

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4255

Appeal MA20-00371

Town of Grimsby

September 22, 2022

Summary: The Town of Grimsby (the town) received an access request, pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), for a certain investigation report. The town's position is that the report is employment-related. The town denied access to the report under various exemptions in the *Act*. The town later issued a revised decision relying on the exclusion at section 52(3) (labour relations or employment) of the *Act*. In this order, the adjudicator upholds the town's decision to withhold the report under section 52(3)3, and dismisses the appeal.

Statutes Considered: The *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 Town of Grimsby (the town) received an access request, pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), for a certain investigation report. The town's position is that the report is employment-related. The town issued a decision to deny access to the report, under various exemptions in the *Act*.

[2] The requester, now the appellant appealed the town's decision to the Information and Privacy Commissioner of Ontario (the IPC). A mediator was appointed to explore resolution.

[3] During mediation, the town issued a revised decision, relying on various exemptions, as well as the exclusion at section 52(3) (labour relations and employment) of the *Act*, to deny access to the record in full. The appellant confirmed his interest in pursuing access to the record and raised the possible application of the public interest override in section 16 of the *Act* in relation to the exemption claims. Accordingly, the public interest override was added as an issue in this appeal.

[4] Mediation did not resolve the issues on appeal and the appellant confirmed he wished to proceed with the appeal to adjudication. As a result, the appeal was moved to the adjudication stage, where an adjudicator may conduct an inquiry.

[5] As the adjudicator of this appeal, I began a written inquiry under the *Act* by sending a Notice of Inquiry, setting out the facts and issues on appeal, to the town and a party whose interests may be affected by the appeal (an affected party). I sought and received written representations from the town and the affected party in response. I then sought and received representations from the appellant in response to the Notice of Inquiry and the non-confidential portions of the town's representations, and a summary of the affected party's representations. Further representations were solicited and exchanged among the parties in accordance with the IPC's *Practice Direction 7*.

[6] For the reasons that follow, I uphold the town's decision because I find that the report is excluded from the scope of the *Act* under section 52(3)3. As a result of this finding, it is not necessary to consider any of the alternate claims made by the town. I also find that section 16 is not applicable because it does not apply to records that are excluded from the *Act*.

RECORDS:

[7] The record at issue in this appeal is an investigation report (including an appendix) and an executive summary, totalling about 400 pages. The town has withheld the report in its entirety.

DISCUSSION:

[8] By way of background, the request is for the third party investigation report into a matter that was addressed at a certain town council meeting. Before that meeting, a number of workplace misconduct allegations within the town were raised. The town's council then held a special closed-session meeting that resulted an open-session resolution, which included statement that town council appoint the town clerk to hire a third party to investigate any allegations that may arise from the matter.

[9] The report at issue is the result of the third party investigation referred to in the

resolution. Given a certain statement in the open-session resolution,¹ the appellant questions the town's assertion that the report is employment-related.

[10] However, having reviewed the report, I confirm that it is a third-party investigation report concerning potential town employee workplace misconduct, containing findings and recommendations (including potential disciplinary action).

[11] The sole issue in this order is whether the exclusion at section 52(3) applies to the report.

[12] The town's position is that sections 52(3)1 and 52(3)3 apply to the report. For the reasons that follow, I find that the town has established that the report is excluded under section 52(3)3. As a result, it is not necessary to consider the town's claim that section 52(3)1 also applies.

[13] Section 52(3) of the *Act* excludes certain records held by an institution that relate to labour relations or employment matters. If the exclusion applies, the record is not subject to the access scheme in the *Act*, although the institution may choose to disclose it outside of the *Act's* access scheme.²

[14] The purpose of this exclusion is to protect some confidential aspects of labour relations and employment-related matters.³

[15] Section 52(3)3 says:

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.

[16] If section 52(3) applies to a record, and none of the exceptions found in section 52(4) applies, the record is excluded from the scope of the *Act*.

