

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4001

Appeal MA18-447

Toronto Community Housing Corporation

January 26, 2021

Summary: In response to a request from a member of the media for access to records regarding its use of private investigation services, Toronto Community Housing Corporation denied access to 16 investigation reports. It relied on the exclusion in section 52(3) (labour relations and employment records) to withhold 14 investigation reports related to employee conduct, and on the discretionary exemption in section 12 (solicitor-client privilege) to withhold two investigation reports related to slip and fall claimants. The adjudicator upholds TCHC's decision to deny access to the reports under sections 12 and 52(3)3, and its exercise of discretion under section 12, and she dismisses the appeal.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, sections 12 and 52(3)3.

OVERVIEW:

[1] The appellant, a member of the media, made a request to Toronto Community Housing Corporation (TCHC) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records related to its use of private investigation services. In her request, the appellant specified that she sought access to the following:

Any and all [TCHC] records of payment (e.g. invoices, receipts) to private investigators or private investigation firms for services.

Any and all TCHC email correspondence that mentions the hiring of private investigators or private investigation firms, the work done by

private investigators or private investigation firms, and any proposed action by

TCHC based on information obtained by private investigators or private investigation firms.

Any and all reports prepared for TCHC by private investigators or private investigation firms.

[2] Regarding her request for records of payment, the appellant subsequently clarified that she sought access to a list of invoices received by TCHC in 2013 from private investigation firms showing the total amount and the names of the firms, and to copies of invoices received between January 1, 2014 and May 15, 2018 from private investigation firms.

[3] TCHC issued an access decision granting the appellant partial access to the records responsive to her request. TCHC disclosed the list of 2013 invoices, in its entirety, and severed copies of the remaining responsive invoices. TCHC denied access to the investigation reports, relying on the exclusion in section 52(3) (labour relations and employment records) and the exemptions in sections 12 (solicitor-client privilege), 7(1) (advice or recommendations) and 14 (personal privacy) of the *Act*. The appellant was not satisfied with TCHC's decision and appealed it to the Information and Privacy Commissioner of Ontario (IPC).

[4] The IPC attempted to mediate the appeal. During mediation, TCHC issued a revised access decision claiming section 12 for the withheld portions of the 2014-2018 invoices. In its revised access decision, it named the three investigation firms that prepared the 11 investigation reports responsive to the access request, and it disclosed one complete report and one partial report. The appellant, noting the public interest override in section 16 of the *Act*, asserted that disclosure of all the reports was in the public interest. A mediated resolution of the appeal was not possible and it was moved to the adjudication stage of the appeal process.

[5] An IPC adjudicator conducted an inquiry under *Act*, inviting and receiving initial and reply representations from the parties. During the inquiry, TCHC located seven additional records responsive to the appellant's request, five investigation reports that TCHC withheld in full pursuant to sections 52(3), 12 and 14 of the *Act*, and two invoices that TCHC disclosed in part, relying on section 12 to withhold some portions. Finally, TCHC provided an index of the records at issue in the appeal. The appeal was then transferred to me to continue the adjudication process.

[6] In this order, I uphold TCHC's decision that section 52(3)3 excludes 14 of the 16 investigation reports from the application of the *Act* and that the remaining two reports at issue qualify for exemption under section 12. I also uphold TCHC's exercise of discretion under section 12 and I dismiss the appeal.

RECORDS:

[7] TCHC did not provide copies of the records to the IPC. It provided an index of the records in its representations that included a description and date for each record, and a more detailed Table of Records attached as an exhibit to an affidavit. Non-confidential versions of the index and table were shared with the appellant. The non-confidential index is reproduced below. The 16 records at issue are all investigation reports prepared by four investigation firms, A, B, C and D, as set out in the index below.

Record Number and Description	Exclusion/exemptions claimed
A-1. Investigation Report Pertaining to [Subject]	52(3), 12 and 14(1)
A-2. Investigation Report Pertaining to [Subject]	52(3), 12 and 14(1)
A-3. Reporting Letter re: [Subject] – HR Issue	52(3), 12 and 14(1)
A-4. Investigation Report Pertaining to [Subject]	52(3), 7(1), 12 and 14(1)
A-5. Investigation Report Pertaining to [Subject]	52(3), 7(1), 12 and 14(1)
A-6. Investigation Report Pertaining to [Subject]	52(3), 12 and 14(1)
A-7. Investigation Report Pertaining to [Subject]	52(3), 12 and 14(1)
A-8. Investigation Report Pertaining to [Subject]	52(3), 12 and 14(1)
A-9(a). Investigation Report Pertaining to [Subject]	52(3), 7(1), 12 and 14(1)
A-9(b). Reporting Letter re: [Subject] – HR Issue	52(3), 7(1), 12 and 14(1)
A-9(c). Reporting Letter re: [Subject] – HR Issue	52(3), 7(1), 12 and 14(1)
A-10(a). Investigation Report re: [Subject]	12 and 14(1)
B-1. Investigation Report	52(3), 12 and 14(1)
C-1. Confidential Report	52(3), 7(1), 12 and 14(1)
C-2. 2012-006: Toronto Community Housing Corporation Internal Investigative Report: Phase II	52(3), 7(1), 12 and 14(1)
D-1(a). Investigation Report re: [Subject]	12 and 14(1)

