Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4308

Appeal MA21-00359

City of Windsor

December 21, 2022

Summary: The City of Ottawa received a request under the *Municipal Freedom of Information and Protection of Privacy Act* for access to records relating to the appellant, a city employee. The city located and provided the appellant with part of a complaint letter submitted to the city's human resources department about the appellant. The appellant sought access to the remaining portions. In this order, the adjudicator finds that the entire complaint is excluded from the application of the *Act* by section 52(3)3 (labour relations and employment records) and upholds the city's decision to withhold parts of it on that basis. She dismisses the appeal.

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

Orders Considered: PO-3642.

Cases Considered: *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner,* 2010 ONSC 991 (Div. Ct.); *Ontario (Ministry of Correctional Services) v. Goodis*, [2008] O.J. No. 289 (Div. Ct.).

OVERVIEW:

[1] This appeal is about whether attachments to a complaint letter (the complaint or complaint letter) that was sent to the City of Windsor (the city) about a city employee are excluded from the application of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) under section 52(3) because they are

communications about employment-related matters in which the city has an interest.

[2] The appellant,[1] who is employed by the city, made a request under the *Act* for access to a variety of records from various city departments, and for communications between specific individuals. The city issued a decision that the appellant appealed to the IPC. During mediation, the appellant made a narrowed[2] request to the city for access to a letter of complaint made about the appellant to the city. The city revised its decision and granted access to the specified complaint letter and to 27 of its 33 attachments. It claimed that the withheld information was exempt under the mandatory personal privacy exemption in section 14. The city also took the position that the *Act* does not apply to the records because they are employment-related records excluded from the *Act* by section 52(3).

[3] Mediation was not successful and the matter proceeded to the adjudication stage of the appeal process, where an adjudicator may conduct a written inquiry. I decided to conduct a written inquiry based on the issues for adjudication identified in the mediator's report.[3]

[4] In its representations in response to a Notice of Inquiry, the city maintained that the records were excluded under section 52(3), the position it had taken during mediation. Because the exclusion raises a jurisdictional issue – meaning that the *Act* does not apply to records that are found to be excluded – I asked both parties to submit representations on the exclusion.

[5] In their representations, the appellant sought to expand the request to its original scope, writing that they only agreed to narrow the request for settlement purposes.[4] The only records identified as being at issue in the mediator's report, however, were the six attachments to the complaint that the city had not disclosed by the end of mediation.

[6] In this decision, I consider the application of the exclusion in section 52(3) only

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[1] The appellant's partner, to whom the decision was also addressed, is described in the appellant's representations as a co-appellant. According to the appeal submitted to the IPC, however, the appellant identified their partner as their representative for the purposes of the purposes of the appeal. In view of this, and the nature of the record, I have considered the appellant who is the subject of the complaint to be the appellant in this appeal and the appellant's partner to be their representative, as stated in the appeal form.

[2] As set out above, the request was initially broader in scope but was narrowed during mediation at the IPC.

[3] According to the mediator's report, the issues for adjudication were the city's fee estimate and the application of the mandatory personal privacy exemption in section 14 to the six attachments that the city withheld. Because from my review of the records it appeared that they may contain the appellant's personal information as well as that of other identifiable individuals, I also asked for representations on the application of the discretionary personal privacy exemption in section 38(b) of the *Act*.

[4] The city maintained its position in mediation that the complaint letter is excluded, notwithstanding the narrowed request. The s 52 claim was specific to the complaint letter which was the only letter located in response to the narrowed request.

to the records that are properly before me as described in the mediator's report. The parties agreed during mediation about the records remaining at issue, namely, the six attachments to the complaint letter. Mediation offered the parties the opportunity to narrow the request and issues in order to move the appeal forward. Based on those discussions, the records at issue were narrowed to those identified in this order.

[7] In this order, I apply a "whole record" approach to find that the six attachments are part of the complaint. I find that the complaint, as a whole, relates to communications about an employment-related matter in which the city had an interest as the appellant's employer. I therefore find that the complaint, inclusive of all of its attachments, is excluded from the *Act* by operation of paragraph 3 of section 52(3).

RECORD:

[8] The record is a letter of complaint against a city employee containing 33 attachments. The city has already provided the appellant with parts of the complaint and its attachments.

