

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3560

Appeal MA16-476

Town of Aylmer

February 9, 2018

Summary: The appellant seeks access to records relating to the termination of the employment of an identified individual. There are 14 records at issue in this appeal. The town denied the appellant access to the records, in full. The town takes the position that the records are excluded from the scope of the *Act* under section 52(3) (employment or labour relations) and, in the alternative, are exempt under sections 12 (solicitor-client privilege) and 14(1) (personal privacy). The adjudicator upholds the town's decision. The adjudicator finds that the majority of the records are excluded from the scope of the *Act* pursuant to section 52(3)3. In addition, the adjudicator finds that Record 10 is exempt from disclosure under section 12 and upholds the town's exercise of discretion.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 12, 52(3) and 52(4)

Orders and Investigation Reports Considered: Orders MO-1622, PO-3651

Cases Considered: *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681; *Ministry of the Attorney General v. Toronto Star et al.*, 2010 ONSC 991 (Div. Ct.).

OVERVIEW:

[1] The appellant submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Town of Aylmer (the town) for information relating to the termination of the employment of an identified individual and, specifically, any financial compensation or settlement package.

[2] The town located twelve records responsive to the request and issued a decision to the appellant denying him access to the records, in full. The town applied the mandatory personal privacy exemption in section 14(1) of the *Act* to withhold the records. The town also advised the appellant that the presumption in section 14(3)(f) applied to the records.

[3] The appellant appealed the town's decision. In his appeal letter, the appellant claimed that the public has the right to know how municipal tax dollars are being spent, thereby raising the potential application of the public interest override in section 16 of the *Act*.

[4] During mediation, the town issued a revised access decision. In that decision, the town advised the appellant that the records are excluded from the scope of the *Act* under section 52(3) (employment/labour relations) and, in the alternative, are exempt from disclosure under section 14(1) and the discretionary solicitor-client privilege exemption in section 12. The town also indicated that certain records are not responsive to the appellant's request, but were included to ensure transparency.

[5] The town conducted a second search for responsive records and located two additional records. The town issued a supplemental decision to the appellant and advised him that they are excluded from the scope of the *Act* under section 52(3) and, in the alternative, are exempt from disclosure under section 14.

[6] The appellant confirmed his interest in obtaining access to all records.

[7] The appeal could not be resolved at mediation. Consequently, the appeal was transferred to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry into the issues under appeal. I began my inquiry by inviting the town and an individual whose interests may be affected by the disclosure of the records (the affected party) to submit representations in response to a Notice of Inquiry. Both the town and the affected party submitted representations.

[8] I then invited the appellant to make submissions in response to the town's representations, which were shared in accordance with *Practice Direction Number 7* of the IPC's *Code of Procedure*. I did not share the affected party's representations with the appellant due to confidentiality concerns. The appellant submitted representations. In his representations, the appellant offered a compromise on receiving some of the requested information including a salary range, the length of term of additional pay and a copy of the employment contract. The appellant agreed that certain "sensitive information" could be redacted.

[9] I then sought and received reply submissions from the affected party and the town. The town advised that it already disclosed the affected party's salary range to the appellant as well as related financial statements. Finally, I sought and received sur-reply submissions from the appellant, who argued that he should have access to the length of the term that the affected party's salary was extended.

[10] Although the appellant appears to have narrowed the scope of his appeal, I will consider whether all the records at issue are excluded from the scope of the *Act* or otherwise exempt from disclosure. I decided to do so upon review of the appellant's representations on the public interest override.

[11] In the discussion that follows, I find that the majority of the records are excluded from the scope of the *Act* under section 52(3). In addition, I find that Record 10 is exempt from disclosure under section 12 of the *Act*. I uphold the town's decision and dismiss the appeal.

RECORDS:

[12] There are fourteen records at issue in this appeal, consisting of a Final and Full Release of an individual's employment, a cheque requisition form, payroll forms and various correspondence.

ISSUES:

- A. Does section 52(3) exclude the records from the *Act*?
- B. Does the discretionary exemption at section 12 apply to the records?
- C. Did the town exercise its discretion under section 12? If so, should this office uphold the exercise of discretion?

DISCUSSION:

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

[13] The town claims that all the records are excluded from the scope of the *Act* pursuant to section 52(3) of the *Act*. 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.

[14] 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*.

