

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3075

Appeal MA12-359

Township of Killaloe, Hagarty and Richards

July 24, 2014

Summary: The appellant submitted an access request to the Township of Killaloe, Hagarty and Richards for a number of records, including complaint letters that township officials sent to his full-time employer. The township denied access to two letters because it claimed that they are excluded from the *Act* under section 52(3)3 (labour relations and employment records). The adjudicator finds that the two letters were prepared by the township in relation to communications about employment-related matters in which the township has an interest. He upholds the township's decision that these records are excluded from the *Act* under section 52(3)3.

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

OVERVIEW:

[1] The appellant is employed full-time by a provincial government entity and he was also a part-time volunteer firefighter with the Township of Killaloe, Hagarty and Richards (the township). There were a number of disagreements between the township and the appellant about the working conditions for volunteer firefighters. In 2011, the appellant led a successful effort to have the volunteer firefighters unionized. In 2012, a senior official at the appellant's full-time employer informed him that a complaint letter had been received from the township about him.

[2] The appellant then submitted a multi-part access request to the township under the *Municipal Freedom of Information and Protection of Privacy Act* (MFIPPA or the *Act*) for a number of records, including the following:

[A]ll records . . . pertaining to complaints about [me] by (or at the behest of) Killaloe Council or staff to [my full-time employer]. This includes any information purported to substantiate any complaint and includes but it is not limited to:

. . .

7. All records conveyed to [my full-time employer] including but not limited to complaint letters.

[3] The township located two letters that are responsive to that part of the appellant's access request and denied access to them under the exclusion in section 52(3)3 (labour relations and employment records) of the *Act*. These letters were written and signed by two different township officials and sent to the appellant's full-time employer.

[4] The appellant appealed the township's decision to the Information and Privacy Commissioner of Ontario (IPC), which assigned a mediator who attempted to resolve the issues in dispute between the parties. This appeal could not be resolved during mediation, and it was moved to adjudication for an inquiry. I sought representations from the township and the appellant on whether the records are excluded from the *Act* under section 52(3)3. In response, both parties submitted representations to me on this issue.

RECORDS:

[5] The two records at issue are:

- (1) a two-page letter dated November 11, 2011; and
- (2) a one-page letter dated February 13, 2012, including a seven-page attachment.

DISCUSSION:

LABOUR RELATIONS AND EMPLOYMENT RECORDS

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

[6] The township claims that the two letters are excluded from the *Act* under section 52(3)3. This provision 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.

[7] If section 52(3) applies to the records, and none of the exceptions found in section 52(4)¹ applies, the records are excluded from 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.²

[9] 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

¹ Section 52(4) states:

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.
4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment.

² Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees' actions.³

[10] For section 52(3)3 to apply, the township 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.

[11] For the reasons that follow, I find that the two letters that township officials sent to the appellant's full-time employer are excluded from the *Act* under section 52(3)3.

[12] I am satisfied that the two letters were prepared by township officials and that this preparation was in relation to communications between these township officials and the appellant's full-time employer. Consequently, I find that parts 1 and 2 of the section 52(3)3 test have been met.

[13] The more significant issue is determining whether these communications were about "labour relations" or "employment-related" matters in which the township has an interest, as stipulated in part 3 of the section 52(3)3 test.

[14] 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.⁴

[15] The township states that the appellant was a volunteer firefighter, which is a part-time position. It points out that when a union submitted a certification application to the Ontario Labour Relations Board, the appellant was on the list of employees for the proposed bargaining unit. In addition, it submits that he was a township employee under the terms of the collective agreement, dated August 30, 2012, that was subsequently reached between itself and the union.

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

⁴ *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.

[16] The two letters that township officials wrote to the appellant's full-time employer are dated before the collective agreement was reached between the township and the union. Given that the term "labour relations" refers to the collective bargaining relationship between an institution and its employees, I find that these letters are not communications about "labour relations" matters for the purposes of section 52(3)3, because a collective agreement was not yet in place.

