

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3504

Appeal MA16-588

Town of Petrolia

October 4, 2017

Summary: The town of Petrolia (the town) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* for access to records relating to a particular incident involving a town motor vehicle that occurred while driven by a town employee. Amongst other things, the requester sought access to witness statements and a copy of the town's investigation into the incident. The town granted partial access to responsive records and relied on a number of exemptions as well as the exclusion at section 52(3)3 (employment or labour relations) of the *Act* to deny access to the records it withheld. This order finds that the records remaining at issue are excluded from the scope of 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, section 52(3)3.

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

OVERVIEW:

[1] The town of Petrolia (the town) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*) for access to records relating to a particular incident involving a town motor vehicle that occurred while driven by a town employee. Amongst other things the requester sought access to witness statements and a copy of the town's investigation into the incident.

[2] The town identified responsive records and, after notifying a company, granted partial access to them upon payment of a fee. The town relied on sections 6(1)(b) (closed meeting), 12 (solicitor-client privilege), 14(1) (personal privacy) and 52(3)3 (employment or labour relations) of the *Act* to deny access to the portions it withheld.

[3] The requester (now the appellant) appealed the town's access decision.

[4] During mediation, the town issued a revised access decision disclosing additional information to the appellant and waiving any interest it sought to charge on the fee. Accordingly, that information, the application of section 6(1)(b) of the *Act* and the amount of the fee are not at issue in the appeal. Also during mediation, after receiving an index of records from the town, the appellant indicated that he was only seeking access to records identified as items 1, 3, 8, 9, 12 and 21 on the index of records. As a result, these are the only records that remain at issue in the appeal.

[5] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*.

[6] During the inquiry into the appeal, I sought and received representations from the town and from the appellant. Representations were shared in accordance with section 7 of the IPC's Code of Procedure and Practice Direction 7.

[7] For the reasons that follow, I find that the records remaining at issue are excluded from the scope of the *Act* on the basis of the exclusion in section 52(3)3 of the *Act*. Accordingly, it is not necessary to address the possible application of the other exemptions claimed by the town.

RECORDS:

[8] Remaining at issue in the appeal are records described by the town in its index of records as: Timeline of events and dates related to the damage claim (Item 1), Incident report from town employee (Item 3), Statement from town employee re: truck damage (Item 8), Statement from town employee re: truck damage (Item 9), Notes of town employee relating to town's investigation of damaged vehicle (Item 12) and Picture of pole backed into taken by town Supervisor (Item 21).

DISCUSSION:

[9] The town takes the position that the records at issue are excluded from the scope of the *Act* on the basis of the exclusion in section 52(3)3 of *MFIPPA*.

[10] Section 52(3) 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.

[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 1, 2 or 3 of this section, it must be reasonable to conclude that there is "some connection" between them.¹

[13] 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.²

[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.³

[15] The exclusion in section 52(3) does not exclude all records concerning the actions or inactions of an employee simply because this conduct may give rise to a civil action in which the town may be held vicariously liable for torts caused by its employees.⁴

[16] The type of records excluded from the *Act* by section 52(3) are documents

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 Order PO-2157.

³ *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.

⁴ *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.).

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

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

[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] 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.⁶

[19] The records collected, prepared maintained or used by the town ... 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.⁷

The town's representations

[20] The town submits that this appeal is about access to certain town records relating to an internal investigation conducted by the town of an incident involving the use of and damage to a town vehicle driven by a town employee during the course of employment. In support of its position, the town provided an affidavit of its Chief Administrative Officer/Clerk explaining how the town had retained a lawyer to provide legal advice with respect to the conduct of its investigation. He deposes that:

... As a consequence, the undisclosed documents all form a component of the town's records [that] were used by the town for the review of the conduct of its employee as well as being provided to [the named lawyer] for his review and advice in relation thereto.

[21] Relying on Ontario (Ministry of Correctional Services) v. Goodis⁸, the town

⁵ *Ministry of Correctional Services*, cited above.

⁶ *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above.

⁷ *Ministry of Correctional Services*, cited above.

⁸ Cited above. The town cites paragraphs 30 and 31 of the decision in support of its submission.

submits that:

... the intent of the Section 52(3) of the *Act* provides for the exclusion of public access to documentation which forms part of the town's investigation and review of its employee's actions which are to be considered in the context of whether or not the employee's conduct merited some form of discipline.

[22] The town states that there is no form of litigation "associated with the town's review of the employee's actions."

[23] The town then provided a detailed explanation of the origin of the records remaining at issue.

Timeline of events and dates related to the damage claim (Item 1)

[24] The town submits that:

At the initial stages of its internal review of the conduct of its employee, the town engaged the services of [named lawyer] to provide it with legal advice. The time line of events was prepared by a member of the town's management staff to assist [named lawyer] with his analysis of the issues which directly related to the town's employee who was in possession of and operating a town vehicle when it was damaged. The document itself was identified as an internal legal document which confirmed the privilege component of it. ...

Incident report from town employee (Item 3)

[25] The town submits that:

The incident report of the town's employee was completed in accordance with the terms of the employee's requirements to make a report to the town's senior management. ...

[26] The town acknowledges that the incident report was created in accordance with the provisions of the town's policy before the lawyer was retained, however, it submits that this record did form part of the information provided to the lawyer for his advice and consideration.

