

Information and Privacy Commissioner,  
Ontario, Canada



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

---

## ORDER MO-3496

Appeal MA15-628

The Corporation of the Municipality of Brighton

September 15, 2017

**Summary:** The Municipality of Brighton received a request for access to a report prepared by a third party relating to an organizational review of the municipality. The municipality denied the appellant access to the record under a number of identified exemptions and also on the basis that the record was excluded from the scope of the *Act* under the labour relations exclusion in section 52(3)3. In this order, the adjudicator finds that section 52(3)3 applies to the record and is, therefore, excluded from the scope of the *Act*. The adjudicator dismisses the appeal.

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

**Orders and Investigation Reports Considered:** Orders P-1369, PO-3684

### OVERVIEW:

[1] The appellant submitted an access request to the Municipality of Brighton (the municipality) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for

A complete, unedited report from [an identified company] regarding an organizational review for the Municipality of Brighton and used as a basis for a special meeting of council held November 12, 2015.

[2] The municipality located the responsive record and issued an access decision to the appellant, denying him access to it, in part. In its decision, the municipality stated

The full Organization Review Report contains detailed information, much of which was provided by employees with the assurance of confidentiality. Prior to the one-on-one interviews with the Municipality's employees, the consultants advised each employee that his/her responses would not be published in a manner that would permit an employee to be identified.

The full report contains a series of exhibits that breakdown [*sic*] the employee responses by Department and level (i.e. Director, Manager, Supervisor, Professional/technical, etc.). In a smaller municipality with few employees in each category, it is possible to identify an employee, particularly when all or most employees in a Department expressed either satisfaction or dissatisfaction on a particular questionnaire item. Any employee identifiable information needs to remain private and confidential according to the terms of the interview.

The Executive Summary does not contain any identifying information and can be issued.

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

[4] During mediation, the mediator asked the municipality to identify which provision(s) of the *Act* it was relying on to deny access to the record. The municipality issued a supplemental decision claiming the application of the mandatory exemption in section 10 (third party information). In that decision, the municipality stated

Access is denied under s. 10 MFIPPA Third Party Information. [The named company] provided this Executive Summary for release to the public. While they were undertaking the organizational review, they spoke to all employees of the Municipality of Brighton and assured them that all responses were confidential. Since the workforce is small, individuals are identified in the broader community with their positions. To breach this confidentiality assurance, it would be very easy for people to relate large portions of the report to individuals and their positions.

The report is making recommendations that will have an effect on many employee positions. Council may or may not act on these recommendations, but until their decisions have been made, it should not be released to the public. Discussions have not yet taken place with the employees' union, and these discussions would be jeopardized by release of this report before that happens.

[5] The municipality issued a further supplemental decision in which it continued to rely on the exemption in section 10(1). In addition, the municipality claimed the application of the exclusion in section 52(3) (employment or labour relations) and the discretionary exemption in section 7(1) (advice or recommendations) of the *Act*.

[6] The municipality did not specifically cite section 14(1) (personal privacy) of the

*Act* in its decision. However, the municipality referred repeatedly to protecting the privacy of its employees as one of the reasons for denying access. Accordingly, section 14(1) was added as an issue in the appeal.

[7] The appellant advised the mediator that he disagrees with the ministry's access decisions. The appellant claimed that section 52(3) does not apply nor do the exemptions claimed by the municipality. The appellant also raises the possible application of the public interest override in section 16 of the *Act* to the record.

[8] The appellant also took the position that the consultant did not have the authority to promise the municipality's employees confidentiality. Rather, the appellant claimed that the decision rests with the municipal council that commissioned the report. The appellant also stated that it would be difficult to relate a large portion of the report to individuals and their positions. The appellant further noted that parts of the report were discussed in public meetings, including references to staff positions so that individuals' identities were clearly identified. In addition, the appellant noted that there were occasions in which matters relating to staff performance arose and council members were not reluctant to identify which individuals were involved. Given these circumstances, the appellant's position is that concerns relating to identifying individuals in connection with the report are irrelevant.

