



**Information and Privacy
Commissioner/Ontario**
**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER M-883

Appeal M_9600268

The Corporation of the Township of Alberton



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NATURE OF THE APPEAL:

The Corporation of the Township of Alberton (the Township) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to all records relating to the requester which were collected by Council, members of Council and/or their representatives concerning a particular complaint. The requester is a former employee of the Township. The Township denied access to the records pursuant to section 12 of the Act (solicitor-client privilege).

The requester appealed the Township's decision to deny access.

During the mediation stage of the appeal, the appellant narrowed the scope of her appeal to cover only the records which are in the possession of the Township's solicitor.

Within the 35-day period provided in the Confirmation of Appeal letter for raising additional discretionary exemptions, the Township issued a supplementary decision letter. In its supplementary decision, the Township stated that section 52(3) of the Act, (the labour relations and employment information exclusion) does not apply to any of the records at issue with the exception of one specific record. This record consists of the agreement between the Township, the appellant and two other individuals, a copy of which is already in the appellant's possession.

In its supplementary decision letter, the Township also raised the application of sections 6(1)(b), 8(1)(b), 8(2)(a), 10, 11(c), (e) and (f), 13, 14 and 38 of the Act to the records.

During the mediation stage of the appeal, the appellant took the position that additional records responsive to her request should exist. Although the Township acknowledged that there are additional records which are potentially responsive to the appellant's request, it took the position that these records belong to its solicitor and are neither in the custody of the Township nor under its control. I previously determined that these two issues (reasonableness of search and custody and control) should be addressed as preliminary issues in an interim order. Order M-824 resolved the two preliminary issues. In this order, I will now consider the remaining substantive issues arising from the appeal.

Subsequent to the issuance of Order M-824, the Township indicated that it was no longer relying on sections 6(1)(b), 8(1)(b), 8(2)(a), 10 and 38(c) of the Act to deny access to the records. The Township reiterated its position that section 52(3) applies to the records. In the alternative, the Township denies access to the records pursuant to the exemptions contained in sections 11(c), (e) and (f), 12, 13 and 14 of the Act.

The records at issue consist of nine letters from the Township's solicitor, four of which are addressed to the Township and five of which are addressed to five individuals (the affected persons). All the records relate to the complaint of sexual and other harassment made by the appellant, and to the employment status of the appellant and other identifiable individuals.

A Notice of Inquiry was provided to the appellant, the Township and the affected persons. Representations were received from the appellant and the Township.

The interpretation of section 52(3) is a preliminary issue which goes to the Commissioner's jurisdiction to continue the inquiry. I will, therefore, first consider the application of this section to the records.

DISCUSSION:

JURISDICTION: LABOUR RELATIONS OR EMPLOYMENT-RELATED RECORDS

The Township submits that all three subsections of section 52(3) apply to the records.

The appellant submits that section 52(3) does not apply to the records and that it was not the intention of the legislation to prevent an individual from obtaining access to records containing personal information.

Section 52(3) is record-specific and fact-specific. If this section applies to a specific record, in the circumstances of a particular appeal, and none of the exceptions listed in section 52(4) are present, then the records are excluded from the scope of the Act and are not subject to the Commissioner's jurisdiction. As a result, if I find that I do not have jurisdiction to deal with the records, I need not consider the substantive exemptions claimed by the Township.

Section 52(3) of the Act reads as follows:

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.

(4) This 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.

I will first consider the possible application of section 52(3)3 to the records. In order for a record to fall within this section, the Township must establish that:

1. the record was collected, prepared, maintained or used by the Township or on its behalf; **and**
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 Township has an interest.

[Order P-1242]

Requirement 1 and 2

The Township submits that the records were prepared by its solicitors, for and on behalf of the Township, for use in meetings, discussions or negotiations with the appellant and the affected persons. Having reviewed the records, I am satisfied that the records meet Requirements 1 and 2.

Requirement 3

The Township submits that the appellant was an employee of the Township at the time that she complained of sexual and other harassment and that the meetings, discussions and negotiations for which the records were prepared were employment-related. I accept that the appellant was an employee of the Township and that the records which relate to her complaint are employment-related.

The remaining component under section 52(3)3 is whether the investigation into the appellant's complaint can be characterized as a matter "in which the institution has an interest".

The Township submits that its interest in the matter is a legal interest in that the records relate to the appellant's allegations that the Township has violated the Human Rights Code and the Labour Relations Act. The Township submits that the records and, therefore, the outcome of the investigation would affect the Township's legal rights and obligations under the legislation.

In Order P-1242, former Assistant Commissioner Tom Mitchinson addressed a similar issue in determining the interest of a different institution and commented that "[a]n "interest" must be a legal interest in the sense that the matter in which the Ministry has an interest must have the capacity to affect the Ministry's legal rights or obligations". I agree with the former Assistant Commissioner's reasoning and approach and adopt it for the purposes of this appeal.

In the same order, based on an extensive review of case law, former Assistant Commissioner Tom Mitchinson also concluded that:

if the Ministry fails to act on a harassment complaint, it risks potential liability under section 41(1) of the [Human Rights] Code, while an effective WDHP [Workplace Discrimination and Harassment Program] investigation may reduce or preclude such liability. In my view, therefore, the WDHP investigation has the potential to affect the Ministry's legal rights and/or obligations, and for this reason I find that the WDHP investigation is properly characterized as a matter "in which the institution has an interest".

I have carefully considered the evidence before me and I find that, like the WDHP investigation described in Order P-1242, the Township's investigation was carried out in response to complaints of harassment. I accept that the Township's interest in the matter can be characterized as a legal interest as the issues relate directly to the Township's obligations as employer under both the Human Rights Code and the Labour Relations Act. Accordingly, I find that the third requirement under section 52(3)(3) has been met.

In summary, I find that the records were collected, prepared, maintained and/or used by the Township in relation to meetings, consultations, discussions or communications about employment-related matters in which the Township has an interest. None of the exceptions in section 52(4) apply in the circumstances of this appeal. I find, therefore, that the records fall within the parameters of section 52(3)3 and are therefore excluded from the scope of the Act.

Because of the finding I have made, I need not consider the application of the exemptions claimed by the Township under the Act.

ORDER:

I uphold the decision of the Township.

Original signed by: _____

December 31, 1996

Mumtaz Jiwan
Inquiry Officer