

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3003

Appeal MA13-434

Town of Erin

January 30, 2014

Summary: The requester sought access to a report submitted to the Town of Erin (the town) in a closed meeting. The town denied access to the report, taking the position that it is excluded from the *Municipal Freedom of Information and Protection of Privacy Act* under section 52(3)3 (employment-related matter) or, in the alternative, is exempt from disclosure under sections 6(1)(b) (closed meeting) and 7(1) (advice or recommendations) of the *Act*. In this order, the adjudicator finds that the report is covered by the *Act* and no exemptions apply. The town is ordered to disclose the report.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 6(1)(b), 7(1) and 52(3)3.

BACKGROUND:

[1] This appeal arises out of a request made to the Town of Erin (the town) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

The agenda of May 7th & 21st and of June 4th & 18th closed meetings – plus all reports involved in these meetings.

[2] The town located five records in response to the request and, in a decision dated July 19, 2013, denied access to all of them. With its decision letter, it provided the requester (now the appellant) with an index of records setting out a general description

of the five records and specifying the sections of the *Act* that it applied to each record. The index cited sections 2(1)(g) (definition of personal information), 6(1) (draft by-law/private bill or closed meeting records), 7(1) (advice or recommendations), 8(1)(a), (b) and (f) (law enforcement), 12 (solicitor-client privilege), 38(a) (exemption for own personal information) and 52(3)3 (exclusion for labour relations or employment-related matters) of the *Act*.

[3] The appellant appealed the town's decision to this office.

[4] During the course of mediation, the appellant narrowed his request to Document 2 listed in the town's index of records. This record is described in the index as "Report – May 7th Meeting" and as comprising 24 pages. Accordingly, the records described in the index as Documents 1, 3, 4 and 5 are no longer at issue in this appeal.

[5] The town maintained its decision to withhold access to Document 2 pursuant to sections 6(1) (with reference to the exemption for closed meeting records), 7(1) and 52(3)3 of the *Act*.

[6] The town also advised the mediator that a closed meeting investigation had been conducted in relation to Document 2 (specifically, in relation to the tabling of this record at a closed session of Council), and directed the mediator to the resulting Meeting Investigator Report, dated August 2013, posted on the town's website.

[7] The appellant advised that he was familiar with the contents of the Report, and continued to seek access to the record as a matter of public interest. The public interest override at section 16 of the *Act* was consequently added to the appeal.

[8] As no further mediation was possible, the appeal was transferred to the adjudication stage of the appeal process, where an adjudicator conducts a written inquiry under the *Act*. As the adjudicator on this appeal, I sent a Notice of Inquiry to the town, inviting it to submit representations on the appeal. The town advised this office that it had decided not to submit representations, indicating that its position is clear in the materials before me.

ISSUES:

Issue A: Does section 52(3)3 exclude the record from the *Act*?

Issue B: Does the discretionary exemption at section 6(1)(b) apply to the record?

Issue C: Does the discretionary exemption at section 7(1) apply to the record?

DISCUSSION:

Issue A: Does section 52(3)3 exclude the record from the *Act*?

[9] The town takes the position that the record is excluded from the *Act* by the operation of paragraph 3 of section 52(3).

[10] Section 52(3)3 of the *Act* 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:

3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

[11] 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*.

[12] 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

[13] 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

[14] 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

[15] 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.⁴

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.

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.

[16] 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.⁵

[17] 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.

[18] As the town has not provided representations, there is limited evidence before me on all the issues. I have reviewed the material in the file in order to arrive at a conclusion on whether the record at issue is excluded from the *Act* under section 53(3).

[19] Based on this review, I am unable to find that the record was "collected, prepared, maintained or used by" the town, in relation to "meetings, consultations, discussions or communications" about employment related matters in which the town has an interest.

[20] The Report of the Closed Meeting Investigator confirms that some members of Town Council (the "majority") are of the "opinion" that the report forms "a part" of a human resource record. However, this falls short of evidence that satisfies the test under section 52(3). Other than the vague reference to the opinion of these members, as conveyed to the Investigator, I do not have any facts describing the particular file or files in which the report is located, and establishing, for instance, that it was taken from a human resources or personnel file.

[21] The record itself is not about a human resources or employment matter, and can be described as the "work product" of the individual by whom it is authored. It was produced in the course of employment and is no different in this respect from the many records authored by various employees of institutions in the day-to-day exercise of their employment responsibilities, which are normally covered by the *Act*.

