

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3368

Appeal MA15-363

City of Kawartha Lakes

October 27, 2016

Summary: The appellant made a request to the City of Kawartha Lakes (the city) for the employment records of a city employee, including disciplinary records, if any exist. The appellant also sought other records of the employee that involved the appellant. The city denied access to the employment records on the basis that they are excluded from the *Act* under section 52(3). The city granted partial access to the remaining records, with some personal information withheld under section 14(1). The adjudicator upholds the city's decision.

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

BACKGROUND:

[1] The appellant was asked by an employee of the City of Kawartha Lakes (the city) not to solicit clients at a particular courthouse. The appellant subsequently submitted a request to the city under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the following:

[1] I am seeking employment records/files, human resources records/files, union records/files and/or documents regarding [the named city employee] - [the employee's job title] for the City of Kawartha Lakes.

Specifically, I am seeking all records and documents as they relate to all or any complaint, grievance, disciplinary record, or other record as it relates to the said [employee] in her role as [job title] for the City of Kawartha Lakes.

I am seeking all or any complaint records/file, as such record or file might relate to any municipal employee or civilian, regarding [the employee] being [the employee's job title] in the City of Kawartha Lakes.

[2] I am seeking all emails, letters, memorandums, or other correspondence authored by or received by [the employee] regarding [the appellant]

[3] I am seeking any notes, records, or meeting agenda notations in the possession of [the employee] or in the possession of a designate of [the employee] as it such notes, records, or meeting agenda notations relate to [the appellant] ...

[2] With respect to the first item of the request, the city denied access to any records that may (or may not) exist, on the basis that records of this nature would fall outside of the application of the *Act* pursuant to the exclusions for labour and employment records at sections 52(3)2 and 52(3)3 of the *Act*. The city also stated that should this office find that records of this nature do fall within the scope of the *Act*, the city refuses to confirm or deny the existence of any such records pursuant to section 14(5) of the *Act*, as confirming or denying their existence would constitute an invasion of the employee's privacy.

[3] With respect to the second and third items of the request, the city located four responsive records and granted full access to one record and partial access to the other three, with some information in the records withheld in reliance on the mandatory personal privacy exemption at section 14(1) of the *Act*.

[4] The appellant appealed the city's decision to this office.

[5] During mediation, the city formally notified the city employee whose information appears in some of the records (the affected party). The affected party objected to the release of any records to the appellant.

[6] Also during mediation, the city clarified that it was claiming section 14(5) of the *Act* only to refuse to confirm or deny the existence of any "complaint, grievance, disciplinary record, or other record as it relates to the said [named employee]." The city no longer claims the application of section 14(5) for other employment/human resources records.

[7] The city also issued a revised decision granting partial access to an additional record, now listed as record number 5 on the index of records provided to this office.

Some information in the record was withheld pursuant to the mandatory personal privacy exemption at section 14(1) of the *Act*.

[8] The mediator also raised the possible application of the discretionary personal privacy exemption at section 38(b) of the *Act* (this exemption, rather than the mandatory personal privacy exemption, is the correct exemption to consider where a record contains the personal information of both the requester and another individual). The possible application of section 38(b) to the records was added as an issue in this appeal.

[9] The appellant advised the mediator that he wished to pursue access to all of the withheld information, including any records the existence of which the city refused to confirm or deny pursuant to section 14(5) of the *Act*.

[10] As no further mediation was possible, the appellant asked that the appeal proceed to the next stage of the appeal process, where an adjudicator conducts an inquiry. I sought and received representations from the city and the affected party. The appellant was then invited to provide representations but did not do so.

[11] In this order, I uphold the city's decision that the affected party's employment records (with the exception of record 5), including disciplinary records, if any, are excluded from the *Act* pursuant to section 52(3)3 of the *Act*. I also uphold the city's decision to withhold the information severed from records 1, 2, 4 and 5 pursuant to section 14(1) of the *Act*.

RECORDS:

[12] The records at issue are:

1. Employment/human resources records, including disciplinary records, if any exist, relating to the affected party; and
2. Records 1, 2, 4, and 5 listed on the city's index of records, consisting of correspondence and a handwritten note.

ISSUES:

- A. Does section 52(3) exclude the employment records from the *Act*?
- B. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- C. Does the mandatory exemption at section 14(1) or the discretionary exemption at section 38(b) apply to the information at issue?

DISCUSSION:

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

[13] Pursuant to section 52 of the *Act*, the *Act* does not apply to certain classes of records, although an institution may still exercise its discretion to disclose records outside of the access regime established by the *Act*.¹ However, the Commissioner does not have the jurisdiction to make any order concerning the disclosure or non-disclosure of records to which the *Act* does not apply.

