Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4392

Appeal MA21-00410

Corporation of the Municipality of Temagami

June 8, 2023

Summary: The Corporation of the Municipality of Temagami (the municipality) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records concerning a harassment complaint that involved the requester. The municipality conducted a search and located the complaint. Ultimately, the municipality denied access to the record under the exclusion at section 52(3)3 (labour or employment relations). At mediation, the appellant raised the issue of access to the investigation report that arose out of the municipality's investigation of the complaint. The municipality noted that it does not have the report as it is not in its custody or control. As a result, reasonable search and custody and control were added as issues to the appeal. In this order, the adjudicator finds that section 52(3)3 applies to exclude the complaint from the *Act*. He also finds there is no useful purpose in ordering the municipality to conduct a further search for records as those records would also be excluded under the *Act*.

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

Orders and Investigation Reports Considered: Orders MO-2385, MO-2698, MO-3386 and PO-3930.

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

OVERVIEW:

[1] A complaint was made to the Corporation of the Municipality of Temagami (the municipality) by one of its employees which included an allegation of harassment by a member of the public (the appellant). The complaint resulted in an investigation and an investigation report. The municipality received a request under

Municipal Freedom of Information and Protection of Privacy Act (the *Act*) for the following:

> … all records in the possession of and accessible to the Municipality:
>
> 1. either in print or electronics (i.e. digitized); and,
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> 2. including records from regular council sessions and/or Closed Sessions of Council; and,
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> 3. including correspondence and digitized item exchange between and among the Municipality and [company A], [individual A], [company B], members of Council; and
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> 4. including the Final Report from [individual B], and [company A], and [company B] with regards the harassment investigation initiated by [individual C] against me;
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> as each of the above pertain to the Report from [company A] and [individual B] and [company B] which deal with the harassment investigation instituted by [individual C] against me.

[2] After time extension requests were made under the *Act*, the municipality issued a decision denying access in full to the responsive records citing the *Occupational Health and Safety Act* (the *OHSA*).[1]

[3] The requester, now the appellant, appealed the municipality's decision to the Office of the Information Privacy Commissioner of Ontario (the IPC).

[4] An IPC mediator was assigned to explore resolution. The municipality subsequently issued a revised decision, advising that a search was conducted, a responsive record was reviewed and a decision was made to deny access in full to it, pursuant to the exclusion at section 52(3)3 (labour or employment relations) and in the alternative the exemptions at sections 10(1)(d) (third party information) and 6(1)(b) (closed meeting) of the *Act*.[2]

[5] The municipality also confirmed at mediation the nature of the responsive record in its custody or control, advising that it consisted only of a complaint initiated by the employee against the appellant.

[6] The appellant subsequently advised that he would like to move the appeal forward to adjudication, challenging the exclusion and exemptions claimed and raising the issue of reasonable search. Specifically, the appellant believes more records should exist, such as an investigation report in response to the harassment complaint.

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[1] *Occupational Health and Safety Act,* R.S.O. 1990, C.O.1.

[2] Given my findings on the application of section 52(3), I do not need to consider the municipality's alternative claims.

[7] The file was transferred to the adjudication stage of the appeal process. The original adjudicator assigned to this appeal decided to conduct an inquiry and invited representations from the municipality. Representations were received and at this point, I was assigned carriage of the appeal. I shared the municipality's representations with the appellant and invited representations. After review of the representations, I provided both parties with the opportunity to submit additional representations.

[8] In this order, I uphold the municipality's decision that the complaint is excluded from the *Act* by section 52(3)3. I do not order the municipality to carry out further searches for the investigation report or related presentations because they would also be excluded from the *Act* by section 52(3)3.

RECORDS:

[9] The record at issue is a three-page complaint. The appellant also seeks a related investigation report, including presentations of the report to council.

ISSUES:

A. Is the appellant's request for access frivolous and vexatious under section 4(1) of the *Act*?

B. Does the section 52(3)3 exclusion for records relating to labour relations or employment matters apply to the complaint?

DISCUSSION:

Issue A: Is the appellant's request for access frivolous and vexatious under section 4(1) of the *Act*?

[10] Although the municipality issued a decision denying access under section 52(3), during the inquiry it also argued that the appellant's request was frivolous and vexatious. While the institution has already identified a responsive record and issued a decision, I have decided to consider its position that the appellant's request is for a collateral purpose and not to gain access. Based on my review of the parties' representations, I find that the appellant's request is not frivolous and vexatious.

[11] Section 4(1)(b) of the *Act* provides institutions with a straightforward way of dealing with frivolous or vexatious requests. However, institutions should not exercise its discretion under section 4(1)(b) lightly, as this can have serious implications for access rights under the *Act*.[3]

[12] Section 4(1)(b) reads:

[3] Order M-850.

> Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,
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> > the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

[13] Section 5.1 of Regulation 823 under the *Act* elaborates on the meaning of the phrase "frivolous or vexatious":

> A head of an institution that receives a request for access to a record or personal information shall conclude that the request is frivolous or vexatious if,
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> > (a) the head is of the opinion on reasonable grounds that the request is part of a pattern of conduct that amounts to an abuse of the right of access or would interfere with the operations of the institution; or
> >
> > (b) the head is of the opinion on reasonable grounds that the request is made in bad faith or for a purpose other than to obtain access.

[14] An institution that concludes that an access request is frivolous or vexatious has the burden of proof to justify its decision.[4]

[15] In this case, the municipality submits that the appellant's request was for a purpose other than to obtain access.

[16] If a request is made for a purpose other than to obtain access, the institution does not need to demonstrate a "pattern of conduct."[5] A request is made for a purpose other than to obtain access if the requester is motivated not by a desire to obtain access, but by some other objective.[6] The IPC has previously found that an intention by the requester to take issue with a decision made by an institution, or to take action against an institution, is not enough to support a finding that the request is "frivolous or vexatious."[7] In order to qualify as a "purpose other than to obtain access," the requester would need to have an improper objective above and beyond an intention to use the information in some legitimate manner.[8]

[17] Briefly, the municipality submits that the purpose of the appellant's request was for a purpose other than to obtain access. It submits that the appellant's representations are replete with personal attacks, opinions regarding what he believes the responsive records say, and a defence o66666r an attempt to appeal substantiated allegations of harassment. The municipality submits that a reasonable inference may be drawn that the appellant is using the access process to further his

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[4] Order M-850.
[5] Order M-850.
[6] Order M-850.
[7] Orders MO-1168-I and MO-2390.
[8] Order MO-1924.

dispute with the municipality and to attack the decision set out in the investigation report.

Analysis and finding

[18] Given the subject matter of the request in this appeal, I find that the appellant's request is not frivolous and vexatious. While the appellant's representations address issues that are not relevant in this appeal, I do not find that his request is made for any other purpose but to obtain access.

[19] In my view, the appellant is not using the access process for any collateral purpose other than to obtain access to the complaint and the investigation report that relate to him. Despite the municipality taking issue with the appellant's representations, I find that a review of the appellant's submissions does not support the municipality's position that there was a collateral purpose to the request other than to obtain access to the complaint and the report. The appellant does not believe harassment occurred and addressed this issue in detail in his representations.

[20] As set out above, section 5.1 of *Regulation 823* sets thresholds that must be met in order to establish that a request is frivolous or vexatious. In my view, as set out in my reasoning above, in the circumstances of this appeal, neither of those thresholds has been met. Based on the evidence before me, I find that the municipality has not established on a reasonable ground that the request made by the appellant is frivolous or vexatious as that phrase has been defined in section 5.1 of *Regulation 823*.

Issue B: Does the section 52(3) exclusion for records relating to labour relations or employment matters apply to the complaint and the investigative report?

[21] Although the municipality only identified the complaint as a responsive record, I will also determine if section 52(3)3 applies to exclude any resulting investigative report, including the electronic presentation of same made to council.

[22] Section 52(3)3 of the *Act* provides:

> 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:
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> …
>
> 3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

[23] Section 52(3) is record-specific and fact-specific. If section 52(3) applies to a record, it has the effect of excluding the record from the scope of the *Act*. If that is the case, I do not have jurisdiction to consider the issue of the denial of access by

the municipality and whether the record qualifies or does not qualify for exemption under the *Act*.

[24] 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.[9]

[25] The type of records excluded from the *Act* by section 52(3)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 in the context of the institution's possible vicarious liability in relation to those actions, as opposed to the employment context.[10]

[26] The phrase "labour relations or employment-related matters" has been found to apply in the context of:

- a job competition;[11]
- an employee's dismissal;[12]
- a grievance under a collective agreement;[13]
- disciplinary proceedings under the *Police Services Act*;[14]
- a "voluntary exit program;"[15]
- a review of "workload and working relationships";[16] and
- the work of an advisory committee regarding the relationship between the government and physicians represented under the *Health Care Accessibility Act*.[17]

[27] The phrase "labour relations or employment-related matters" has been found not to apply in the context of:

- an organizational or operational review;[18] or

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[9] 9 *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.
[10] See *Ontario (Ministry of Correctional Services) v. Goodis,* 2008 CanLII 2603 (ON SCDC).
[11] Orders M-830 and PO-2123.
[12] Order MO-1654-I.
[13] Orders M-832 and PO-1769.
[14] Order MO-1433-F.
[15] Order M-1074.
[16] Order PO-2057.
[17] *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner),* cited above.
[18] Orders M-941 and P-1369.