[17] If section 52(3) applied at the time the record was collected, prepared, maintained or used, it does not stop applying at a later date.⁴

¹ Although the resolution in question was open-session, I will not specify details about which parts of the resolution the appellant refers to, to minimize the possibility of identification of individual(s) involved through this public order.

² Order PO-2639.

³ *Ontario (Ministry of Community and Social Services) v. John Doe*, 2015 ONCA 107 (CanLII).

⁴ *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. 509.

[18] When determining whether the section 52(3) exclusion applies, the record is examined as a whole, rather than by individual pages, paragraphs, sentences, or words. This whole-record method of analysis has also been described as the "record-by-record approach."⁵

What types of records are covered by this exclusion?

[19] The type of records excluded from the *Act* by section 52(3) are those relating to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue.⁶

[20] Section 52(3) does not exclude all records concerning the actions or inactions of an employee of the institution simply because their conduct could give rise to a civil action in which the institution could be held vicariously liable for its employees' actions.⁷

"In relation to"

[21] For the collection, preparation, maintenance or use of a record to be "in relation to" one of the three subjects mentioned in this section, there must be "some connection" between them.⁸

[22] The "some connection" standard must, however, involve a connection relevant to the scheme and purpose of the *Act*, understood in their proper context. For example, given that accountability for public expenditures is a core focus of freedom of information legislation, accounting documents that detail an institution's expenditures on legal and other services in collective bargaining negotiations do not have "some connection" to labour relations.⁹

"Labour relations"

[23] The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to similar relationships. The meaning of "labour relations" is not restricted to employer- employee relationships.¹⁰

⁵ See, for example, Orders M-352, PO-3642, MO-3798-I, MO-3927 and MO-3947.

⁶ *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.). The CanLII citation is "2008 CanLII 2603 (ON SCDC)."

⁷ *Ministry of Correctional Services*, cited above.

⁸ Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

⁹ Order MO-3664, *Brockville (City) v. Information and Privacy Commissioner, Ontario*, 2020 ONSC 4413 (Div Ct.).

¹⁰ *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.

“Employment of a person”

[24] 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.¹¹

Section 52(3)3: labour relations or employment-related matters in which the institution has an interest

[25] 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 use 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.

[26] The town and the affected party submit that the report meets this three-part test is met.¹²

[27] The appellant states that the town’s representations “largely demonstrate to a sufficient degree why the [report] should be excluded from the *Act*, as far as it relates to employment matters of [a specified town employee].” However, he submits that the town’s representations do not establish that other matters that may be found in the report, including information related to the mayor and members of town council are excluded under section 52(3).

[28] The investigator’s mandate was to investigate “any allegations” that may arise from the main subject matter of the town council resolution. I appreciate that this might imply that matters other than potential town employee misconduct were investigated, particularly given a statement in the resolution that the appellant flagged.¹³

[29] However, and for the reasons I articulate more fully below, I find that, notwithstanding the resolution, the report, taken as a whole and on its face, was clearly prepared for the town in relation to communications about employment-related matters. The fact that the report may also discuss other matters does not remove it

¹¹ Order PO-2157.

¹² In making my decision in this appeal, while I have considered both the confidential and non-confidential representations of the town, as well as the confidential representations of the affected party, I will only be referring to the town’s non-confidential representations in this order.

¹³ See Note 1.

from the scope of the section 52(3) exclusion. I cannot consider whether the exclusion at section 52(3) applies to some parts of the record, and not others. As mentioned, determining whether the section 52(3) exclusion applies involves examining the record as *a whole*, rather than by individual pages, paragraphs, sentences, or words. This whole-record method of analysis means that I cannot isolate portions of the record (even if they discuss the mayor and/or members of town council) to determine whether they meet the exclusion at section 52(3).¹⁴

[30] The record as a whole is about an investigation into workplace-related complaints and alleged workplace misconduct. I will now turn to the three-part test under section 52(3).

Part 1: collected, prepared, maintained or used

[31] The town submits that the report and its contents were collected, prepared, maintained, and/or used on behalf of and by the town for the purpose of conducting and considering the results of a labour relations and employment investigation. The town explains that the investigator was required to prepare the report for the town's council, on behalf of the town.

