

Information and Privacy Commissioner,  
Ontario, Canada



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

---

## ORDER MO-2880

Appeal MA12-168

City of Ottawa

May 3, 2013

**Summary:** The appellant sought access to records relating to the termination of his employment with the city. The city granted access to a number of responsive records and portions of records. It also took the position that all but one of the remaining records, which it claimed to be exempt under section 38(b), were excluded from the *Act* as a result of section 52(3)3 (employment-related matters). In this order, the city's decision is upheld with respect to the application of section 52(3)3 to the records for which it is claimed. In addition, that portion of one record containing the personal information of another individual is found to be exempt under the personal privacy exemption in section 38(b).

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section(s) 2(1) (definition of "personal information"), 14(1), 38(b) and 52(3)3.

### OVERVIEW:

[1] The City of Ottawa (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the appellant's:

. . . complete employment file and any other correspondence or documentation with the City of Ottawa on which my name appears.

[2] The city confirmed with the appellant that he was seeking access to his complete employment file and any correspondence with the city in which his name appears respecting labour relations issues, employee performance, any reason for termination and general employment-related matters. It then issued a decision letter granting complete access to some of the responsive records which it located, denying access to others, in whole or in part, based on the exemptions in sections 7(1) (advice or recommendations), 12 (solicitor-client privilege) and 14(1) (invasion of privacy), as well as the exclusion in section 52(3) (labour relations and employment records) of the *Act*.

[3] The appellant appealed the city's decision to this office. During the mediation stage of the appeal, the city provided the appellant with an index of records. Because the records appeared to contain the personal information of the appellant, the possible application of sections 38(a) and (b) of the *Act* was added as issues in the appeal. As no further mediation was possible, the file was transferred to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*. I sought and received the representations of the city, initially, and provided a complete copy to the appellant, who also submitted representations.

[4] In this decision, I uphold the city's decision and find that the majority of the records are excluded from the operation of the *Act* by virtue of section 52(3)3. In addition, I find that the undisclosed portions of record 48 are exempt under section 38(b).

## **RECORDS:**

[5] The records at issue in this appeal consist of various emails and a single document entitled "Request for Personnel Action".

## **ISSUES:**

- A. Does section 52(3) operate to exclude the records from the scope of the *Act*?
- B. Does Record 48 contain personal information as that term is defined in section 2(1) of the *Act* and if so, to whom does it relate?
- C. If Record 48 contains the personal information of the appellant and another identifiable individual, is it exempt from disclosure under the discretionary personal privacy exemption in section 38(b) of the *Act*?

## **DISCUSSION:**

### **Issue A: Does section 52(3) operate to exclude the records from the scope of the *Act*?**

[6] The city takes the position that all of the remaining records, with the exception of the withheld portions of record 48, are excluded from the *Act* by virtue of section 52(3), which 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.

[7] 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*.

[8] For the collection, preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in paragraph 1, 2 or 3 of this section, it must be reasonable to conclude that there is "some connection" between them.<sup>1</sup>

[9] The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining

---

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

legislation, or to analogous relationships. The meaning of "labour relations" is not restricted to employer-employee relationships.<sup>2</sup>

[10] 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].

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

[12] The city submits that the subject matter of the excluded records pertains to employment-related matters addressing human resources and staff relations issues which arose out of the relationship between the city and the appellant, who was employed by the city for a period of time. The city states that the appellant's employment contract with it was not extended and he was not made a permanent employee, and that records relating to that decision address employment-related matters. In addition, it argues that "the records in this request are also labour relations related, as they relate to the broader conditions of work of [the appellant] and are related in part to the collective agreement between the city and [the union] to whom [the appellant] was a member."

[13] The city goes on to rely on the decision of the Court of Appeal in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.). It argues that this decision stands for the proposition that records which are excluded from the operation of the *Act* under section 52(3) remain excluded, regardless of the passage of time. The city goes on to note that the records at issue in this appeal were created around the time of the termination of the appellant's employment with the city and arise exclusively from that relationship, specifically the labour relations and employment related issues involving the appellant.

[14] I have decided to begin my analysis of this exclusion with an examination of the possible application of section 52(3)3 to the records.

### **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;

---

<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> *Ministry of Correctional Services*, cited above

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.

[16] 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]
- a review of "workload and working relationships" [Order PO-2057]
- the work of an advisory committee regarding the relationship between the government and physicians represented under the *Health Care Accessibility Act*<sup>4</sup>.

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

- an organizational or operational review [Orders M-941 and P-1369]
- litigation in which the institution may be found vicariously liable for the actions of its employee.<sup>5</sup>

[18] 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.<sup>6</sup>

---

<sup>4</sup> *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.).

<sup>5</sup> Orders PO-1722, PO-1905 and *Ontario (Ministry of Correctional Services) v. Goodis*, cited above.

<sup>6</sup> *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*.