[15] 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

[16] 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.²

[17] The term *employment of a person* refers to the relationship between an employer and employee. The term *employment-related matters* refers to human resources or staff relations issues arising from the relationship between an employer and employee that does not arise out of a collective bargaining relationship.³

[18] If section 52(3) applies at the time the record was collected, prepared, maintained or used, it does not cease to apply later.⁴ Section 52(3) may apply where the institution that received the request is not the same institution that originally *collected, prepared, maintained or used* the records, even where the original institution is an institution under the *Act*.⁵

[19] Based on my review of the records, it is clear that they were all *collected, prepared, maintained or used* by the town or its legal counsel on the town's behalf in relation to the employment of the affected party. Records 1, 2, 3, 4, 5, 9 and 12 consist of correspondence prepared by or for the town's legal counsel, acting on the town's behalf, in relation to the employment of the affected party. Record 6 is a town Resolution relating to Record 5. Records 7 and 8 relate to a Joint Special Council Meeting of the town in which the affected party's employment with the town was discussed. Record 10 is the Full and Final Release relating to the affected party's termination of employment. Record 11 consists of a Cheque Requisition that relates to the affected party's termination. Record 12 is a letter from the affected party's legal counsel to the town's legal counsel relating to her termination. Finally, Records 13 and 14, which the town located during mediation, are payroll forms relating to the affected

¹ Order MO-2589; see also *Ministry of the Attorney General v. Toronto Star et al.*, 2010 ONSC 991 (Div. Ct.).

² *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] OJ No. 4123 (CA); see also Order PO-2157.

³ Order PO-2157.

⁴ *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 OR (3d) 355 (CA), leave to appeal refused [2001] SCCA No. 507.

⁵ Orders P-1560 and PO-2106.

party's employment with the town. Clearly, Records 13 and 14 were generated, maintained and used by the town in relation to the affected party's employment. Given the nature of these records, I am satisfied the records were all collected, prepared, maintained or used by or on behalf of the town.

[20] The types 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.⁶

[21] In its representations, the town submits that sections 52(3)1, 52(3)2 and 52(3)3 apply to all the records at issue. Based on my review of the records, I find that the majority of them are excluded from the scope of the *Act* pursuant to sections 52(3)3.

Section 52(3)3

[22] For section 52(3)3 to apply, the town must establish that

1. the records were collected, prepared, maintained or used by the town 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 town has an interest.

[23] The phrase *labour relations or employment-related matters* has been found to apply in the context of a job competition⁷ and a grievance under a collective agreement.⁸ It has been found not to apply in the context of an organizational or operational review.⁹

[24] 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.¹⁰

[25] As stated above, I accept that the records were collected, prepared, maintained or used by the town, thereby satisfying the first requirement of the section 52(3)3 test.

[26] Regarding the second part of the test, the town submits that Records 1, 2, 3, 4, 5, 9, 11 and 12 were collected, prepared, maintained or used in relation to communications between the town, its legal counsel and the affected party's counsel. In addition, the town submits that the records relate to the communications or

⁶ *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 OR (3d) 457, [2008] OJ No. 289 (Div. Ct.).

⁷ Orders M-830 and PO-2123.

⁸ Orders M-832 and PO-1769.

⁹ Orders M-941 and P-1369.

¹⁰ *Ontario (Solicitor General) v. Mitchinson*, 2001 CanLII 8582 (ON CA).

negotiations between the town and the affected party, through their respective legal counsel, to resolve a dispute concerning the affected party's employment.

[27] The appellant did not make any specific representations on the exclusion in section 52(3).

[28] As noted above, the Divisional Court in *Ontario (Attorney General) v. Toronto Star*¹¹ instructs that for the collection, preparation, maintenance or use of a record to be considered *in relation to* any of the circumstances identified in section 52(3), it must be reasonable to conclude there is *some connection* between them. Based on my review of the records, I find that the majority were collected, prepared, maintained and/or used "in relation to meetings, consultations, discussions or communications" between the town, its legal counsel and/or the affected party's counsel regarding matters relating to the affected party. Records 1 through 5, 9 and 12 consist of correspondence or communications between the town, its legal counsel and/or the affected party's legal counsel. Records 6 to 8 relate to a closed meeting in which council discussed the affected party's employment. Finally, I accept the town prepared, maintained or used Records 10, 11, 13 and 14 in discussions or communications relating to the affected party's employment. Therefore, I find that the first and second requirements of the section 52(3)3 test are satisfied for all of the records.

[29] With regard to the third part of the section 52(3)3 test, the town submits that the records at issue relate to an employee's exit program. As the affected party's former employer, the town submits that it was directly involved in the employment-related matter and had an interest in it. Based on my review of the records, I find that the records relate to the town's discussions, consultations and negotiations regarding the affected party's employment. As such, I am satisfied that the information contained in the records relates to or is *about* an employment-related matter. Therefore, I find that the first part of the third requirement in section 52(3)3 is satisfied. All of the records at issue contain information relating to an employment-related matter, namely the affected party's employment and termination of that employment with the town. The records address the terms and conditions relating to her employment and termination. Clearly, these matters arise from a relationship between an employer and an employee. Therefore, I am satisfied that the type of information contained in the records can be described as *employment-related matters*.