[14] One class of records excluded by section 52 is records concerning certain employment-related matters. Specifically, section 52(3) provides in part:

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:

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.

[15] 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*.

[16] Section 52(4) provides, in part:

This Act applies to the following records:

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.

Representations

[17] The city argues that employment and disciplinary records fall under section 52(3) of the *Act*. It argues that any records of this nature would have been collected, prepared, maintained and used by the city in meetings, consultations, discussions or communications with the affected party about either labour relations or employment-

¹ See, for example, Order PO-2639.

related matters in which the city has a direct interest as they involve the city's own workforce.

[18] The city submits that such records would have been collected by the city's Human Resources Division and would have been used in dealing with the affected party with respect to her job competition and her employment. These records would pertain to employment-related matters addressing human resources issues with the city acting as an employer.

[19] The affected party, too, submits that section 52(3) applies to employment records.

[20] The city argues that these records would also fall under section 52(3)2 of the *Act* as they would have been collected, prepared, maintained and used by the city in negotiations between the city and the employee in relation to the employment of a person.

Discussion and findings

[21] 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

[22] I find that the affected party's employment records, including any disciplinary records, if any exist, were collected, prepared, maintained or used by the city. The affected party is an employee of the city. From my review of the records in the affected party's employment file, I am satisfied that these records were collected, prepared, maintained or used by the city in its capacity as the affected party's employer. Without disclosing the contents of that file, I observe that employment files typically contain information such as hiring documentation (résumés, interview notes), and performance reviews. These types of documents are collected, prepared, maintained or used by an employer.

[23] As for any disciplinary records in relation to the affected party that may or may not exist, I find that they, too, would have been collected, prepared, maintained or used by the city, as the affected party's employer.

[24] Accordingly, I find that part 1 of the section 52(3)3 test has been met.

Part 2: meetings, consultations, discussions or communications

[25] From my review of the employment records, it is evident that meetings, consultations, discussions and communications took place involving the affected party and the city with respect to the records at issue. Also, since any decisions about discipline necessarily entail meetings, consultations, discussions or communications, I find that, if any disciplinary records exist, they too would have been in relation to such meetings, consultations, discussions or communications.

[26] Accordingly, I find that part 2 of the section 52(3)3 test has been met.

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

[27] For the collection, preparation, maintenance or use of a record to be "in relation to" labour relations or employment-related matters in which the city has an interest, it must be reasonable to conclude that there is "some connection" between them.² The phrase "labour relations or employment-related matters" has been found to apply in the context of, for example, a job competition;³ an employee's dismissal;⁴ a grievance under a collective agreement;⁵ and disciplinary proceedings under the *Police Services Act*.⁶

[28] From my review of the employment records provided by the city, I find that they were all collected, prepared, maintained or used by the city "in relation to" labour relations or employment matters. As noted above, employment files typically contain records such as résumés, interview notes and performance evaluations. All of these types of records relate to employment matters.

[29] I find, further, that if any disciplinary records exist, they too would have been collected, prepared, maintained or used by the city "in relation to" labour relations or employment matters. The only type of discipline that the city could administer would be in the context of the affected party's employment.

[30] I also find that the city has an interest in the employment matters to which the records pertain, including disciplinary records, if any exist. The phrase "in which the institution has an interest" has been held to mean more than a "mere curiosity or

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

³ Orders M-830 and PO-2123.

⁴ Order MO-1654-I.

⁵ Orders M-832 and PO-1769.

⁶ Order MO-1433-F.

concern”, and refers to matters involving the institution’s own workforce.⁷ In this case, therefore, the meetings, consultations, discussions or communications would have been about labour relations or employment matters “in which the city has an interest”, since the city is the employer of the affected party.

[31] I conclude, therefore, that part 3 of the section 52(3)3 test has been met. From my review of the records provided, I also find that the exception at section 52(4) does not apply to them. Further, section 52(4) would not apply to any disciplinary records, if they exist.⁸

[32] As a result, I find that the records responsive to part 1 of the appellant’s request (with the exception of record 5, which was disclosed in part)⁹ are excluded from the *Act* pursuant to section 52(3)3, and I will not address them further in this order.

[33] In light of my conclusion, I do not need to consider whether these records are also excluded from the *Act* by virtue of section 52(3)2. I also do not need to consider the city’s application of section 14(5) to disciplinary records, if any exist.

[34] I will now consider the exemptions applied by the city in respect of the four records that it disclosed in part to the appellant.

Issue B: Do the records contain “personal information” as defined in section 2(1) and, if so, to whom does it relate?

