that they are not in the custody or under the control of the municipality. In making this finding, it is not necessary for me to review in detail the issues concerning the indicia of custody and control of municipal councillor's records. Even if the request had been for records in the possession of an individual who was an officer or employee of the municipality, because of the nature of the records requested and the councillor's description of the responsive records that exist, I find that the records at issue are not in the custody or control of the municipality.

[54] The requested records relate to a harassment complaint against the municipal councillor. The councillor has indicated that a number of records are in the custody or under the control of the municipality, and has identified those records which are not in the municipality's custody or under its control. These records consist of personal records maintained by the councillor in response to the allegations made against him/her. They include personal notes prepared by the councillor to discuss the allegations; typed points from a meeting regarding the allegations for the councillor's personal use; drafts of documents prepared by the councillor relating to this matter,

documents stored in a personal e-file relating to this matter, and correspondence between the councillor and his/her personal legal advisor (paid for by the councillor personally).

[55] In my view the records identified by the municipal councillor that are not in the possession of the municipality are also not in the municipality's custody or control. I find that these records are the personal records of the municipal councillor relating to a harassment complaint made against him/her. These records, as described, are clearly the councillor's personal records relating to this matter, and are not in the custody or control of the municipality.

[56] Having made this finding regarding the specific records identified as responsive to this part of the request, it is not necessary for me to review in detail issues concerning the custody or control of records in the possession of municipal councillors generally. The specifically identified records maintained by the councillor for that person's use in the complaint are his/her personal records, and are not in the municipality's custody or control.

**ORDER:**

1. I find that the identified responsive records relating to the performance and/or performance appraisal of the named employee with the municipality fall outside the scope of the *Act* because of the operation of section 52(3)3.
2. I find that the responsive records in the possession of the municipal councillor relating to a harassment complaint against that councillor are not in the custody or control of the municipality.

Original signed by: \_\_\_\_\_  
Frank DeVries  
Adjudicator

\_\_\_\_\_  
July 30, 2012