

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3429

Appeal MA16-397

Municipality of Thames Centre

April 26, 2017

Summary: The appellant made a request to the Municipality of Thames Centre under the *Municipal Freedom of Information and Protection of Privacy Act* for a copy of a review of the Municipality's dismissal of a fire department employee. Section 52(3) of the *Act*, which excludes certain records regarding labour relations or employment related matters from the scope of the *Act* applies to the review record. The appeal is dismissed.

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

OVERVIEW:

[1] The Municipality of Thames Centre (the municipality) received a request, under the *Act*, for access to the record of a review of its decision to dismiss a firefighter, known as the "Hewitt Review".

[2] The review was conducted under bylaw No. 15-2015, which allows the municipality to establish, maintain and operate a fire department. Section 20 of the bylaw provides that a volunteer firefighter shall not be dismissed without the opportunity for a review of [the proposed] termination, if the firefighter makes a written request for such a review within seven working days of receiving notification of the proposed dismissal. A person appointed by the municipality, not employed in the fire department, conducts the review.

[3] The municipality issued a decision denying the appellant's request for access to the Hewitt Review under section 12 (solicitor client privilege) of the *Act*.

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

[5] During mediation, the municipality issued a revised decision claiming the exclusion in section 52(3)3, which excludes records related to labour relations or employment related matters from the scope of the *Act*, applies to the record. The municipality continues to withhold the record under section 12, in the alternative.

[6] As the appeal was not resolved at mediation, the appellant requested that the appeal proceed to the next stage of the appeal process, which is an inquiry. During the inquiry the parties were invited to, and provided, representations. The parties' representations were shared in accordance with *Practice Direction Number 7* of the IPC's *Code of Procedure*.

[7] This order finds that the Hewitt Review is excluded from the scope of the *Act* under section 52(3)3. As a result, the appeal is dismissed without considering the application of the section 12 exemption to the record.

RECORD:

[8] The record at issue is a report known as the Hewitt Review.

ISSUES:

[9] The first issue is whether section 52(3)3, which excludes from the scope of the *Act* records related to labour relation or employment related matters, applies to the record. If section 52(3)3 does not apply to the record, a second issue arises, namely whether the discretionary exemption in section 12 (solicitor client privilege) applies to the record.

DISCUSSION:

Does section 52(3) exclude the Hewitt Review from the scope of the *Act*?

[10] Section 52(3) states 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:

...

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 record, and none of the exceptions in section 52(4) apply, the record is 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 section 52(3), it must be reasonable to conclude that there is "some connection" between them.¹

[13] 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.² 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.³

[14] 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

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

[15] For section 52(3)3 to apply, the municipality must establish that:

1. the Hewitt Review was 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 and 2: collected, prepared, maintained or used in relation to meetings, consultations, discussions or communications

[16] I am satisfied that the municipality used the record for discussions at a meeting.

¹ Order MO-2589; see also *Ontario (Attorney General) v. Toronto Star*, 2010 ONSC 991.

² Order PO-2157.

³ *Ontario (Ministry of Correctional Services) v. Goodis*, 2008 CanLII 2603 (ON SCDC).

⁴ *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, 2001 CanLII 8582 (ON CA), application for leave to appeal to the Supreme Court of Canada dismissed June 13, 2002 (Gonthier, Major and LeBel JJ.). S.C.C. File No. 28853. S.C.C. Bulletin, 2002, p. 781.

In particular, the municipality provided me with minutes of a closed meeting on June 20, 2016 that establish that the record was used at that meeting to inform decisions regarding the dismissal. Therefore, Parts 1 and 2 of the section 52(3) test are met.

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

[17] As noted above, 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.⁵ 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. Of particular relevance to this appeal, the phrase “labour relations or employment-related matters” has been found to apply in the context of an employee’s dismissal.⁶

[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.⁷ 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.⁸

[19] The parties agree that the Hewitt Review is a record produced as a result of a request made under section 20 of bylaw No. 15-2015. That is, it is a review of the municipality’s proposed dismissal of an employee of its volunteer fire department.⁹ The review is employment-related for the purposes of section 52(3)3 because it is about the proposed dismissal of an employee.

[20] It is clear that the firefighter’s dismissal is an employment-related matter in which the institution had an interest. The municipality had an interest in this matter because the dismissal and subsequent review relate to a municipal firefighter. Part 3 of the section 52(3) test, and consequently, all three parts of the test are therefore met for the Hewitt Review.

[21] Despite finding that section 52(3) applies to the record, the *Act* still applies to it if the record falls within any of the exceptions in section 52(4). The municipality addressed why each of the section 52(4) exceptions do not apply to the record. The appellant did not raise the section 52(4) exceptions, and none arise from my review of

⁵ Order PO-2157.

⁶ Order MO-1654-I.

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

⁸ *Ontario (Ministry of Correctional Services) v. Goodis*, cited above.

⁹ Previous orders have confirmed that volunteer firefighters fall within the wording of the exclusion- see orders MO-2721-I and MO-3075.

the record. I agree that none of the section 52(4) exceptions apply.

[22] Accordingly, I find that section 52(3) applies to the Hewitt Review, with the effect that it is outside the scope of the *Act*.

[23] The appellant argues that, as he requested the review and that it was done for his benefit, it makes sense that he should be able to see a copy of it. His evidence suggests that it is standard practise for dismissed firefighters in other parts of Ontario to receive a copy of any such review.

[24] To be clear, my finding does not preclude the municipality from disclosing the Hewitt Review. My finding is simply that because section 52(3)3 applies, the record is outside the scope of the *Act*. Whether or not the record should be disclosed is therefore outside my jurisdiction and therefore not to determined under the provisions of the *Act*.

[25] Given my finding that section 52(3) applies, I do not need to consider the application of the section 12 exemption the municipality also relied on to withhold the Hewitt Review.

ORDER:

I uphold the municipality's decision that section 52(3) applies to exclude the Hewitt Review from the scope of the *Act* and dismiss the appeal.

Original Signed by: _____
Hamish Flanagan
Adjudicator

_____ April 26, 2017