[35] The city claims that portions of records 1, 2, 4 and 5 are exempt pursuant to the personal privacy exemptions at sections 14(1) and/or 38(b) of the *Act*. In order to determine if either of these exemptions may apply, it is necessary to decide whether the records contain “personal information” and, if so, to whom it relates. That term is defined in section 2(1) as follows:

⁷ *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above.

⁸ Section 52(4) provides:

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.

⁹ The city’s letter to the affected party, confirming its hiring of her and the terms of her hiring, is subject to the *Act* by virtue of section 52(4). This was the additional record disclosed to the appellant, in part, during mediation.

“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 if 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;

[36] 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.¹⁰

[37] Sections (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.

¹⁰ Order 11.

(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.

[38] 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.¹¹ However, 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.¹²

[39] Record 1 is a letter from the affected party to the appellant. The letter has been disclosed to the appellant, with the exception of two names of individuals other than the affected party and the appellant. I find that the disclosure of these individuals' names, coupled with the remainder of the contents of the letter, would reveal that they attended at a courthouse in their personal capacities. This constitutes their personal information pursuant to paragraph (h) of the definition. I find, further, that the letter does not contain the personal information of either the appellant or the affected party, as their information relates to them in their professional capacities and does not reveal anything of a personal nature about them.

[40] Record 2 is a statement of an individual regarding the appellant. The statement was released to the appellant with the name and telephone number of the individual redacted. I find that the disclosure of this individual's name would reveal that she attended the courthouse in her personal capacity, and therefore this constitutes her personal information under paragraph (h) of the definition. Her telephone number is her personal information under paragraph (d) of the definition. The information about the appellant is not personal information as it relates to him in his professional capacity and does not reveal anything of a personal nature about him.

[41] Record 4 is a letter from the affected party to the appellant about an individual's speeding tickets. The name of the individual has been redacted. I find that the disclosure of this individual's name would reveal that he had speeding tickets, and therefore constitutes his personal information under paragraph (h) of the definition. The information of the other named individuals mentioned in the letter, including the appellant and the affected party, relates to them in their professional capacities and does not reveal anything of a personal nature about them.

[42] Record 5 is a letter from the city to the affected party confirming her hiring and the terms thereof. The city disclosed this letter to the appellant, but withheld the affected party's home address, date of hire, salary, signature and date. I find that the

¹¹ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

¹² Orders P-1409, R-980015, PO-2225 and MO-2344.

record contains the personal information of the affected party pursuant to paragraphs (b) (employment history), (d) (address), and (f) (correspondence that is implicitly of a private or confidential nature). The record does not contain the personal information of any other individual.

[43] In conclusion, I find that the records remaining at issue, that is, records 1, 2, 4 and 5, contain the personal information of the affected party and other individuals, but not of the appellant.

Issue C: Does the mandatory exemption at section 14(1) or the discretionary exemption at section 38(b) apply to the information at issue?

[44] 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. Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would be an “unjustified invasion” of the other individual’s personal privacy, the institution may refuse to disclose that information to the requester. Since the section 38(b) exemption is discretionary, the institution may also decide to disclose the information to the requester.¹³

[45] I have found above, however, that the records at issue do not contain the personal information of the appellant. Therefore, the appropriate personal privacy exemption to consider is not the discretionary exemption at section 38(b), but the mandatory exemption at section 14(1). Under section 14(1), where a record contains personal information of another individual but *not* the requester, the institution is prohibited from disclosing that information unless one of the exceptions in sections 14(1)(a) to (f) applies. Also, if any of the paragraphs in section 14(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 14(1).

[46] None of the parties argued that any of the exceptions in sections 14(1)(a) to (e) apply, and I find that they do not. I will consider, however, whether the exception at section 14(1)(f) applies. Under section 14(1)(f), the city is prohibited from disclosing the information unless disclosure would not be an unjustified invasion of personal privacy.

Section 14(1)(f): would disclosure be an unjustified invasion of privacy?

[47] In order to determine whether disclosure would be an unjustified invasion of personal privacy, reference is made to sections 14(2) and (3). If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an

¹³ See below in the “Exercise of Discretion” section for a more detailed discussion of the institution’s discretion under section 38(b).

unjustified invasion of personal privacy. A presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if a section 14(4) exception or the “public interest override” at section 16 applies.¹⁴ The appellant has not claimed the application of the public interest override in this case.

[48] I have reviewed the records and the parties’ representations, and make the following findings.