- litigation in which the institution may be found vicariously liable for the actions of its employee.[19]

[28] 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.[20]

[29] 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.

Representations

[30] In its representations, the municipality indicated that the complaint was made by an employee of the municipality and as per section 52(3)3 the request could be refused. In his initial representations, the appellant submits that the complaint and/or the investigation do not relate to either a labour relations matter or an employment matter.[21]

[31] In its reply representations, the municipality expands on its position and relies on Order MO-3386 where a workplace harassment investigation was at issue and the adjudicator determined that section 52(3)3 applied to exclude records from the scope of the *Act*. The municipality notes that in Order MO-3386 the records consisted of workplace harassment complaints, minutes and supporting documents relating to the complaints and a resulting investigation report. The municipality notes that the adjudicator accepted that all three parts of the test were met and found that the records were excluded from the *Act* (section 52(3)3,) as the complaints were made by an employee and the subject of the complaints and resulting investigation was the employee's work environment.

[32] In the present appeal, the appellant's arguments focus on the investigation report. The appellant submits that the investigation report does not meet parts 1 and 2 of the test for the application of section 52(3)3. The appellant states that

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[19] Orders PO-1722, PO-1905 and *Ontario (Ministry of Correctional Services) v. Goodis*, cited above.
[20] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above.
[21] I note that much of the appellant's representations focus on the harassment allegation against him, how the municipality did not follow its own human resources processes and procedures when dealing with it, its reliance on the *OHSA*, his own involvement in the investigation and his desire to obtain the report which is about him along with a public interest in the report. Given that I must examine whether or not the exclusion at section 52(3)3 applies to the records, these submissions are not wholly relevant and will not be fully set out.

council for the municipality did not use, collect, maintain or prepare the report as required. Further the appellant submits that he is not seeking any records of communications, meetings, consultations or discussions as required under part 2. The appellant submits that the municipality paid for the investigation report and acted on it by having its lawyer inform him of sanctions against him.

[33] Finally, the appellant submits that with regard to part 3 of the test, the substance of the investigation report in not an employment-related matter as he is not a member of staff or the municipality but a member of the public. The appellant submits that the municipality has a human resources policy that dictates how it will treat alleged harassment of an employee by a member of the public and that it did not follow its own policy.

[34] The appellant submits the municipality's claim that the records "arise out of the municipality's employment relationship with its employee" is not valid. The appellant submits that when a member of the public is accused of harassment, the human resources policy addresses the procedure to follow. The appellant attached to his representations the municipality's Workplace Harassment Policy[22] which addresses the procedure to investigate an allegation of harassment made by an employee, and includes the following if the harasser is a member of the public: "If the harasser is a member of the public, the CAO shall send them a letter to advise them of our harassment policy and to advise that if the behaviour continues that appropriate legal action shall be taken." The appellant submits that the municipality did not follow this procedure as he was never advised that "appropriate legal action" would be taken if the alleged harassment continued.

[35] The appellant submits that it is this policy that applies to the situation as he is a member of the public and that the municipality's reliance on the *Occupational Health and Safety Act*[23] (the *OHSA*) regulations is incorrect because that the *OHSA* applies only if a member of staff harasses another member of staff. The appellant submits that therefore the records he seeks do not "arise from a municipality's relationship with its employee as that relationship in this instance is tied to the HR harassment policy."

[36] The appellant also submits that the municipality's interest in these matters is not clear. He suggests that the municipality's claim that the complaint relates to its workplace is not transparent as he is not an employee in the workplace

Analysis and finding

Part 1: collected, prepared, maintained or used

[37] Based on my review of the record and the municipality's representations, I find that the complaint was collected, maintained and used by the municipality. It is apparent that the complaint was given to the municipality by an employee and the municipality acted upon it by investigating it. Therefore, I find that part 1 of the test

[22] Schedule A to Bylaw 10-932, as amended by By-law 17-1337.
[23] R.S.O. 1990, c. O.1.

has been met.

Part 2 and 3: in relation to meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

[38] I agree that Order MO-3386 is relevant in this appeal.[24] In that order the adjudicator found that section 52(3)3 applied to exclude the records because the complaints were made by an employee and the subject of the complaints and resulting investigation was about the employee's work environment. The adjudicator found that the records were created as a result of an employee's complaints of workplace harassment and that it was 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 adjudicator found that the records all arose out of the municipality's employment relationship with its employee and were therefore excluded from the *Act*.