ISSUES:

- A. Does section 52(3) of the *Act* exclude 14 of the 16 investigation reports from the application of the *Act*?
- B. Does the discretionary exemption in section 12 apply to the two remaining reports?
- C. Did TCHC exercise its discretion under section 12? If so, should its exercise of discretion be upheld?

DISCUSSION:

A. Does section 52(3) of the *Act* exclude 14 of the 16 investigation reports from the application of the *Act*?

[8] Section 52(3) of the *Act* states:

Subject to subsection (4), this Act does not apply to records collected, 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, 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.

[9] If any one of paragraphs 1, 2 or 3 of 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*.

[10] For the collection, preparation 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 The term “employment of a person” refers to the relationship between an employer and an employee, and “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 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.³

TCHC’s representations

[11] In its non-confidential representations that were shared with the appellant, TCHC states that it is an employer of over 1,700 people and an operator of approximately 2,100 buildings throughout the City of Toronto. It explains that its employees work at several locations throughout Toronto and many self-report their activities to superiors because they do not attend a central location for work. TCHC adds that the dispersion of its workforce makes it difficult and impractical to oversee employees’ daily activities, and, therefore, when it occasionally receives complaints or information concerning its employees’ conduct and activities, it takes its responsibility to investigate these concerns seriously. TCHC states that it initially conducts internal investigations of employee conduct concerns, and if it deems that further investigation is warranted, it engages independent third party investigation firms to conduct investigations and to provide it with information, advice and recommendations in response to the concerns.

[12] TCHC states that 14 of the records at issue, excluding the A-10(a) and D-1(a) reports, were prepared to investigate employee conduct concerns. It states that these 14 investigation reports relate to the employment of certain individuals at TCHC, their activities, and to anticipated proceedings arising from the potential termination of their employment. TCHC asserts that these 14 reports relate to matters in which it is acting as the employer, and terms and conditions of employment or human resources questions are at issue. TCHC argues that there is a connection between its employees, who are the subjects of these reports, and the employment responsibilities of these individuals at TCHC.

[13] TCHC claims that all three paragraphs of section 52(3) of the *Act* apply to these 14 investigation reports. Regarding paragraph 3 of section 52(3), TCHC submits that it collected and maintained these 14 reports for its own use during internal consultations, discussions and communications about employment matters relating to the employees

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

whose conduct was investigated. TCHC asserts that none of the exceptions to section 52(3) found in section 52(4) of the *Act* applies in respect of these reports, which are neither agreements with the employee, nor employee expense accounts.

[14] TCHC also provides an affidavit sworn by its General Counsel and Corporate Secretary (the TCHC Affidavit) who confirms he is responsible for overseeing TCHC's processing of access requests, and describes the steps TCHC took to process the appellant's access request and locate responsive records. Exhibit "C" to the TCHC Affidavit titled "Table of Records at Issue in Appeal MA18-447" provides details about each record at issue under the following headings: Record, Pages, Description of record, Date of record, TCHC's decision, Exclusion/exemptions claimed.

[15] Exhibit "C" confirms that the A-1 to A-8, and A-9(a), (b) and (c) reports were prepared for or requested by TCHC's Director of Labour Relations and Legal Counsel. It also describes the specific employee conduct that was investigated in each one of these A reports and confirms that these reports led to various employment outcomes for the individuals investigated. Exhibit "C" also confirms that the C-1 and C-2 reports relate to the same subject matter and were prepared for TCHC's General Counsel, and it describes the nature and origin of the employee conduct concern investigated. Finally, Exhibit "C" confirms that the B-1 report was requested by a TCHC investigator at the direction of the Director of Compliance and Legal Counsel, and describes the employee conduct concern investigated.

The appellant's representations

[16] In her representations, the appellant argues that access to private investigators' reports lies squarely in the public interest since TCHC is a publicly funded housing company and taxpayers have a right to know how and why a publicly funded corporation is choosing to spend its funds on private investigators. The appellant states that she does not seek access to personal information or the names of people mentioned in the reports; she seeks access only to the content of the reports that will show what services were requested by, and provided to, TCHC.