[19] The records collected, prepared maintained or used by [the institution] ... 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.<sup>7</sup>

### **Analysis and findings**

[20] The city submits that all of the records, with the exception of the undisclosed portions of record 48, pertain to meetings, consultations, discussions and communications in relation to labour relations issues and an employment-related matter involving the appellant's employment. It submits that these records were used by its staff in response to the labour relations and employment issues involving the appellant and that as the employer, it had an interest in the subject matter of the records.

[21] The appellant does not address the application of the section 52(3) exclusion to the records in his representations.

[22] I have carefully reviewed the records which the city claims to be excluded from the operation of the *Act* under section 52(3) and agree that this section applies to all of the records, with the exception of the undisclosed portions of record 48. The records address directly the city's handling and response to the termination of the appellant's employment. They include internal email correspondence, as well as email communications between its managers and representatives of the appellant's bargaining agent.

[23] Based on my review of the contents of these records, I find that they were collected, prepared, maintained or used by the city in relation to meetings, consultations, discussions or communications about labour relations or employment-related matters in which the city has an interest. Clearly, the context surrounding the termination of the appellant's employment satisfies the requirement that the subject matter of the records pertain to an employment-related matter. In addition, I find that, in its capacity as an employer, the city clearly "has an interest" in the matter being addressed in the records, in this case the appellant's continued employment with the city.

[24] As a result, I find that all of the necessary elements of section 52(3)3 have been met and the records for which it has been claimed are excluded from the operation of the *Act*. Further, I find that none of the exceptions to the exclusion set out in section 52(4) apply in the circumstances of this appeal.

---

<sup>7</sup> *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*.

[25] The sole record remaining at issue consists of the undisclosed portions of record 48.

**Issue B: Does Record 48 contain personal information, as that term is defined in section 2(1) of the *Act* and if so, to whom does it relate?**

[26] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

"personal information" means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except if they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name where 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;

[27] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

[28] Sections 2(2.1) and (2.2) also relate to the definition of personal information. These sections state:

(2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

(2.2) For greater certainty, subsection (2.1) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[29] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.<sup>8</sup>

[30] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.<sup>9</sup>

[31] Record 48 is an email chain passing between the city's Manager of Legal Operations and Support Services and the appellant's supervisor. Portions of record 48, consisting of information relating to the supervisor's availability, have been severed from it. Other portions of the email chain refer by name to the appellant and have been disclosed to him.

[32] In my view, the undisclosed portions of record 48 relate to the individual identified therein strictly in her personal capacity and qualifies as her personal information, as that term is defined in paragraph (h) of the definition in section 2(1). The information describes this individual's availability on a particular day, which is clearly information that meets the criteria of "personal information" under the *Act*. I further find that other portions of record 48 refer to the appellant by name and include other personal information about him, which also meets the requirements of the definition of that term in paragraph (h) of section 2(1).

---

<sup>8</sup> Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

<sup>9</sup> Orders P-1409, R-980015, PO-2225 and MO-2344.



[33] Accordingly, I find that record 48 contains the personal information of both the appellant and another identifiable individual.

**Issue C: If Record 48 contains the personal information of the appellant and another identifiable individual, is it exempt from disclosure under the discretionary personal privacy exemption in section 38(b) of the *Act*?**

[34] Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exemptions from this right.

[35] Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would constitute an “unjustified invasion” of the other individual’s personal privacy, the institution may refuse to disclose that information to the requester.

[36] If the information falls within the scope of section 38(b), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This involves a weighing of the requester’s right of access to his or her own personal information against the other individual’s right to protection of their privacy.

[37] Sections 14(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold is met. If the information fits within any of paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b). I find that none of the exceptions in paragraphs (a) to (e) apply; neither do any of the circumstances set out in section 14(4) which describe when the disclosure of personal information will not be found to be an unjustified invasion of personal privacy under section 14(1)(f).

[38] Section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy under section 38(b) [Order P-239]. The list of factors under section 14(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 14(2) [Order P-99].

[39] Neither the appellant nor the city provided me with representations suggesting that any of the factors in section 14(2) favouring disclosure, or non-disclosure, respectively, might apply. The city has indicated that it balanced the appellant’s right of access against the privacy interests of the supervisor and concluded that the privacy

interests of the supervisor outweighed the appellant's need to have access to what is clearly the personal information of this other individual.

[40] Taking into consideration the fact that the appellant has been granted access to the majority of the personal information contained in record 48 relating to himself, I find that the disclosure of the remaining undisclosed portions of this email chain, which relates solely to another identifiable individual, would result in an unjustified invasion of the personal privacy of this individual under section 38(b). I am satisfied that the city properly exercised its discretion not to disclose this information to the appellant, particularly in light of the fact that all of the remaining portions of record 48 were made available to him.

[41] In light of my findings with respect to the application of sections 52(3)3 and 38(b) to the records, it is not necessary for me to also consider whether the records are exempt from disclosure under section 38(a), taken in conjunction with sections 7(1) and 19.

**ORDER:**

I uphold the city's decision and dismiss the appeal.

Original signed by: \_\_\_\_\_  
Donald Hale  
Adjudicator

\_\_\_\_\_ May 3, 2013