

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2899

Appeal MA12-127

Windsor Police Services Board

June 14, 2013

Summary: The appellant sought access to records relating to the retirement of the chief of police and the hiring of his replacement. After considerable mediation, the parties agreed that certain records that pre-dated the chief's retirement were the only records remaining at issue. The police claimed the application of the labour relations and employment exclusion in section 52(3)3. In this order, the decision by the police is upheld and the exception to the exclusion in section 52(4)3 is found not to apply.

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

Orders and Investigation Reports Considered: Orders MO-1622, MO-1994 and MO-2318.

OVERVIEW:

[1] The appellant submitted a request to the Windsor Police Services Board (the police), pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), for access to the following:

The employment contract of [the former chief of police] and any other documents related to his employment and retirement;

The employment contract of [the former deputy chief, now the acting police chief] and any documents related to his employment as deputy chief and/or acting chief; and

The employment contract of [the deputy chief] and any other documents related to his employment.

[2] Prior to issuing its access decision, the police notified the individuals who were the subject of the request, pursuant to section 21 of the *Act*, to obtain their views regarding disclosure of their personal information. Following receipt of their responses, the police issued a decision respecting access to the records which provided that:

- full access was granted to the Windsor Police Services Board's resolution appointing the former deputy chief to acting chief;
- with respect to the employment contracts for the three named individuals (records 10, 11 and 12 respectively), the police granted partial access, severing out certain parts of these contracts, on the basis that they contained personal information that is exempt under the mandatory personal privacy exemption in section 14(1) of the *Act*.
- with respect to records 17, 18 and 19, which relate to the retirement of [the former chief], the police stated these records fall outside of the jurisdiction of the *Act*, based on the exclusion in section 52(3)3 of the *Act*.

[3] The appellant appealed the decision of the police, to this office.

[4] During mediation, the mediator spoke with the appellant and the police, as well as the individuals who were the subject of the request (the affected parties). Mediation efforts resulted in clarification of the records sought by the appellant, a further search by the police and several further access decisions by the police which resolved some aspects of the appeal. The decision by the police to deny access to records 17, 18 and 19 on the basis that these records are excluded from the operation of the *Act* under section 52(3) is the sole issue which remains for adjudication.

[5] I sought and received representations from the police, a complete copy of which was shared with the appellant, who also submitted representations. I then sought and received further submissions by way of reply from the police.

[6] In this order, I uphold the police decision to deny access to the records on the basis that they are excluded from scope of the *Act* under section 52(3)3 and do not fall within the ambit of the exception to the exclusion in section 52(4)3.

RECORDS:

[7] The records remaining at issue in this appeal consist of the following:

- Record 17 - Minutes of an in camera Windsor Police Services Board meeting held on December 22, 2011;
- Record 18 – Correspondence/Memo dated December 22, 2011; and
- Record 19 – Letter outlining a Windsor Police Services Board resolution dated March 22, 2012.

DISCUSSION:

Does section 52(3)3 exclude the records from the *Act*?

General Principles

[8] 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.

[9] 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*.

[10] 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

[11] 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.²

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.). See also Order PO-2157.

[12] 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].

[13] 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.³

[14] 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.⁴

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

[15] 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.

Part 1: collected, prepared, maintained or used

[16] Record 17 consists of minutes of a special in camera meeting of the Windsor Police Services Board held on December 22, 2011 and was clearly prepared, maintained and used by the police. Record 18 is a memorandum prepared by the outgoing chief that was referred to and used by the police in the course of its discussions at the closed meeting held on December 22, 2011. Record 19 is a letter dated March 22, 2012 from the police which describes a resolution arising from the Windsor Police Services Board in camera meeting held that day. Again, I conclude that this letter was prepared and used by the police, thereby satisfying the first part of the test under section 52(3)3.

³ *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.

⁴ *Ministry of Correctional Services*, cited above.