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

[22] The circumstances of this appeal are very broadly analogous to those considered in Order M-927, in which this office drew a distinction between records in an ordinary police investigation file, and the same records when used in an inquiry into the conduct of the police officers. In finding that the records at issue, consisting of pages from a police officer's notebook, witness statements and a Motor Vehicle Collision Report, were not excluded under section 52(3), the adjudicator stated:

It is difficult to imagine any category of records which would be more integral to the basic mandate of a police force than the files kept in connection with day-to-day police investigations of incidents occurring within the force's jurisdictional boundaries, and related entries in officers' notebooks. Moreover, although some of them are prepared by employees of the Police, such records are not, in essence, related to employment or labour relations. Rather, they record the activities and conclusions of the investigating officers and, at times, others who conduct forensic analyses, etc. Generally speaking, such records are subject to the Act.

....

Applying section 52(3) to the information at issue in this appeal would have the effect of permanently removing certain information maintained by the Police with respect to their basic mandate (i.e. protection of the peace and investigation of possible criminal behaviour which comes to their attention) from the scope of the Act, while most information of this nature would remain subject to the Act. As noted above, this information is not, in essence, related to employment or labour relations...

In my view, therefore, it would be a manifestly absurd result, and one not intended by the Legislature, if the records at issue were removed from the scope of the Act because they happen to have been reviewed in connection with an investigation of an employee's conduct.

On the other hand, in the context of a request for the file relating to an investigation of a police officer's conduct, where copies of incident reports, etc. from the original investigation formed part of that file, section 52(3) could apply to that entire file including those particular copies. However, in my view, the main investigation file housing the original incident reports, etc., and related officers' notebook entries, would remain subject to the Act.

[23] Although the circumstances in the two appeals are different, the principles expressed above support my conclusion here. On its face the record appears to have been generated in the ordinary course of an employee's duties. Even if it might have been reviewed by the town in connection with a consideration of human resources matters, this is not sufficient to support the application of section 52(3)3. Further, the

evidence does not establish that it is located in a human resources or personnel file. I find that section 52(3) does not apply to exclude the record at issue from the *Act*.

Issue B: Does the discretionary exemption at section 6(1)(b) apply to the record?

[24] Section 6(1)(b) reads:

A head may refuse to disclose a record,

that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public.

[25] For this exemption to apply, the institution must establish that

1. a council, board, commission or other body, or a committee of one of them, held a meeting
2. a statute authorizes the holding of the meeting in the absence of the public, and
3. disclosure of the record would reveal the actual substance of the deliberations of the meeting.⁶

[26] Previous orders have found that:

- “deliberations” refer to discussions conducted with a view towards making a decision;⁷ and
- “substance” generally means more than just the subject of the meeting.⁸

[27] The first and second parts of the test for exemption under section 6(1)(b) require the institution to establish that a meeting was held by the institution and that it was properly held *in camera*.⁹

[28] With respect to the third requirement set out above, the wording of the provision and previous decisions of this office make it clear that in order to qualify for exemption under section 6(1)(b), there must be more than merely the authority to hold a meeting

⁶ Orders M-64, M-102 and MO-1248.

⁷ Order M-184.

⁸ Orders M-703 and MO-1344.

⁹ Order M-102.

in the absence of the public. Section 6(1)(b) of the *Act* specifically requires that disclosure of the record would reveal the actual substance of deliberations which took place at the institution's *in camera* meeting, not merely the subject of the deliberations.¹⁰

[29] As indicated above, the town did not submit representations in response to the Notice of Inquiry and I have reviewed the material in the file before me in arriving at my determinations. During mediation, the town referred this office and the appellant to the Report of the Closed Meeting Investigator of August 2013. From my review of that Report, it appears that the issues before the Investigator overlap, but are not the same as those before me. The Minutes of the Council Meeting of May 7, 2013 indicate that Council moved to a closed session to address "personal matters about an identifiable individual."¹¹ This phrase is found in the *Municipal Act, 2001* as one of the reasons permitting a municipality to hold a closed meeting.¹²

[30] The investigator found, among other things, that the closed session was properly convened. Further, as noted above, he recorded the "opinion" of the majority of the members of Council and town staff that the report forms part of a human resources record. The investigator also found the report, "aside from the human resource issues, to be stretching the definition which allowed it to be a Closed Meeting item."

[31] For the purposes of my decision, I am prepared to assume, without deciding, that a closed meeting was held, which the town was authorized under the *Municipal Act, 2001* to hold in the absence of the public.