[39] I agree with the analysis and adopt it for the purpose of this appeal. After reviewing the complaint, I confirm that it was made by an employee to the municipality concerning perceived harassment and the effect on both the employee's workplace and duties.[25] It is clear from the representations and upon reviewing the complaint, that this record was collected and used by the municipality in relation to meetings and discussions about employment-related matters in which it had an interest.

[40] This is an employment-related matter because upon receiving this complaint, the municipality, as an employer of the complainant would have a responsibility to investigate the complaint of workplace harassment. The municipality clearly had an interest in this matter because the complainant was an employee and the complaint related to his workplace and duties. Parts 2 and 3 are met and consequently, all three parts of the section 52(3)3 test are met for the complaint.

[41] The appellant suggests that because he is not a municipal employee the complaint cannot be characterized as an employment-related. I disagree. In my view, whether the municipal employee was experiencing perceived harassment from a work colleague or from a member of the public, if the incident(s) involve the employee's job or job function, from the municipality's perspective it is an employment-related matter.

[42] In considering my finding, I also reviewed Order MO-2698 which was not raised by either party. In that order, the adjudicator found that records involving complaints made by city employees concerning the conduct of the appellant, who was not an employee, were not excluded from the *Act* by section 52(3)3. When referring to the records, the adjudicator noted that they do not contain information concerning an employee's actions or conduct and did not contain any information

[24] I note that in Order MO-3386, the adjudicator had each record that was claimed excluded before him to examine.
[25] I make no finding on whether harassment actually occurred as this is not an issue before me.

that alleged employee misconduct. Instead, the records were found to include staff observations about the appellant who was not a city employee and was not in an employment-like relationship with the city. As a result, the adjudicator found that the records did not contain information relating to any human resources or staff relations issues between the city and the employees. I distinguish MO-2698 from this appeal, because I have found that the complaint at issue in the current appeal involves information predominately relating to the municipal employee's workplace and duties.

Investigation report

[43] In his representations, the appellant makes clear that the record he is seeking is the investigation report resulting from the complaint, including any electronic presentation of same made to council.

[44] In *Ontario (Ministry of Correctional Services) v. Goodis* (*Goodis*),[26] the Divisional Court cautioned that there was no general proposition that all records pertaining to employee conduct are excluded from the *Act*, even if they are in files pertaining to civil litigation or complaints by a third party. Swinton J., writing for the unanimous Court, also pointed out that "(w)hether or not a particular record is 'employment-related' will turn on an examination of the particular document." I agree with and adopt this analysis for the purpose of making my determinations in this appeal.

[45] Although *Goodis* reinforces the requirement that each record must be examined before a determination is made under section 52(3), it is evident in this appeal that the remaining record at issue, the investigation report, including any electronic presentation of same, would also be subject to the exclusion at section 52(3)3. These records were prepared on the municipality's behalf in relation to meetings and discussions about an employment-related matter in which it has an interest, namely the workplace investigation arising from the complaint. As a result, I find that the investigation report, including any electronic presentation of same, are also excluded from the *Act* by section 52(3)3.

[46] I am able to make this finding without reviewing the actual report or presentations. I note that in order MO-2385, the adjudicator did not have all of the records before him for parts of the request relating to three employees and a workplace investigation into a complaint. The adjudicator noted that there was a high probability that any record responsive to this part of the request would be subject to section 52(3)3, as the records related to "firings, investigations and complaints, all of which occurred in an employment context." The adjudicator found that by definition any responsive record would likely relate to a complaint about employee conduct or be human resources information, which has consistently been found to be excluded by section 52(3)3. I agree with and adopt this approach for the purposes of this appeal.

[47] The municipality claims that the report is in the custody and control of the

[26] Cited above.

consultant who was commissioned to complete the report and its lawyer who made the presentation to council. I make no finding on the municipality's claim in this regard, including whether it has control over the record to require the consultant to provide it with a copy. In my view, no useful purpose would be served to adjudicate this issue for the purposes of making a determination. Applying the rationale in Order MO-2385, set out above, it is clear that the resulting investigation report from the workplace complaint would also fall within the exclusion under 52(3)3 of the *Act*.

[48] While the municipality's search was identified as an issue because it did not locate a copy of the investigation report, I am again of the view that no useful purpose would be served in determining whether the municipality's search was reasonable. I find that in this appeal there would be no useful purpose served in ordering the municipality to search for the investigation report given my finding above that it is excluded from the *Act* by section 52(3)3.

ORDER:

I uphold the municipality's decision and dismiss the appeal.

Original Signed By: June 8, 2023
Alec Fadel
Adjudicator