[17] Regarding section 52(3) specifically, the appellant asserts that it likely does not apply to every investigation where a private investigator produced a report and that it should not be used as a basis to fully exclude all the reports. The appellant argues that TCHC should sever any information in the reports that could harm labour relations or employment-related matters, along with the names of any employees the reports might concern, and then disclose the remaining information in the reports. The appellant relies on section 4(2) of the *Act* in support of her submission that the records should be disclosed in severed form.

[18] In her reply representations, the appellant maintains her argument that section 52(3) should not fully exclude the records from disclosure. She asserts that TCHC has failed to show how the actions of private investigators detailed in the records could harm employment-related matters once identifying information, like the name of the

person investigated, has been severed.

Analysis and findings

[19] Section 52(3) is an exclusion that operates to exclude records from the application of the *Act*. If I find that the section 52(3) exclusion applies, the result is that the record, in its entirety, is not subject to the *Act* and none of the other sections of the *Act* can apply to it, including the severance obligation in section 4(2) of the *Act* on which the appellant relies. The IPC has consistently taken the position that the whole record must be considered when determining the application of the exclusions in section 52(3) and its provincial counterpart.⁴ I follow the whole-record approach in this appeal.

[20] As I note above, if any of paragraphs 1, 2 or 3 of section 52(3) applies to the records, the application of section 52(3) will have been established and the records will be excluded from the application of the *Act*. Based on my review of the parties' representations, I am satisfied that paragraph 3 of section 52(3) applies to exclude the 14 reports from the application of the *Act*. Accordingly, I will address only section 52(3)3 of the *Act* in my reasons below.

[21] For section 52(3)3 to apply, TCHC must establish that:

1. the records were collected, prepared, maintained or used by it 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 labor relations or employment-related matters in which TCHC has an interest.

[22] While I do not have the records before me, I am satisfied that I have sufficient evidence from the TCHC Affidavit to determine whether section 52(3)3 applies to the 14 reports. Exhibit "C" of the TCHC Affidavit establishes that all but two of the reports are investigation reports pertaining to an employee and that they were prepared for TCHC for use in giving legal advice regarding the employment status of the employees investigated. This affidavit evidence satisfies all three parts of the test for the application of section 52(3)3; the 14 reports are records that were prepared for and maintained and used by TCHC in relation to communications about employment-related matters in which TCHC has an interest. As the employer of the individuals investigated, TCHC clearly has an interest in the employment-related matters set out in the investigation reports.

⁴ Orders MO-3163, PO-3572 and PO-3642, and recently, MO-3968.

[23] For the reasons above, I find that section 52(3)3 applies to exclude the A-1, A-2, A-3, A-4, A-5, A-6, A-7, A-8, A-9(a), A-9(b), A-9(c), C-1, C-2 and B-1 reports, in their entirety, from the application of the *Act*.

B. Does the discretionary exemption in section 12 apply to the two remaining reports?

[24] TCHC claims that the solicitor-client privilege exemption at section 12 of the *Act* applies to the two remaining reports, A-10(a) and D-1(a). Section 12 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.

[25] Section 12 encompasses both common law solicitor-client privilege ("subject to solicitor-client privilege") and statutory solicitor-client privilege ("prepared by or for counsel employed or retained by an institution..."). Establishing that either common law or statutory privilege applies engages the application of this exemption. TCHC asserts that the two reports that remain at issue, A-10(a) and D-1(a), qualify for exemption under both the common law and statutory solicitor-client privilege. Because I find below that the two reports qualify for exemption under the statutory privilege (prepared by or for TCHC counsel for use in giving legal advice), I will address only that privilege.

TCHC's representations

[26] In its representations, TCHC submits that the A-10(a) and D-1(a) investigation reports relate to alleged slip and fall claimants and were prepared for and used by its in-house legal counsel in giving TCHC legal advice on the incidents that are the subject of the reports. TCHC submits that the A-10(a) report was requested by the Manager of Risk Management and Insurance, and it provides information in its confidential representations about the nature of the incident investigated and the purpose of the investigation. Exhibit "C" to the TCHC Affidavit confirms that the A10-(a) report is a reporting letter marked privileged and confidential, prepared for TCHC's Director of Risk Management and for TCHC legal counsel, and it describes the reason for the investigation.

[27] TCHC submits that the D-1(a) report was requested by TCHC's insurer and it describes the incident investigated and the purpose of the investigation. Exhibit "C" confirms that the D-1(a) report was prepared for TCHC's insurer and TCHC legal counsel for a specific legal use, and it describes the subject matter investigated and the reason for the investigation. Exhibit "C" also specifies the legal use of the report by legal counsel.