[32] The third part of the test for exemption under section 6(1)(b) requires that disclosure of the record would "reveal the actual substance of the deliberations of the meeting". I am not satisfied on the material before me, and in the absence of any representations on the issue, that the third part of the test has been established. The only evidence before me as to the substance of the deliberations at the closed meeting is the minutes of that session. Comparing the record to those minutes, I am unable to conclude that disclosure of the record would reveal the substance of the deliberations of the meeting. As I have indicated above, the report is not about a human resources matter. It does not, in itself, relate to "personal matters about an identifiable individual."

[33] Although I accept that the record was before Council during the closed meeting, this is insufficient to meet the third part of the test under section 6(1)(b). This office has held that the third requirement for exemption under section 6(1)(b) is not satisfied if the disclosure would merely reveal the *subject* of the deliberations and not their

¹⁰ Orders MO-1344, MO-2389 and MO-2499-I.

¹¹ These Minutes are publicly available on the town's website.

¹² S.O. 2001, CHAPTER 25, s. 239(2)(b).

substance.¹³ The Divisional Court also confirmed that even if a municipality is entitled to convene a closed meeting, section 6(1)(b) does not apply to exempt material before council at the meeting, if it does not reveal the substance of the discussions. In the appeal before me, I am not convinced that disclosure of the record would reveal the substance of the closed meeting deliberations.

[34] I find, therefore, that the town has not shown that the record is exempt under section 6(1)(b) of the *Act*.

Issue C: Does the discretionary exemption at section 7(1) apply to the record?

[35] Section 7(1) states:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

[36] The purpose of section 7 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure.¹⁴

[37] Previous orders have established that advice or recommendations for the purpose of section 7(1) must contain more than mere information.¹⁵ In order to qualify as "advice or recommendations," the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised¹⁶.

[38] Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit one to accurately infer the advice or recommendations given.¹⁷

¹³ Order MO-1344.

¹⁴ Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.).

¹⁵ Order PO-2681.

¹⁶ Orders PO-2084, PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.

¹⁷ As above.

[39] Examples of the types of information that have been found *not* to qualify as advice or recommendations include

- factual or background information
- analytical information
- evaluative information
- notifications or cautions
- views
- draft documents
- a supervisor's direction to staff on how to conduct an investigation.¹⁸

[40] Information about the context in which the records were created and communicated is helpful in assessing whether they contain information that could be said to "advise" an institution in making its decision, or allow an accurate inference about any advice given. In this appeal, given that I have no representations from the town, I have no context (other than the little that is found in the record itself) enabling me to understand how the record came to be created, and its place in the town's decision-making processes. I have no information about the genesis of the record, on whose direction it came about, or whether it was self-initiated by the author.

[41] Further, on my review, the record is primarily devoted to background information and broad evaluations and analysis. Arguably, parts of it could be characterized as "advice or recommendations", but it is so general in nature I am not satisfied that it is the sort of information that is intended to be captured by the section 7(1) exemption. As stated by the former Commissioner Sidney B. Linden in Order 94 (in relation to the provincial equivalent):

...in my view, section 13 was not intended to exempt all communications between public servants despite the fact that many can be viewed, broadly speaking, as advice or recommendations. As noted above, section 1 of the Act stipulates that exemptions from the right of access should be limited and specific. Accordingly, I have taken a purposive approach to the interpretation of subsection 13(1) of the Act. In my opinion, this exemption purports to protect the free flow of advice and recommendations within the deliberative process of government decision making and policy making.

In this case, it can be inferred that the author of the memo is "recommending" that the noted questions be considered in the course of the investigation but in my view this is not the kind of recommendation to be exempted pursuant to subsection 13(1) of the Act. The disclosure of

¹⁸ Orders P-434, PO-1993 and PO-2028.

this type of information could not reasonably be expected to inhibit the free flow of information to policy makers and decision makers within the government.

[42] In this case as well, having regard to the purposes of section 7(1) and its provincial equivalent. I am not convinced that disclosure of the information in the record would prohibit the free flow of advice and recommendations within the deliberative process of government decision-making and policy-making. In the circumstances before me, having regard to the contents of the record and the lack of contextual information to support the application of the exemption, I find that the section 7(1) exemption does not apply.

[43] In view of my conclusion, it is unnecessary to consider whether the public interest override in section 16 would support disclosure of the record in any event.

[44] As I have found that no exemptions apply, I will order the town to disclose the record.

ORDER:

I find that the record is covered by the *Act* and no exemptions apply. The town is ordered to disclose the record to the appellant by **February 21, 2014**.

Original signed by: _____
Sherry Liang
Senior Adjudicator

_____ January 30, 2014