[9] In addition, the appellant argued that the record is a report or study regarding the municipality's performance and efficiency and therefore the exception to section 7(1) in section 7(2)(e) applies.

[10] Mediation could not resolve the issues in this appeal and it was transferred to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry. The adjudicator originally assigned to this appeal invited the municipality to provide representations in response to a Notice of Inquiry, which summarizes the facts and issues in this appeal. The municipality submitted representations. The adjudicator then invited the appellant to make submissions in response to the municipality's representations, which were shared in accordance with Practice Direction Number 7 of the IPC's *Code of Procedure*. The appellant submitted representations. The adjudicator then sought and received reply representations from the municipality.

[11] In addition, the adjudicator notified a party whose interests may be affected by the disclosure of the record (the affected party) and invited it to submit representations on the disclosure of the records. The affected party did not submit representations.

[12] The appeal was then transferred to me to complete the order. Prior to issuing this order, I became aware that the municipality disclosed a severed version of the record to the public. I contacted the municipality regarding its position on disclosure of the report. The municipality advised that it maintains that the record is excluded from the scope of the *Act* under section 52(3)3 and that the withheld portions of the record are exempt under sections 7(1) and 10(1). The appellant confirmed his interest in pursuing access to the entire report.

[13] In the discussion that follows, I find that the entire report is outside the scope of the *Act* under section 52(3)3 of the *Act*. As a result, I do not have the jurisdiction to make an order for its disclosure or non-disclosure to the appellant.

## **RECORD:**

[14] The information at issue consists of the withheld portions of a report entitled *Municipality of Brighton Organization Review Project Report* dated September 8, 2015.

## **DISCUSSION:**

### **Does section 52(3) apply to exclude the record from the *Act*?**

[15] 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.

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*. The effect of such a finding is that I would lack the jurisdiction to make any order to disclose or withhold the report, regardless of the municipality's partial disclosure of the report to the public. In such a case, the municipality would have full discretion to disclose or withhold the report outside the *Act's* access regime.

[16] For the collection, preparation, maintenance or use of a record to be *in relation to* the subjects mentioned in paragraph 52(3), it must be reasonable to conclude that there is *some connection* between them.<sup>1</sup>

[17] 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.<sup>2</sup>

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

1. The record was collected, prepared, maintained or used by the municipality or on its behalf;

---

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

<sup>2</sup> *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, 2001 CanLII 8582 (ONCA), application of leave to appeal to the Supreme Court of Canada dismissed June 13, 2002 (Gonthier, Major and LeBel JJ). SCC File No. 28853. SCC Bulletin 2002 p. 781.

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: report collected, prepared, maintained or used***

[19] The municipality submits that the report was prepared by the affected party for the municipality. The report clearly identifies that the affected party prepared the report for the municipality. Therefore, I find that part one of the section 52(3)3 test is met.

***Part 2: meetings, consultations, discussions or communications***

[20] The municipality states that it retained the affected party to perform an organizational review. The municipality submits that the affected party interviewed a number of municipality employees in confidence on issues related to labour relations and future negotiations. The municipality submits that the report contains recommendations that will affect many employee positions. Specifically, the municipality submits that the report contains information relating to staffing levels, briefing materials in relation to program reorganization and possible staffing surpluses. Finally, the municipality submits that its Chief Administrative Officer would review the report, prepare recommendations and present them to council.

[21] In his representations, the appellant raised a number of incidents involving the municipality, its council and senior staff in which organizational and staffing concerns were raised. The appellant stated that between 2010 and 2016, the Integrity Commissioner conducted two investigations relating to the municipality's council. The appellant also identified a second report prepared by a human resources consulting group that was received in a 2016 public council meeting. This second report was entitled "A Report on the Relationship Between Council and Staff in the Municipality of Brighton"<sup>3</sup> and the appellant advises that it is publicly available.