Section 14(3) presumptions

[49] I find that the presumption at section 14(3)(d) (employment or educational history) applies to some of the withheld information in record 5. Information which reveals the start and end dates of employment, and the number of years of service has been found to fall within the section 14(3)(d) presumption.¹⁵ The presumption at section 14(3)(f) (income) also applies to the withheld salary information in record 5. Subject to section 14(4), discussed below, this information is, therefore, exempt from disclosure under section 14(1).

Section 14(2) factors

[50] For the information that is not covered by a presumption in section 14(3), section 14(2) lists various factors that may be relevant in determining whether disclosure of the personal information would be an unjustified invasion of personal privacy, and the information will be exempt unless the circumstances favour disclosure.¹⁶ 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).¹⁷

[51] Some of the factors listed in section 14(2), if present, weigh in favour of non-disclosure, while others weigh in favour of disclosure. I will begin by considering factors weighing in favour of disclosure.

[52] Although the appellant did not file representations, my review of the file suggests to me that he is of the view that the information at issue is relevant to a fair determination of his rights. Section 14(2)(d) of the *Act* states:

(2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

¹⁴ *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767.

¹⁵ Orders M-173, P-1348, MO-1332, PO-1885 and PO-2050; see also Orders PO-2598, MO-2174 and MO-2344.

¹⁶ Order P-239.

¹⁷ Order P-99.

(d) the personal information is relevant to a fair determination of rights affecting the person who made the request;

[53] Previous orders of this office have found that, for section 14(2)(d) to apply, the appellant must establish that:

(1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; and

(2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and

(3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and

(4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing¹⁸

[54] In this case, the appellant has not specified any legal right that is at stake. Moreover, he has not identified any existing or contemplated proceeding related to any such legal right. I find, therefore, that the factor at section 14(2)(d) does not apply.

[55] The appellant did not identify any other factors favouring disclosure that might apply. Since there are no factors favouring disclosure, the information at issue is exempt from disclosure under section 14(1). Therefore, I do not need to consider whether there are any factors favouring non-disclosure.

[56] I conclude that the exemption at section 14(1) of the *Act* applies to all of the information severed from records 1, 2, 4, and 5.

Absurd result

[57] Although not raised by the appellant, I have also considered whether the absurd result principle applies to any of the information severed from records 1 and 4. This office has previously found that where a requester originally supplied the information at issue, or is otherwise aware of it, the information may not be exempt under section 14(1) because to withhold the information would be absurd and inconsistent with the purpose of the exemption.¹⁹ The absurd result principle has been applied where the

¹⁸ Order PO-1764; see also Order P-312, upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.).

¹⁹ Orders M-444 and MO-1323.

information is clearly within the requester's knowledge.²⁰ In this case, since records 1 and 4 are letters that were sent to the appellant, he would be expected to already be aware of the information in those records.

[58] However, if disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information is within the requester's knowledge.²¹ In this case, I find that disclosure of the names withheld from records 1 and 4 would be inconsistent with the purpose of the exemption. Section 14(1) is designed to protect personal privacy. Although the appellant did not provide representations, it is evident from his request that he is primarily seeking information about the affected party. The identities of the other individuals are peripheral to the appellant's concerns. In these circumstances, I decline to apply the absurd result principle to order disclosure of these individuals' names.

Does section 14(4)(a) apply to record 5?

[59] If any of the paragraphs in section 14(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 14(1). In particular, I have considered whether record 5 is subject to section 14(4)(a), which provides:

- (4) Despite subsection (3), a disclosure does not constitute an unjustified invasion of personal privacy if it,
 - (a) discloses the classification, salary range and benefits, or employment responsibilities of an individual who is or was an officer or employee of an institution; or

[60] Record 5 is the city's confirmation of hire letter to the appellant. The city disclosed most of this record with certain limited information severed including the affected party's salary. However, section 14(4)(a) refers to "salary range" and does not apply to an employee's actual salary.²² I find, therefore, that section 14(4)(a) does not apply to the salary information in record 5.

[61] I conclude that all of the information severed from records 1, 2, 4 and 5 is exempt from disclosure pursuant to section 14(1) of the *Act*.

²⁰ Orders MO-1196, PO-1679 and MO-1755.

²¹ Orders M-757, MO-1323 and MO-1378.

²² See Order 61.

ORDER:

1. I uphold the city's decision that the affected party's employment records (with the exception of record 5), including disciplinary records, if any exist, are excluded from the *Act* pursuant to section 52(3) of the *Act*.
2. I uphold the city's decision to withhold the information severed from records 1, 2, 4 and 5 pursuant to section 14(1) of the *Act*.

Original Signed by: _____

Gillian Shaw
Adjudicator

October 27, 2016 _____