[30] Finally, I accept that the town *has an interest* in the employment-related matter that is the subject of the records, namely the affected party's employment with the town. In my view, the town clearly has more than a mere curiosity or concern about the information contained in the records, as these records relate to the employment and termination of its staff, the affected party. Accordingly, I find that the town has an interest in the information at issue and that the second part of the third requirement is met.

[31] Therefore, I find that all the records were collected, prepared, maintained or

¹¹ *Supra*, note 1.

used by the town in relation to meetings, consultations, discussions and communications related to labour relations or employment-related matters in which the town has an interest, as contemplated by the exclusion at paragraph 3 of section 52(3) of the *Act*. Accordingly, subject to the possible application of any of the exceptions listed in section 52(4), I find that section 52(3) applies.

Section 52(4): exceptions to the section 52(3) exclusion

[32] Section 52(4) addresses exceptions to the section 52(3) exclusion by listing four specific types of records that are subject to the *Act*. Based on my review of the records, I find that section 52(4)3 applies to Record 10. Section 52(4)3 reads

This Act applies to the following records:

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.

[33] Based on my review of the records, I find that Record 10 falls within the exception in paragraph 3 of section 52(4). In Order MO-1622, the adjudicator considered the application of the exception to the section 52(3)3 exclusion in section 52(4)3. In that decision, the adjudicator found that the exception in section 52(4)3 applied to certain severance agreements between an institution and its former employees, stating as follows:

In my view, the fully executed Agreements and Release which form part of Record 1 and all of Record 13 represent "agreements between an institution and one or more employees". The records reflect the fact that the information contained in these documents was arrived at following negotiations between the individuals involved and the City [of London]. In addition, I have found above that the agreements and negotiations which gave rise to them were "about employment-related matters between the institution and the employees". In my view, the Agreements which comprise part of Record 1 and all of Record 13 fall within the ambit of the exception in section 52(4)3.¹²

I adopt the above analysis for the purposes of this appeal. Record 10 represents an agreement between the town and its former employee, the affected party. It is clear from a review of the other records at issue that the agreement in Record 10 was arrived at following negotiations between the affected party and the town, through their respective legal counsel. As discussed above, I found that Record 10 contains information about *employment-related matters* between the town and its employee. Accordingly, I find that Record 10 falls within the ambit of the exception in section

¹² Order MO-1622. This analysis was adopted in subsequent decisions, including Orders MO-1994, MO-2318 and MO-2899.

52(4)3 and that I have jurisdiction to determine whether it is properly exempt under the *Act*.

[34] I reviewed the remainder of the records and find that none fall within any of the exceptions listed in section 52(4) of the *Act*. Accordingly, I find that, as a result of the operation of the exclusion at section 52(3)3, Records 1 to 9 and 11 to 14 fall outside of the scope of the *Act* and I have no jurisdiction to determine whether any exemptions apply to them.

[35] I will now consider whether Record 10 is exempt from disclosure.

Issue B: Does the discretionary exemption at section 12 apply to the records?

[36] The town claims the application of section 12 of the *Act* to Record 10. Section 12 of the *Act* states,

A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

Section 12 contains two branches. Branch 1 (*subject to solicitor-client privilege*) is based on the common law. Branch 2 (*prepared by or for counsel employed or retained by an institution*) is a statutory privilege. The town submits that Branch 2 applies to Record 10. Specifically, the town states that its legal counsel prepared Record 10 for use as part of the dispute resolution process between the town and the affected party. The town submits its legal counsel created Record 10 to avoid further litigation before the courts or a tribunal. The town submits that the records relate to the settlement of a dispute between itself and the affected party in relation to an anticipated proceeding either before the courts or before the Human Rights Tribunal of Ontario.

[37] The appellant did not address section 12 in his representations.

[38] I find that Record 10 is exempt under branch 2, which is a statutory exemption available in the context of counsel employed or retained by an institution giving legal advice or conducting litigation.

[39] In *Liquor Control Board of Ontario v. Magnotta Winery Corporation*¹³, the Ontario Court of Appeal found that records prepared for use in the mediation or settlement of litigation were exempt under the statutory privilege aspect found in branch 2 of section 19, the provincial equivalent to section 12 of the *Act*. Based on the wording of section 12, this would extend to *contemplated* litigation. The Court of Appeal also found that the word *litigation* in the second branch encompasses mediation and settlement discussions. The adjudicator in Order PO-3651 adopted the analysis in *Magnotta* as

¹³ 2010 ONCA 681 (*Magnotta*).

follows:

In my view, in order to conclude that there was “contemplated” litigation, there must be evidence that litigation was reasonably in contemplation, which requires more than a vague or general apprehension of litigation.¹⁴ The question of whether records were prepared for use in mediation or settlement of litigation or contemplated litigation, and/or whether litigation is reasonably contemplated, is a question of fact that must be decided in the specific circumstances of each case.¹⁵

In the specific circumstances of this appeal, based on the [Niagara Health System’s] representations, I am satisfied that litigation was reasonably contemplated, and that there was more than a vague or general apprehension of litigation between it and the former managers. I am also satisfied that the information at issue consists of agreements that were made in settlement of this reasonably contemplated litigation, or records that were used in the settlement of the issues among the parties. Most of the records were prepared by counsel for the NHS or by counsel for the former managers. Other records were prepared by the NHS’s human resources staff. In all cases, the information was prepared to settle the issue of the cessation of the employees’ employment with NHS. In other words, I find that all the records at issue were prepared for use in the settlement of contemplated litigation.

The adjudicator upheld the Niagara Health System’s application of the solicitor-client privilege exemption to the information before her.

[40] I adopt the analysis in Order PO-3651 for the purposes of this appeal. Based on my review of all of the records as well as the town’s representations, I am satisfied that litigation was reasonably contemplated and there was more than a vague or general apprehension of litigation between the town and the affected party. I am also satisfied that Record 10 consists of an agreement made in settlement of this reasonably contemplated litigation. The town’s legal counsel and the affected party’s legal counsel prepared the agreement that forms Record 10 to settle the issue of the affected party’s termination of employment with the town. Therefore, I find that Record 10 was prepared for use in the settlement of contemplated litigation.

[41] Accordingly, I find that Record 10 was prepared for the town in contemplation of or for use in litigation, including settlement negotiations, and is therefore subject to branch 2 statutory litigation privilege. The town claims and I am satisfied that neither the town nor the affected party waived this privilege. On this basis, I find that Record 10 is subject to section 12 of the *Act*.

[42] Having found that the information at issue is exempt from disclosure under

¹⁴ See Order PO-2323.

¹⁵ See Order PO-3059-R.

section 12, the public interest override is not applicable. However, an institution is required to consider the public interest in the disclosure of the information at issue in exercising its discretion under section 12¹⁶, which I will consider, below. In addition, because I found that section 12 applies to exempt Record 10 from disclosure, it is not necessary for me to consider whether section 14(1) applies.

Issue C: Did the town exercise its discretion under section 12? If so, should this office uphold the exercise of discretion?

[43] The section 12 exemption is discretionary, which means that the town could choose to disclose Record 10, despite the fact that the town may withhold it under the *Act*. In applying section 12, the town was required to exercise its discretion. On appeal, the Commissioner may determine whether the town failed to do so. In addition, the Commissioner may find that the town erred in exercising its discretion where it did so in bad faith or for an improper purpose; where it took into account irrelevant considerations; or where it failed to take into account relevant considerations. In either case, I may send the matter back to the town for an exercise of discretion based on proper considerations.¹⁷ However, I may not substitute my own discretion for that of the town.¹⁸

[44] I upheld the town's application of section 12 to Record 10. As such, I must review the town's exercise of discretion under that exemption.

[45] The town submits that it exercised its discretion to apply section 12 to Record 10 properly. It submits that it exercised its discretion in good faith and for no improper purpose. The town claims that it considered the following: protecting the affected party's personal privacy and the confidentiality of the legal advice the town received with respect to the resolution of the dispute with the affected party. The town submits that its refusal to disclose the records complies with the personal privacy exemption of the *Act*. Further, the town submits that it must ensure that its position with respect to the resolution of the dispute is not disclosed to any party that may use such information against the town in future negotiations or in the resolution of similar disputes.

[46] The appellant submits that he supports the town exercising its discretion to release some of the information he requested. The appellant states that he does not intend to focus on an individual employee. Rather, the appellant states that he is interested in the overall financial implications the settlement may have to the taxpayers.

[47] Based on my review of the parties' representations, I am satisfied the town considered relevant factors in exercising its discretion and did not take into account irrelevant considerations in applying section 12 to withhold Record 10. With specific reference to any public interest in the record, I find that the disclosure of Record 10 would not address the concerns the appellant raised in relation to the "financial

¹⁶ See *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23.

¹⁷ Order MO-1573.

¹⁸ Section 43(2) of the *Act*.

implications” of the settlement agreement. In any case, I am satisfied the town considered relevant factors, including the nature of the information contained in Record 10, the importance of solicitor-client privilege, as well as the purposes of the *Act*, the appellant’s right to access and the affected party’s right to privacy, in exercising its discretion. I am also satisfied that the town did not consider irrelevant factors. Therefore, I uphold the town’s exercise of discretion under section 12 to withhold Record 10 from disclosure.

ORDER:

I uphold the town’s decision and dismiss the appeal.

Original Signed By _____
Justine Wai
Adjudicator

February 9, 2018 _____