[22] I am satisfied from the contents of the report and the context provided by the appellant and municipality that the report was prepared or used in meetings, consultations, discussions or communications between the municipality's CAO and council at a minimum regarding the findings contained in the report. Therefore, I find that part two of the section 52(3)3 test is met.

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

[23] The type of records excluded from the *Act* under section 52(3) are documents related to matters in which the municipality is acting as an employer, and terms and

---

<sup>3</sup> Prepared by Pesce & Associates, July 2016.

conditions of employment or human resources questions are at issue.<sup>4</sup>

[24] 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.<sup>5</sup> The phrase has been found to apply to a review of "workload and working relationships"<sup>6</sup>, a job competition<sup>7</sup>, an employee's dismissal<sup>8</sup>, records relating to a consulting firm report on human resources<sup>9</sup>, and a review of the reasonableness of an employee's conduct<sup>10</sup>. Employment-related matters are separate and distinct from matters related to employees' actions.<sup>11</sup>

[25] The municipality submits that the records are excluded from the scope of the *Act* under section 52(3)3 because they contain information that was collected from employees in relation to labour relations. Further, the municipality submits that the report contains recommendations that would have an effect on many of its staff positions. The municipality submits that it would disclose the report to the public once its newly appointed Chief Administrative Officer reviews the report, prepares his recommendations and introduces them to council. As stated above, the municipality disclosed a severed version of the record to the public.

[26] In his representations, the appellant submits that the IPC has found that the phrase *labour relations or employment-related matters* does not apply in the context of an organizational or operational review. The appellant submits that the report, which is titled *Municipality of Brighton Organization Review Project Report*, should not be excluded from the scope of the *Act*.

[27] Adjudicator Hamish Flanagan considered whether a report was an organizational or operational review in Order PO-3684. Adjudicator Flanagan referred to Order P-1369, in which the provincial equivalent of section 52(3)3 was found not to apply to a report of a review of the Liquor control Board of Ontario because the connection between the contents of a record and "meetings, consultations, discussions or communications about labour relations or employment-related matters" was considered too remote to find that the collection, preparation, maintenance or use of the record was *in relation to* such meetings, consultations, discussions or communications. In addition, the adjudicator in Order P-1369 was not persuaded that the record at issue represented a consultation or discussion *about* labour relations or employment-related matters. Instead, the adjudicator in Order P-1369 found that the record was a broadly-based organizational review "which touches occasionally, and in an extremely general way, on staffing and

---

<sup>4</sup> *Ontario (Ministry of Correctional Services) v. Goodis*, 2008 CanLII 2603 (ON SCDC).

<sup>5</sup> Order PO-2157.

<sup>6</sup> Order PO-2057.

<sup>7</sup> Orders M-830 and PO-2123.

<sup>8</sup> Order MO-1654-I.

<sup>9</sup> Order PO-3194.

<sup>10</sup> Order PO-3549.

<sup>11</sup> *Ontario (Ministry of Correctional Services) v. Goodis*, 2008 CanLII 2603 (ON SCDC).

salary issues.<sup>12</sup>

[28] The mandate for the report at issue in Order PO-3684 was described as a “review of a university department”. In light of this description, Adjudicator Flanagan addressed the issue of whether the report could be considered an operational or organizational review as follows:

While the mandate of the report at issue suggests a broad organizational or operational type review, as noted above, the [University of Ottawa] says that one of the purposes the report was used for was in making a decision regarding the reappointment of the chair. I am satisfied that a key function of the report and, in context, a good deal of the purpose of its creation was to inform discussion about the reappointment of the chair. This distinguishes the report from organizational or operational reviews.

...