DISCUSSION:

[9] At the outset, I note that, although the complaint contains allegations about the appellant in their capacity as a city employee, I have not described the appellant's position or the nature of the allegations about the appellant's position in this decision because I find that to do so could reasonably be expected to identify the appellant. For the same reasons, I have omitted describing portions of the complaint in this decision, although I have read it and the attachments in their entirety.

[10] Because the city claims that the complaint letter and attachments are excluded from the *Act* under section 52(3), I must first consider this issue. Only if the record is not excluded from the *Act* do the exemptions also relied on by the city to deny access become relevant. For the reasons below, I find that the attachments are excluded by virtue of section 52(3) and it is therefore not necessary to consider the city's exemption claims.

[11] Pursuant to section 52 of the *Act*, the *Act* does not apply to certain types of records. A finding that the *Act* does not apply to the record at issue in this appeal ends the matter before me because if the *Act* does not apply, then the general right of access in section 4(1) does not apply.

[12] Section 52(3) excludes records concerning certain labour relations or employment- related matters. Section 52(3)3, which the city relies on here, states that:

> 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.

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

[14] For the collection, preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in paragraphs 1, 2, or 3 of section 52(3), it must be reasonable to conclude that there is "some connection" between them.[5] The "some connection" standard must involve a connection that is relevant to the statutory scheme and purpose understood in their proper context.[6]

[15] The term "labour relations" refers to matters arising from the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation or analogous relationships.[7] The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between and employer and employees that do not arise out of a collective bargaining relationship.[8]

[16] Examples in which the phrase "labour relations or employment-related matters" in section 52(3) has been found to apply include an employee's dismissal[9] and disciplinary proceedings.[10]

[17] 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.

[18] The IPC takes a "whole record approach" to the exclusions in section 52(3). This means that the record is examined as a whole. The exclusion cannot apply only to a portion of the record. Either the entire record is excluded under section 52(3), or it is not. It is worth noting, however, that an institution may still exercise its discretion to disclose records or information outside of the access regime in the *Act*,[11] as the city

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[5] Order MO-2589. See also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).
[6] Order MO-3664, *Brockville (City) v. Information and Privacy Commissioner, Ontario*, 2020 ONSC 4413 (Div Ct.).
[7] *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.
[8] Order PO-2157.
[9] Order MO-1654-I.
[10] Order MO-1433-I.
[11] See, for example, Orders PO-2639 and PO-3549.

says it did by providing the appellant with parts of the complaint.

[19] My findings below are limited to the record that is before me, which is the record to which the six attachments described in the Mediator's Report were attached. I make no findings about the city's fee estimate to process the appellant's request for access to additional records (as described in the initial request and decision) because the only record at issue in this appeal is the complaint and, for the reasons set out in this order, I find that it is excluded from the *Act*.

Representations

The city's representations

[20] The city submits that the *Act* does not apply to the complaint letter and its attachments by virtue of paragraph 3 of section 52(3) because it relates to communications about employment-related matters in which the city has an interest as an employer.

[21] The city says that the complaint was submitted as a complaint against the appellant, and alleged activity on the appellant's part that subjected the appellant to internal scrutiny and potential disciplinary action.

[22] The city says the complaint was made to the city's human resources executive director, contained allegations of conduct by the appellant in relation to their position as a city employee, and alleged improper use by the appellant of a city-issued cell phone.

[23] The city says that it retained outside counsel to investigate the allegations and for an opinion regarding whether the appellant in any way abused their position as a city employee. The city says although this investigation exonerated the appellant from any wrongdoing, the city nevertheless used and maintained the letter on its own behalf as an employer.

[24] The city submits that the complaint and attachments form one complete record and should be analyzed as a whole and not in isolation from each other. The city says that the attachments are included with the complaint to the city's human resources department, the purpose of which was to form a complaint about a city employee and to persuade the city that this employee should be disciplined.

The appellant's representations

[25] The appellant disputes that the record falls under the section 52(3) exclusion.

[26] The appellant says that "records excluded by section 52(3) are 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" and that only section 52(3)3 has any potential relevance to the record.

[27] The appellant says that the city did not initially claim the exclusion and did so as a "last ditch attempt" to deny access after it had released the letter and promised to the same with the attachments.

[28] The appellant submits that the complaint deals only with a personal matter between the appellant and the author of the complaint, and that these types of issues are not employment-related matters for the purpose of the exclusion.

[29] The appellant says that the only relationship to the employer or labour relations context could be found in the complaint itself, and not the attachments. The appellant says that, since the attachments do not address employment-related matters, they are not excluded from the act by virtue of section 52(3).