The appellant's representations

[28] The appellant argues that section 12 should not fully exempt the records from disclosure. She challenges TCHC's argument that statutory communication privilege covers the preparation of the records on the basis that the records were not prepared by lawyers and, therefore, do not contain privileged legal advice. She argues that if a non-lawyer was retained to investigate and report, no solicitor-client privilege should attach to that report. The appellant asserts that the reports are not automatically privileged because they were sent to a lawyer. She concludes by stressing that she does not seek access to legal advice that counsel provided after reviewing the reports; she seeks access to the reports prepared by third parties.

Analysis and finding

[29] While I do not have the A-10(a) and D-1(a) reports before me, I am satisfied that I have sufficient evidence from the TCHC Affidavit to determine whether section 12 applies to them. The affidavit evidence before me establishes that the A-10(a) and D-1(a) reports were prepared for legal counsel employed by TCHC for their use in giving legal advice in relation to slip and fall claimants, as required for the application of the section 12 exemption.

[30] The appellant's argument—that the reports are not privileged because they were not prepared by lawyers—disregards the wording of the exemption, which does not impose a requirement that the records be prepared by counsel. Section 12 permits TCHC to refuse to disclose a record that was prepared for TCHC counsel for use in giving legal advice to TCHC; the TCHC Affidavit confirms that the A-10(a) and D-1(a) reports are two such records. For these reasons, I find that the A-10(a) and D-1(a) reports qualify for exemption under section 12, subject to my review of TCHC's exercise of discretion.

C. Did TCHC exercise its discretion under section 12? If so, should its exercise of discretion be upheld?

[31] The section 12 exemption is discretionary and permits TCHC to disclose information, despite the fact that it could withhold it. TCHC must exercise its discretion, and, in doing so, must consider only relevant factors. On appeal, I may determine whether TCHC failed to exercise its discretion, or that it erred in exercising its discretion where it did so in bad faith or for an improper purpose, it took irrelevant considerations into account, or it failed to take into account relevant considerations.

[32] Relevant considerations may include the purposes of the *Act*, including the principles that information should be available to the public and exemptions from the right of access should be limited and specific. Relevant considerations may also include the wording of the exemption and the interests it seeks to protect, whether disclosure will increase public confidence in the operation of the institution, the nature of the information and the extent to which it is significant and/or sensitive to the institution,

the requester and any affected person, and the historic practice of the institution with respect to similar information. Additional unlisted considerations may also be relevant.⁵

The parties' representations

[33] TCHC submits that it exercised its discretion under section 12 appropriately after considering the wording and purpose of the exemption. It asserts that it exercised its discretion in good faith. TCHC explains that it considered the fact that the appellant is a journalist, that she does not seek her own personal information, and that she does not have a sympathetic or compelling reason to justify disclosure.

[34] The appellant does not directly address TCHC's exercise of discretion in her representations, but she alludes to relevant considerations. The appellant argues that there is a public interest in disclosure of the reports because disclosure would inform citizens about the TCHC. She asserts that if TCHC is using public funds to hire private investigators at the same time that it has a \$1.6 billion repair backlog for the public housing it provides, then the public should be informed about what services the private investigators provided.

Analysis and finding

[35] TCHC's representations establish that it exercised its discretion under section 12 when it decided to withhold the A-10(a) and D-1(a) reports and that, in doing so, it considered relevant factors.

[36] I am satisfied that TCHC appropriately considered the wording of the solicitor-client privilege exemption and the important interests it seeks to protect, and the fact that the appellant does not seek access to her personal information and does not have a sympathetic or compelling need for the reports withheld under section 12. I am also satisfied that, implicit in TCHC's decision and representations is its consideration of the fact that the information in the two reports is significant and sensitive both to it and to the affected persons who are the subjects of the two investigation reports. These are also relevant considerations.

[37] The appellant's public interest arguments are valid and I note that TCHC addressed these public interest concerns, to some degree, when it disclosed to her information from the invoices it paid to the investigation firms that prepared the A-10(a) and D-1(a) reports. Finally, I have no information before me to suggest that TCHC exercised its discretion in bad faith or for an improper purpose.

[38] For the above reasons, I find that TCHC exercised its discretion under section 12 in deciding to withhold the A-10(a) and D-1(a) reports, that it considered relevant

⁵ Orders P-344 and MO-1573.

factors in its exercise of discretion, and that it did not exercise its discretion in bad faith or for an improper purpose.

ORDER:

I uphold TCHC's decision to withhold the A-10(a) and D-1(a) reports and its exercise of discretion under section 12, and its decision that the exclusion at section 52(3)3 of the *Act* applies to the remaining 14 reports at issue. I dismiss the appeal.

Original signed by _____
Stella Ball
Adjudicator

January 26, 2021 _____