For section 65(6)3 [the provincial equivalent to section 52(3)3] to apply, therefore, there must be some connection between the report and “meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest”. If section 65(6)3 required the record to have a single purpose, it might be more difficult to conclude the section 65(6)3 exclusion applies to the report. However, the Divisional Court in [*Ontario (Attorney General) v. Toronto Star*<sup>13</sup>] found that only “some connection” between the records and the subject matter of that section was required.<sup>14</sup> **In my view, this means that the report can have some aspects that deal with more general organizational matters and still meet the section 65(6)3 requirements.** [Emphasis added]

[29] I adopt the above analysis for the purposes of this appeal. As stated above, the municipality disclosed a severed version of the record at issue to the public. The record clearly states that the “purpose of the Organizational Review was to determine the most effective organization structure and staffing as well as to address any improvement requirements for service delivery by the Municipality Departments.” While the title of the report refers to an “operational review”, the title alone is not determinative of the issue of whether the record is related to or has some connection with meetings, consultations, discussions or communications about labour relations and employment-related matters. As stated in Order PO-3684, a report may contain portions that relate to organizational or operational issues while still meeting the section 52(3)3 requirements. All that is required is that there is *some connection* between the report and the “meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest”.

---

<sup>12</sup> Order P-1369, at page 4.

<sup>13</sup> 2010 ONSC 991

<sup>14</sup> *Ibid.* at para 43.

[30] Upon review of the record, I find that it is distinguishable from organizational or operational reviews as it does much more than touch "occasionally, and in an extremely general way"<sup>15</sup> on staffing and other employment related issues. Instead, the bulk of the report considers the organizational structure of the municipality in terms of staffing and employment positions as well as staffing issues, the working environment and compensation. The publicly available portions of the report show that the affected party collected information such as organization charts, descriptions of employee positions and job functions, job evaluation questionnaires and salary scales from the municipality. Furthermore, the affected party conducted interviews with numerous municipality staff regarding their positions, the organizational structure of the municipality and compensation. It is clear from a review of the record as a whole that it has *some connection* to meetings, consultations, discussions or communications about labour relations and employment-related matters.

[31] 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.<sup>16</sup> In my view, the municipality *has an interest* in the labour relations and employment matters flowing from the report that extends beyond *mere curiosity or concern*. It is clear from the appellant's submissions and the report that the municipality retained the affected party to conduct an organizational review in response to various staffing and human resources issues raised by the municipality's employees. I accept that the municipality, as an employer, has an interest in addressing and resolving these issues as part of the overall management of its workforce.

[32] I note that the appellant submits that section 52(3)3 should not apply because the municipality is willing to release the record at some point in the future. Specifically, the appellant submits that "if the municipality is concerned that release of the full [record] at this time would impair labour relations, it is reasonable then to assume that the same damage would be inflicted in three to six months when they propose to release the full report. Based on this reasoning, I do not accept that the provisions of section 52(3) are applicable in this case."

[33] As stated previously, the municipality released the record, in part, to the public a number of months ago. However, the fact that the municipality released the record, either in full or in part, has no bearing on whether the record itself is excluded from the scope of the *Act* under section 52(3)3. If the record was collected, prepared, maintained or used by or on behalf of the municipality in relation to meetings, consultations, discussions or communications about labour relations or employment-related matters in which the municipality has an interest, the record is not within the scope of the *Act*. Further, as stated previously, if I find that the record is excluded from the scope of the *Act*, the municipality would have full discretion to disclose or withhold the report outside the *Act's* access regime.

---

<sup>15</sup> Oder P-1369, at page 4.

<sup>16</sup> *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 OR (3d) 355 (CA), leave to appeal refused [2001] SCCA No. 507.



[34] In conclusion, I find that section 52(3)3 applies to exclude the entire record from the scope of the *Act*. I base this finding on my review of the record, the circumstances surrounding the creation and use of the record and the parties' representations. I further find that none of the exceptions to section 52(3) listed in section 52(4) apply to the record.

**ORDER:**

I dismiss the appeal.

Original signed by \_\_\_\_\_  
Justine Wai  
Adjudicator

September 15, 2017 \_\_\_\_\_