[30] The appellant submits that the complaint was made to embarrass and humiliate the appellant in order to gain an advantage in a personal matter unrelated to the city, and that the complaint's tone and allegations make it clearly unreliable in an employment- related context.

Analysis and findings

"Whole-record" approach

[31] Previous IPC decisions have held that the employment-related exclusion in section 52(3) requires a record-specific and fact-specific analysis.[12] The IPC has found that the whole record is considered in addressing the possible application of the exclusion.

[32] In Order PO-3642,[13] Adjudicator Jenny Ryu wrote:

> This office has consistently taken the position that the exclusions at section 65(6) (and the equivalent section in the *Act's* municipal counterpart) are record-specific and fact-specific. [Footnote omitted] This means that in order to qualify for an exclusion, a record is examined as a whole. This whole-record method of analysis has also been described as the "record- by-record" approach when applied by this office in considering the application of exemptions to records. [Footnote omitted]
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> This approach to the consideration of exclusions is illustrated in previous orders of this office that have addressed whether an exclusion applies to a record based on the inclusion within the record of an excluded portion. In these orders, this office has applied the record-specific and fact-specific

[12] Orders P-1242 and MO-3163.
[13] Order PO-3642 considered the employment and labour relations exclusion in section 65(6) of the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31. Section 65(6) is the provincial equivalent of section 52(3).

> analysis to consider whether the record, as a whole, qualifies for the claimed exclusion.
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> In Order MO-3163, for example, the adjudicator considered an internal police training video containing, as examples of inappropriate officer behaviour, two discrete clips for which the police claimed certain exclusions. The adjudicator examined the record – the training video – as a whole, and concluded that it did not qualify for any of the claimed exclusions irrespective of whether portions of the record (the individual clips) might themselves qualify for exclusion in another context (which question was not before the adjudicator).
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> …the question is whether the collection, preparation, maintenance or use of the record, as a whole, is sufficiently connected to an excluded purpose so as to remove the entire record from the scope of the *Act*. This approach to the exclusions is consonant with the language of the exclusions, which applies to records that meet the relevant criteria. […]

[33] I agree with and adopt this reasoning, which has been consistently applied by the IPC. A threshold question before me, therefore, is whether, in assessing the application of the section 52(3) exclusion, I should treat the complaint letter, including the attachments, as one record, or whether the attachments should be treated as separate records.

[34] I have examined the entire complaint, including the attachments, and find that the attachments are not discrete records but that they form part of the complaint itself. I therefore find that the complaint, including the attachments, must be considered as the record for the purposes of the exclusion in section 52(3). The attachments were submitted as part of the complaint to illustrate or buttress the author's concerns. As such, they were used in support of the complaint which was intended to persuade the city to take disciplinary action against the appellant as a city employee.

The record is excluded under section 52(3)3

[35] For me to find that section 52(3)3 applies, I must be satisfied that:

1. the record was collected, prepared, maintained or used by the city 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 were about labour relations or employment-related matters in which the city has an interest.

Part 1: collected, prepared, maintained or used by the city or on its behalf

[36] I have reviewed the city's representations and the record at issue, namely, the letter and attachments, and I find that it was maintained and used by the city. Specifically, I am satisfied that the record was used by the city to investigate allegations of possible employee misconduct contained in it, and that this included retaining external legal counsel to investigate on behalf of the city.

[37] I therefore find that the first part of the test in section 52(3)3 is met.

Part 2: in relation to meetings, consultations, discussions or communications

[38] Part 2 of the test in section 52(3)3 requires the record to have been collected, prepared, maintained or used "in relation to" meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest. As I have noted above, to meet this requirement, it must be reasonable to conclude that there is "some connection" between the record and the subject of the exclusion.[14] As noted above, however, the "some connection" standard must involve a connection that is relevant to the statutory scheme and purpose understood in their proper context.

[39] Having considered the evidence before me, I am satisfied that the record, taken as a whole, was collected, prepared, maintained or used by the city in relation to meetings, consultations or discussions, satisfying part two of the three-part test.

[40] The record contains allegations of misconduct on the part of the appellant, who is a city employee. As noted above, these include allegations that the appellant engaged in conduct that was incompatible with their job title and role, and misused a city-owned asset.