Statement from town employee re: truck damage (Item 8)

[27] The town submits that:

The statement obtained from this town employee was obtained as part of the town's collection of information which was intended to assist the town

with its review of the actions of the employee in question. It relates to the observations made by the town employee pertinent to the investigation, and was not made for creating a public record. [Footnote omitted] As such, the town takes the position that the document relates to the town's interests in an employment related matter under Sections 52(3) subparagraph 3 ...

Statement from town employee re: truck damage (Item 9)

[28] The town submits that this statement was obtained from this town employee for the same purpose as stated above.

Notes of town employee relating to town's investigation of damaged vehicle (Item 12)

[29] The town submits that:

The notes were an internal memorandum made by a member of the town's senior management team further to interviews with a number of individuals as part of the town's investigation into the incident. The notes were created for the sole purpose of forming part of the town's investigation into the incident and submission to its lawyer. ...

Picture of pole backed into taken by Town Supervisor (Item 21)

[30] The town submits that this picture forms part of the town's record of its own internal investigation of its employee who made contact with the pole with the town's vehicle during the course of employment.

The appellant's representations

[31] The appellant submits that any municipality would have procedures dealing with events and accidents within its operations.

[32] He submits that Item 1, being timelines and dates of events, is the type of record that "has nothing to do with matters of employment such as terms and conditions of employment or human resources questions" and simply relates to an employee's actions.

[33] Similarly, he submits that Item 3 is a matter related to an employee's actions and "has nothing to do with labour relations nor has it anything to do with employment of a person."

[34] With respect to Item 8 he submits that the matter cannot "remotely" be considered as confidential. With respect to Item 9, he submits that if an incident occurs on public property there would likely be a police report. He submits that the information

in that report would not be considered personal information. He further questions how a verbal statement from the employee involved can be considered a confidentiality issue when insurance companies have access to incident or accident reports from police departments whenever they see fit to request them. He submits that this should be treated the same way.

[35] Regarding Item 12, while recognizing it is part of an investigation, he fails to see how this information is confidential when it was created in accordance with the town's policy. He adds:

It is only reasonable to assume that a report would be filed by an employee when an occurrence occurs. The preparation of this report has nothing to do with labour [relations or] to employment-related matters, it is simply a report dealing with an occurrence.

[36] Finally, with respect to Item 21 he questions how "a picture of a pole [can be] remotely considered a confidential matter."

[37] The appellant further submits that the public has a right to obtain certain information from a town created during the course of an employee performing their employment-related responsibilities and that the broader interest of public accountability is at stake in this matter. The appellant submits that this is a matter of fairness in ensuring public confidence in the town.

The town's reply representations

[38] In reply, the town submits that it has an interest in the withheld information because it consists of records "collected, prepared, maintained or used by or on behalf of the town which forms part of its internal investigation, as an employer, into the conduct of one of its non-unionized employees further to its own established policy. As such, the town submits that the undisclosed records are "employment-related matters" of the town with respect to which it sought legal advice.

Analysis and finding

Part 1: collected, prepared, maintained or used

[39] In the circumstances, and based on my review of the representations and the records themselves, I am satisfied that the records at issue were collected, prepared, maintained or used by the town. Accordingly, part one of the three-part test is met.

Part 2: meetings, consultations, discussions or communications

[40] On my review of the representations and the records provided to me, I am satisfied that the records were collected, prepared or used in relation to meetings, consultations, discussions or communications relating to an investigation about an

incident involving a town employee's use of a town vehicle. Accordingly, part two of the three-part test is met.

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

[41] Previous decisions issued by this office have held that section 52(3) is record-specific and fact-specific. Therefore, the record for which the exclusion is claimed must be examined as a whole.

[42] Although one of the records is a time line and another a photograph, I am satisfied that this information was used specifically to assist in the determination of whether disciplinary action should be taken against the operator of the vehicle, the town employee. On this basis, I accept the town's position that the records at issue relate to labour relations or employment-matters because their purpose is to review the employee's conduct. I am satisfied that this purpose relates directly to labour relations or employment-related matters.

[43] I have also considered the appellant's arguments. Although he may be correct in comparing the nature of some of the information in these records to the information contained in regular police "occurrence reports," ordinary occurrence reports relate to the actions of members of the public, and therefore do not relate to "labour relations or employment related matters."⁹ In contrast, the records at issue in this appeal concern the actions of a town employee with respect to damage to a town vehicle.

[44] Lastly, for the section 52(3)3 test to be established, what remains to be determined is whether the meetings, discussions, consultations and communications are about employment-related matters "in which the institution has an interest," which has been previously held to mean more than a "mere curiosity or concern."

[45] In this appeal, the records relate to an investigation of the actions of a town employee with respect to damage to a town vehicle. I accept that because the town is the employer, it has an interest in the records at issue and that interest is one of "more than a mere curiosity or concern." As a result, I am satisfied that the requisite "interest" exists in the employment-related matters which are the subject of the records. I also find that the records at issue do not fall within any of the exceptions in section 52(4).

[46] In conclusion, I find that the records remaining at issue in this appeal were collected, prepared or used by the town in relation to meetings, discussions or communications about employment-related matters. The town also clearly has an interest in these records, and none of the exceptions in section 52(4) apply. I am therefore satisfied that they are excluded from the scope of the *Act* under section 52(3)3.

⁹ See, for example, Orders M-927 and MO-2131.

ORDER:

The records remaining at issue are excluded from the scope of the *Act* and the appeal is dismissed.

Original Signed by: _____
Steven Faughnan
Adjudicator

_____ October 4, 2017