

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3386

Appeal MA16-19

The Corporation of the Municipality of St. Charles

November 30, 2016

Summary: The appellant requested records relating to a workplace harassment investigation from the Municipality of St. Charles under the *Municipal Freedom of Information and Protection of Privacy Act*. The Municipality denied access to the responsive records, under the exemptions in section 6(1)(b), 12 and 38(b) of the *Act*, and under section 52(3) of the *Act*, which excludes certain records related to labour relations or employment matters from the scope of the *Act*. Section 52(3)3 applies to the records, so they are excluded from the scope of the *Act*. The appeal is dismissed.

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

OVERVIEW:

[1] The Corporation of the Municipality of St. Charles (the municipality) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

1. Complaints under the municipality's *Respect in the Workplace* policy involving the requester.
2. Minutes of General Government Committee meetings relating to the complaints.

3. Documents relating to instructing an independent third party to investigate the complaints.
4. Documents relating to the complaint investigation.
5. A copy of the investigator's report or reports.
6. Copies of all correspondence, with documents, from the law firm which retained the investigator and advised on disciplinary measures imposed on the requester.

[2] The municipality issued a decision denying access in full to the responsive records. The municipality withheld the complaints and minutes under section 6(1)(b) of the *Act* (closed meeting). The remaining records were withheld under section 12 of the *Act* (solicitor-client privilege).

[3] The requester (now the appellant) appealed the municipality's decision.

[4] During mediation, the municipality issued a revised decision to the appellant affirming its reliance on sections 6(1)(b) and 12 and advising it was also relying on section 52(3) of the *Act*, which excludes certain records relating to employment or labour relations matters from the scope of the *Act*, for the records responsive to parts 1 and 5 of the request.

[5] The appellant advised that the records responsive to parts 3, 4 and 6 of the request were no longer at issue, but continued to seek access to the records that are responsive to parts 1, 2 and 5 of the request. As no further mediation was possible, the file was moved to the adjudication stage, where an inquiry is conducted.

[6] The municipality's representations expanded its reliance on the section 52(3) exclusion and the section 6(1)(b) exemption to all of the records in issue. The municipality also clarified that it was not withholding the municipality's *Respect in the Workplace* policy (pages 11-27 in the revised index), a record that it had identified as responsive to the appellant's request.

[7] The parties' representations were shared in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

[8] This order finds that the records in issue are excluded from the scope of the *Act* under section 52(3). Given this finding, the appeal is dismissed without considering the exemptions the municipality also applied to withhold the records.

RECORDS:

[9] The records at issue comprise:

1. workplace harassment complaints (complaints) (pages 56-57 of the records);
2. meeting minutes and supporting documents relating to the complaints from the May 17, 2015 and November 3, 2015 meetings of the municipality's General Government Committee (minutes) (pages 6-10 and 58 of the records); and
3. an investigation report regarding the complaints (investigation report) (pages 28-55 of the records).

DISCUSSION:

A. Does section 52(3) exclude the responsive records from the scope of the *Act*?

[10] Section 52(3) states in part:

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.

[11] If section 52(3) applies to the records, and none of the exceptions in section 52(4) apply, the records are excluded from the scope of the *Act*.

[12] For the collection, preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in paragraph 3 of section 52(3), it must be reasonable to conclude that there is "some connection" between them.¹

[13] 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 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. Employment-related matters are separate and distinct from matters related to employees' actions.³

¹ Order MO-2589; see also *Ontario (Attorney General) v. Toronto Star*, 2010 ONSC 991.

² Order PO-2157.

³ *Ontario (Ministry of Correctional Services) v. Goodis*, 2008 CanLII 2603 (ON SCDC).

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

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

[15] For section 52(3)3 to apply, the municipality 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.

Part 1: collected, prepared, maintained or used

[16] The municipality either prepared or used all of the records at issue. The minutes were prepared by the municipality, specifically its CAO-Clerk. The complaints and investigation report were used by municipality's General Government Committee, as the complaints and investigation report formed the basis of the Committee's decisions at the meetings that resulted in the creation of the minutes. Therefore, Part 1 of the section 52(3) test is met.

Part 2: meetings, consultations, discussions or communications

[17] The records were prepared or used in relation to meetings, consultations, discussions or communications, in particular meetings and discussions of the municipality's General Government Committee relating to the complaints. Therefore, Part 2 of the section 52(3) test is met.

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

[18] As noted above, 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.⁵ 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.

⁴ *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, 2001 CanLII 8582 (ON CA), application for leave to appeal to the Supreme Court of Canada dismissed June 13, 2002 (Gonthier, Major and LeBel JJ.). S.C.C. File No. 28853. S.C.C. Bulletin, 2002, p. 781.

⁵ Order PO-2157.

[19] 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.⁶ The records collected, prepared, maintained or used by the institution 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.⁷

[20] The appellant characterizes the complaint and investigation as being about municipal councilor conduct, and refers to a previous Order (MO-1264) that found that there was no employee-employer relationship between a municipality and its councilors, to support the appellant’s argument that the records are not employment-related for the purpose of section 52(3)3.

[21] I am satisfied that the meetings, discussions and communications were about employment-related matters in which the institution had an interest. The records are employment-related for the purposes of section 52(3)3 because the complaints were made by an employee and the subject of the complaints and resulting investigation was the employee’s work environment. The records may contain information about the conduct of municipal councilors. However, the records were created as a result of an employee’s complaints of workplace harassment contrary to the municipality’s *Respect in the Workplace* policy. This is an employment-related matter because it is part of the municipality’s responsibilities as an employer to investigate complaints of workplace harassment, which directly relate to the employment relationship. The records all arise out of the municipality’s employment relationship with its employee.

[22] Finally, the municipality clearly had an interest in these matters because the complainant was a municipal employee and the complaints related to the municipality’s workplace. Part 3, and consequently, all three parts of the section 52(3) test, are therefore met for the records.

[23] The *Act* still applies to the records if they fall within any of the exceptions in section 52(4). However, the parties did not raise the section 52(4) exceptions, and none arise from my review of the records.

[24] Accordingly, I find that section 52(3) applies to the records, with the effect that they are outside the scope of the *Act*. Given this finding, I do not need to consider any of the exemptions in the *Act* the municipality also relied on to withhold the records.

ORDER:

I uphold the municipality’s decision that section 52(3) applies to exclude the records at issue from the scope of the [Act](#) and dismiss the appeal.

⁶ *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above.

⁷ *Ontario (Ministry of Correctional Services) v. Goodis*, cited above.

Original Signed by: _____
Hamish Flanagan
Adjudicator

November 30, 2016 _____