[32] Based on my review of the report and the parties' representations, I find that the report meets part one of the test. There is no dispute that it was prepared by a third-party investigator to investigate certain matters relating to allegations of town employee workplace misconduct and workplace complaints. Therefore, I find that it is clear on the face of the report that it was collected, prepared, maintained, or used by the town or on its behalf.

Part 2: meetings, consultations, discussions or communications

[33] The town submits that the report and its contents were collected, prepared, maintained or used in relation to meetings,¹⁵ consultations, discussions, and communications. The town submits, and I find, that as part of the investigation the investigator held several interviews and consultations with council and staff, the details of which can be found in the appendix of the report. Furthermore, the town submits, and I accept, that once the investigator presented the report to town council with findings, reasoning, and recommendations, town council held a lengthy in-camera discussion on a specified date, to determine next steps and whether to approve the report's recommendations. The town also submits, and I accept, that the town's legal counsel had communications with all participants, implicated third parties, and others in

¹⁴ Given some of the appellant's representations, I wish to clarify to him that this is distinguishable from circumstances where the investigation is of the mayor himself or herself and/or members of town council themselves, and not an institution's employee.

¹⁵ The town states that at a closed meeting of town council, the terms of reference for the investigation included directions to prepare and submit the report to council with findings, reasoning and recommendations.

relation to the report. For these reasons, I find that the report was collected, prepared, maintained or used in relation to consultations, discussions or communications, and therefore meets part two of the test.

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

[34] Finally, I find that the consultations, discussions, or communications were about employment-related matters in which the town has an interest.

[35] The phrase “labour relations or employment-related matters” has been found to apply in the context of, for example: a job competition;¹⁶ an employee’s dismissal;¹⁷ a grievance under a collective agreement;¹⁸ a “voluntary exit program;”¹⁹ and a review of “workload and working relationships.”²⁰

[36] The phrase “labour relations or employment-related matters” has been found *not* to apply in the context of: an organizational or operational review²¹ or litigation in which the institution may be found vicariously liable for the actions of its employee.²²

[37] 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.²³

[38] The records 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. Matters related to the actions of employees, for which an institution may be responsible are not employment-related matters for the purpose of section 52(3).²⁴

[39] The town submits, and I find, based on my review of the report, that the report relates to an investigation that covered many employment-related matters, including: complaints and allegations regarding possible workplace-related misconduct; an analysis of employment contracts; the hiring and firing of staff; and an analysis of employee roles and responsibilities. Given the nature of what was being investigated, and notwithstanding a statement in the council resolution that suggests otherwise, I have no difficulty finding that the consultations, discussions and communications are about labour relations or employment-related matters in which the institution has an interest. Accordingly, I find that the report meets part three of the test.

¹⁶ Orders M-830 and PO-2123.

¹⁷ Order MO-1654-I.

¹⁸ Orders M-832 and PO-1769.

¹⁹ Order M-1074.

²⁰ Order PO-2057.

²¹ Orders M-941 and P-1369.

²² Orders PO-1722, PO-1905 and *Ontario (Ministry of Correctional Services) v. Goodis*, cited above.

²³ *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above.

²⁴ *Ministry of Correctional Services*, cited above.

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

[40] If a record falls within any of the exceptions in section 52(4), the record is not excluded from the application of the *Act*. Section 52(4) states that the *Act* applies to certain agreements, or an expense account of certain specifications, involving the institution.²⁵

[41] The town submits, and I find, that the report does not fall within any of the exceptions listed in section 52(4) because it is not an agreement or expense account.

[42] For these reasons, I find that the report is excluded from the scope of the *Act* under section 52(3)3, and I dismiss the appeal.

ORDER:

I uphold the town's decision to withhold the report under section 52(3)3, and dismiss the appeal.

Original Signed by: _____

Marian Sami
Adjudicator

September 22, 2022

²⁵ Section 52(4) of the *Act* states that the *Act* applies to the following records:

1. An agreement between an institution and a trade union.
2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.
3. 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.
4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment.