

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3709

Appeal MA17-375

Township of Southgate

December 18, 2018

Summary: The Township of Southgate received a request under the *Municipal Freedom of Information and Protection of Privacy Act* for access to a management letter for 2016 prepared by an auditing company. The township denied access to the management letter pursuant to the exclusion at section 52(3)3 which removes labour relations and employment-related information from the scope of the *Act*. In this order, the adjudicator finds that the exclusion at section 52(3)3 does not apply to the management letter and orders the township to issue an access decision with respect to its disclosure.

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 Township of Southgate (the township) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a “[c]opy of [the] Auditor’s management letter for the year ending 2016.”

[2] The township denied access to the responsive record claiming the application of the exclusion for labour relations and employment-related information at section 52(3)3 of the *Act*.

[3] The requester, now the appellant, appealed the township’s decision.

[4] As a mediated resolution could not be reached, the file was transferred to the adjudication stage of the appeal process for an adjudicator to conduct an inquiry. I

prepared a Notice of Inquiry setting out the facts and issues on appeal, and sought and received representations from the township, initially.

[5] In its representations, the township advised that the auditing company that provided the township with the management letter may have an interest in the disclosure of the record. As a result, I sent a copy of the Notice of Inquiry (as well as a copy of the township's representations) to the company, inviting it to provide its view on the disclosure of the letter at issue. The company advised that it does not "take any position in respect of the matter" and stated that it "will refrain from making any representations."

[6] I then sought and received representations from the appellant, having provided her with a copy of the non-confidential portions of the township's representations, which I severed pursuant to the confidentiality criteria set out in *Practice Direction 7* of this office's *Code of Procedure*.

[7] The sole issue to be determined in this appeal is whether the exclusion for labour relations and employment-related information at section 52(3)3 applies to the management letter and excludes it from the scope of the *Act*.

[8] In this order, I find that the exclusion at section 52(3)3 has not been established and that the *Act* applies to the management letter. I order the township to issue an access decision to the appellant respecting disclosure of the record in accordance with the *Act*.

RECORD:

[9] The responsive record is a "management letter" dated May 31, 2017.

DISCUSSION:

Does the exclusion at section 52(3)3 for records containing labour relations and employment-related information apply to exclude the record from the scope of the Act?

[10] The township submits that the exclusion at section 52(3)3 applies to exclude the management letter from the scope of the *Act*. For the reasons that follow, I disagree and find that the management letter is subject to the *Act*.

[11] Section 52(3)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:

3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

[12] 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*. In the circumstances of this appeal, none of the exceptions in section 52(4) are relevant.

[13] 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

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

[14] 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.

Township's representations

[15] The township explains that from an auditing company that it engaged to prepare its audit, it received two letters regarding the financial management of the township: one was a confidential management letter (the record at issue) and the other was an open letter to members of council which was made available to the public.

[16] The township submits that it denied access to the management letter because it was prepared by the auditing company solely for the information of management and not intended for any other purpose. The township submits that the letter came from the auditing company, marked "private and confidential." It also submits that the auditing company subsequently confirmed that it was not necessary for the management letter to be provided to council as it was of the opinion that all required disclosures and any findings of a relevant nature were included in the open letter to members of council. As indicated above, although the auditing company was invited to comment on the potential disclosure of the management letter, it declined to do so.

[17] The township also submits that a motion for council to be provided with a copy of the management letter did not pass.

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

Appellant's representations

[18] The appellant submits that she has made two previous access requests to the township for management letters and was granted access to them both times. She attached copies of the township's management letters for 2014 and 2015 in support of her position. She also submits she made a similar request to another county and was granted access to that county's management letter. She states that the other county's management letter was prepared by the same auditing company that prepared the management letter for the township.

[19] The appellant further submits that the management letter should be disclosed to her because the audit process should be transparent, "perhaps the most transparent process in government." She also questions why the auditing company is entitled to "arbitrarily decide what is confidential."

Analysis and findings

Part 1: collected, prepared, maintained or used

[20] The township does not make any specific representations on how or whether it collected, maintained or used the record. However, it submits that the record was prepared by the auditing company and "contains matters which may be of interest to management." It further submits that it was prepared "solely for the information of management and not intended for any other purposes."

[21] Although it is clear that the township did not prepare the record at issue, given that the management letter was prepared by an auditing company for the township and given that the township has it in its custody or control, it was clearly collected and maintained by the township. As a result, I find that it meets the requirements of part 1 of the section 52(3)3 test.

Part 2: meetings, consultations, discussions or communications

[22] Again, although the township does not make any specific representations on how the record was collected, maintained or used for the purpose of meetings, consultations, discussions or communications, based on the content of the letter I accept that it meets this part of the test.

[23] From the township's representations and the letter itself, it is clear that it was prepared by the auditing company for the township's management. Given its content, which relates to matters regarding the financial management of the township, I accept that it was collected, maintained and used by the township for the purpose of meetings, consultations or discussions amongst management regarding the management of the township's financial affairs. Accordingly, I find that the management letter satisfies part 2 of the three-part test that must be met for section 52(3)3 to apply.

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

[24] The township does not make any submissions on how the management letter relates to labour relations or employment-related matters in which it has an interest, except for stating that letters submitted by the auditing company and addressed to the township's Treasurer or Chief Administrative Officer constitute an employment-related matter.

[25] 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. 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 Employment-related matters are separate and distinct from matters related to employees' actions.³ Having reviewed the parties' representations and the management letter itself which relates to financial matters, I find that it does not relate to employment-related matters.

[26] 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.⁴ Again, having reviewed the parties' representations and the management letter itself, I find that it relates to the financial management of the township does not relate to labour relations matters.

[27] From my review of the management letter, it is clear that it does not qualify as "labour relations" information as it does not refer to a collective bargaining relationship between the township and its employees. The management letter also does not appear to contain information about employment-related matters in which the township has an interest. Although the township submits that the letter constitutes an employment-related matter, I do not agree. The management letter does not relate to human resources or staff relations arising from the township's relationship with its employees or matters related to a collective bargaining relationship between itself and its employees. Rather, the management letter sets out matters arising from the auditing company's audit of the township's financial statements for 2016 that the company believed might be of interest to township management. These matters are financial in nature.

[28] For these reasons, I find that the management letter does not contain or relate

² Order PO-2157.

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

⁴ *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.); see also Order PO-2157.

to labour relations or employment-related matters in which the township has an interest. Accordingly, part 3 of test for section 52(3)3 to apply has not been established.

[29] As all parts of the three-part test must be met for the exclusion at section 52(3)3 to apply to the record, I find that it does not. Accordingly, I find that the management letter is not excluded from the scope of the *Act* and I will order the township to issue an access decision under the *Act* to the appellant with respect to it.

ORDER:

1. I do not uphold the township's decision that section 52(3)3 applies to exclude the record from the scope of the *Act*.
2. I order the township to issue an access decision to the appellant with respect to the record, in accordance with the provisions of the *Act*, treating the date of this order as the date of the request.
3. In order to verify compliance with this order, the township is required to provide me with a copy of the access decision issued to the appellant pursuant to Provision 2.

Original signed by _____
Catherine Corban
Adjudicator

December 18, 2018 _____