Part 2: meetings, consultations, discussions or communications

[17] The police submit that all of the records “were collected, prepared, used and maintained as a result of in-camera meetings held to discuss details regarding human resource issues resulting from the retirement of the Chief of Police.” Based on my review of the records, I agree that each of them were collected, prepared, used and maintained in relation to the in camera meetings of the Windsor Police Services Board that took place on December 22, 2011 and Mach 22, 2012. Accordingly, part two of the test under section 52(3)3 has been satisfied.

Part 3: labour relations or employment-related matters in which the institution has an interest

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

- a job competition [Orders M-830, PO-2123]
- an employee’s dismissal [Order MO-1654-I]
- a grievance under a collective agreement [Orders M-832 and PO-1769]
- disciplinary proceedings under the *Police Services Act* [Order MO-1433-F]
- a “voluntary exit program” [Order M-1074]

[19] 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.⁵

[20] The records collected, prepared maintained or used by the insitution ... are excluded only if [the] meetings, consultations, discussions or communications are about labour relations or “employment-related” matters in which the institution has an interest. Employment-related matters are separate and distinct from matters related to employees’ actions.⁶

[21] The police submit that the records at issue in this appeal relate directly to human resource issues in which they have an interest. I agree with the position of the police and find that the records discuss issues around the retirement of the chief, which is clearly a staffing concern, and that this is a matter in which the police have an interest. I find that the records describe employment-related matters in which the police have an

⁵ *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*.

⁶ *Ministry of Correctional Services*, cited above.

interest in their role as employer of the chief. I have no difficulty in finding that the third part of the test under section 52(3)3 has also been met, accordingly.

[22] As all three parts of the test have been satisfied, I find that the exclusionary provision in section 52(3)3 applies to all of the records remaining at issue in this appeal. I will now consider whether any of the exceptions in section 52(4) apply.

Section 52(4): exceptions to section 52(3)

[23] If the records fall within any of the exceptions in section 52(4), the *Act* applies to them. Section 52(4) states, in part:

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.

[24] In my view, the only exception which may have some application in the circumstances of this appeal is section 52(4)3. In Order MO-2318, Assistant Commissioner Brian Beamish discussed the application of the exception to the section 52(3)3 exclusion in section 52(4)3. In that decision, he referred to my decision in Order MO-1622 in which I found that the exception in section 52(4)3 applied to certain severance agreements between an institution and its former employees, quoting from the order as follows:

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.

[25] Assistant Commissioner Beamish then referred to a decision of Adjudicator Steven Faughnan in Order MO-1994 in which he distinguished records that comprise the "final agreement" between an institution and its employee and those which do not, stating:

Records 1, 2 and 3 are the steps in the negotiation that led to the creation of Record 4 and do not fall within the scope of an "agreement" discussed in the exception in section 52(4)3, nor do they otherwise fall within any other part of section 52(4). Therefore, the *Act* does not apply to Records 1, 2 and 3.

[26] The Assistant Commissioner then concluded his analysis by finding that:

In this instance, Records 2 and 3 are correspondence negotiating the terms of a severance agreement. I agree with the reasoning in Order MO-1994 that the information in these records are steps in the negotiation and do not fall within the scope of an "agreement" as contemplated by section 52(4)3. None of the other exceptions at section 52(4) apply to these records and the records are excluded from the *Act*.

[27] In the present appeal, I find that the records do not represent the "final agreement" between the police and the chief. Instead, I find that they are more appropriately described as documentation describing the internal process of replacing the retiring chief and locating a suitable replacement for him. I agree with the analysis of Assistant Commissioner Beamish and find that the records before me address steps in the termination of the chief's employment and the negotiation of an agreement for the chief's retirement. As a result, I conclude that they do not constitute an "agreement" for the purposes of section 52(4)3 and this exception to the exclusion does not apply.

[28] In conclusion, I find that the records are excluded from the operation of the *Act* by virtue of section 52(3)3 and that none of the other exceptions to the exclusion in section 52(4) are applicable.

ORDER:

I uphold the decision of the police and dismiss the appeal.

Original Signed By: _____

Donald Hale
Adjudicator

June 14, 2013 _____