[17] However, part 3 of the section 52(3)3 test is satisfied if the communications were about "employment-related" matters in which the township has an interest. The term "employment-related matters" in section 52(3)3 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.⁵

[18] The township submits that even before the signing of the collective agreement, volunteer firefighters were considered to be township employees. In particular, the township issued T4 (statement of remuneration paid) slips to them, and they were also covered by Workplace Safety and Insurance Board (WSIB) benefits. In addition, the Township Personnel Policy applied to them. The township asserts, therefore, that the appellant was an employee and that the two letters "clearly relate to terms and conditions of employment or human resources issues."

[19] In his representations, the appellant provides background information about his attempts to "professionalize" the township's fire department, provide safe working conditions, and unionize volunteer firefighters. In addition, he acknowledges that he was a township employee.

[20] In short, both the township and the appellant agree that volunteer firefighters are township employees. In my view, there are several factors that support such a finding, including the fact that the township issues T4 slips to them, covers them under its WSIB insurance, and applies its Personnel Policy to them. Consequently, I am satisfied that the appellant was a township employee when its officials sent the two letters to his full-time employer.

[21] However, to satisfy the requirements of part 3 of the section 52(3)3 test it is not sufficient to find that the appellant was a township employee. In particular, the two letters must be communications about "employment-related" matters." If the letters have nothing to do with human resources or staff relations issues arising from the employer-employee relationship between the township and the appellant, they are not communications about "employment-related" matters and not excluded from the *Act* under section 52(3)3.

⁵ Order PO-2157.

[22] In my view, the substance of the two letters is an important piece of evidence in determining whether they are communications about "employment-related" matters. Both letters make allegations about the appellant's job performance as a volunteer firefighter, which is clearly a human resources issue. Consequently, I find that the township's letters raise human resources issues arising from the relationship between itself and one of its employees, which meets the definition of an "employment-related" matter.

[23] The appellant disputes that the two letters constitute communications about genuine "employment-related" matters, as required by section 52(3)3. In his view, the township was simply attempting to create problems for him with his full-time employer. He states:

If the complaint letters were ostensibly employed related, the township's submissions do not explain how or why. Nor do they indicate what "interest" the township has in these records . . . In response to my *MFIPPA* request, the township claims to have nothing on my personnel file, positive or negative other than the two letters to [my full-time employer]. If they have no such records relating solely to my employment with the township, they have no such basis upon which to write letters to [my full-time employer]. It then logically follows that the letters to [my full-time employer] cannot truly be employment related . . .

[24] In my view, a dispute about the veracity of the township's claims about the appellant's job performance as a volunteer firefighter does not mean that the issues raised in the two letters are not employment-related matters. Even if the township's allegations are not well founded, they are still about human resources issues and therefore "employment-related" in nature. Accordingly, I find that these communications are about "employment-related" matters, as required by part 3 of the section 52(3)3 test.

[25] To satisfy this part of the test, it must also be established that the township has "an interest" in these employment-related matters. The phrase "in which the institution has an interest" in section 52(3)3 means more than a "mere curiosity or concern," and refers to matters involving the institution's own workforce.⁶ The matters raised in the township's letters concern a member of its own workforce. In addition, given that the township is responsible for providing the community with effective fire services, it clearly had an interest in these employment-related matters that extends beyond a "mere curiosity or concern."

⁶ *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.

[26] In short, I am satisfied that the two letters were prepared by the township in relation to communications about employment-related matters in which the township has an interest. In my view, none of the exceptions in section 52(4) apply to these records. Consequently, the two letters are excluded from the *Act* under section 52(3)3, and the township had no obligation under the *Act* to disclose them to the appellant.

ORDER:

I uphold the township's decision that the two letters are excluded from the *Act* under section 52(3)3.

Original Signed By: _____
Colin Bhattacharjee
Adjudicator

_____ July 24, 2014