[41] I accept the city's position that meetings, consultations, discussions or communications took place regarding the information in the record, including discussions with external counsel retained to investigate on behalf of the city whether the allegations were founded. I also find that it is reasonable to expect that any decisions affecting the results of an investigation into the complaint would have ultimately been communicated to the appellant. I am therefore satisfied that the record was maintained or used by the city in relation to meetings, consultations, discussions or communications.

[42] I am also satisfied that these meetings, consultations, discussions or communications were about employment-related matters in which the city has an interest as an employer, and which satisfies the third and final part of the test for section 52(3)3 to apply, discussed below.

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

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

[43] The remaining part of the test in section 52(3)3 requires a determination that the meetings, consultations, discussions or communications have been about labour relations or employment-related matters "in which the [city] has an interest."

[44] In its decision in *Ontario (Ministry of Correctional Services) v. Goodis*,[15] the Divisional Court found that "employment matters are separate and distinct from matters related to employees' actions." Writing about matters involving allegations of employee misconduct and vicarious Crown liability, Justice Swinton, on behalf of the Divisional Court, wrote:

> Subclause 1 of section 65(6) deals with records collected, prepared, maintained or used by the institution in proceedings or anticipated proceedings "relating to labour relations or to the employment of a person by the institution." The proceedings to which the paragraph appears to refer are proceedings related to employment or labour relations *per se* – that is, to litigation relating to terms and conditions of employment, **such as disciplinary action against an employee or grievance proceedings. In other words, it excludes records relating to matters in which the institution has an interest as an employer. [emphasis added]**

[45] The Divisional Court's reasoning has been adopted and applied in many subsequent IPC orders. 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 and human resources questions are at issue.[16] The phrase "in which the institution has an interest" has been found to mean more than a "mere curiosity or concern," and refers to matters involving an institution's own workforce.[17]

[46] The court also stated in *Goodis* that the case "does not stand for the proposition that all records pertaining to employee conduct are excluded from the *Act*," and that "[w]hether or not a particular record is 'employment-related' will turn on an examination of the particular document."[18]

[47] Based on my review of the complaint and the city's representations in this case, I find that the complaint was used by the city "in relation to meetings, consultations, discussions or communications about matters" in which the city "has an interest" as an

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[15] (2008), CanLII 2603 (ON SCDC), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.).
[16] *Goodis*, supra, and Order PO-3549.
[17] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 C.A. [*Solicitor General*], leave to appeal refused [2001] S.C.C.A. No. 507.
[18] *Goodis*, supra, at para. 29.

employer.

[48] I am satisfied that the city's decision to exonerate the appellant from any wrongdoing as alleged in the complaint would only be taken after meetings, consultations, discussion or communications on the city's part. I accept that these meetings involved the city's human resources department and external counsel retained by the city.

[49] Whether resulting in discipline or not, I am satisfied that information in the record as a whole relates to matters in which the city has an interest as an employer. I agree that the complaint letter contains allegations relating to a dispute between the complaint's author and the appellant that I accept are not related to the appellant's employment. However, the complaint also makes allegations of misconduct on the part of the appellant as a city employee, and which relate to the appellant's role and duties as an employee. The complaint was treated by the city as an employment matter, as evidenced by its retainer of external counsel to investigate. I am satisfied that the complaint's allegations of misconduct about the appellant's employment role, and human resources matters arising from the employment relationship between the city and the appellant, including outcomes potentially affecting the appellant's employment had the complaint been determined to be founded, are employment-related matters in which the city has an interest as the appellant's employer.

[50] For these reasons, I am satisfied that the record meets each of the requirements in section 52(3)3 because:

- it was used during the course of investigating allegations of impropriety and misuse of city-issued property by a city employee
- information in the record was used in meetings, consultations, discussions and/or communications about the city's investigation into the complaint, including the retainer of external legal counsel, before making a decision about the complaint's merits as it related to the employee's employment
- the focus of the investigation, namely the allegations of conduct incompatible with the appellant's position and misuse of a city- issued cell phone, are employment-related matters in which the city had an interest as employer.

[51] Finally, I have considered whether any of the exceptions in section 52(4) apply, and I find that none of them do in the circumstances.

[52] I therefore find that the record, namely the complaint and its attachments, is excluded from the *Act* pursuant to section 52(3).

ORDER:

I find that the complaint letter and attachments are a single record and that section 52(3)3 of the *Act* applies to exclude it from the *Act*.

Original Signed By: December 21, 2022

Jessica Kowalski
Adjudicator