

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4522

Appeal MA22-00430

The Corporation of the Municipality of Callander

May 17, 2024

Summary: The appellant made a request to the municipality under the *Act* for records related to the former mayor and former Chief Administrative Officer (CAO). The municipality located and granted partial access to responsive records, but withheld a letter sent to the CAO under section 14(1) (personal privacy). The appellant sought access to the letter and raised the application of the section 16 public interest override.

In this order, the adjudicator finds that the termination letter is excluded from the scope of the *Act* under section 52(3). He dismisses the appeal.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990, c. M.56, sections 52(3) and 52(4).

Orders Considered: Orders MO-1622 and MO-2318.

OVERVIEW:

[1] The Corporation of the Municipality of Callander (the municipality) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records about a former mayor and former chief administrative officer (CAO).

[2] The municipality located responsive records and granted partial access to them, with some portions withheld under section 14(1) (personal privacy) of the *Act*. The requester (now the appellant) appealed the decision to the Information and Privacy

Commissioner of Ontario (IPC).

[3] During mediation, the appellant stated that he believed additional records responsive to the request exist and took issue with the file format of the records that were disclosed to him. The municipality conducted further searches and located additional records, which were disclosed to the appellant after notification of an affected party. They also provided the records in a searchable format to the appellant.

[4] The municipality provided the appellant with an index of records relating to the termination of the CAO's employment, and the appellant stated that he was only continuing to pursue access to a "termination letter" (the letter) withheld under section 14(1). He raised the issue of the possible application of the section 16 public interest override to the letter and confirmed that he was no longer disputing the municipality's search efforts and the format of the records. Accordingly, the only remaining issues following mediation were the application of sections 14 and 16 to the letter.

[5] No further mediation was possible, and the appeal was transferred to the adjudication stage of the appeals process, where an adjudicator may conduct an inquiry. I decided to conduct an inquiry and I determined that it was necessary to determine if the letter was excluded from the scope of the *Act* under section 52(3) (employment or labour relations). I added the possible application of the exclusion as an issue in the inquiry and sought and received representations from the parties on the application of section 52(3), as well as the issues remaining following mediation. Representations were shared in accordance with the IPC's *Code of Procedure*.

[6] For the reasons that follow, I find that the letter is excluded from the scope of the *Act* and dismiss the appeal.

RECORDS:

[7] The only record remaining at issue is a four-page termination letter.

DISCUSSION:

[8] The sole issue in this appeal is if the letter is excluded from the scope of the *Act* by section 52(3). 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.¹

[9] The purpose of this exclusion is to protect some confidential aspects of labour

¹ Order PO-2639.

relations and employment-related matters.² Section 52(3) states:

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.

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

[11] The types 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.⁴ 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.⁵

[12] 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.⁶

[13] In its representations, the municipality claimed the application of sections 52(3)1, 2, and 3. As described below, I have found that section 52(3)3 applies to the letter, and

² *Ontario (Ministry of Community and Social Services) v. John Doe*, 2015 ONCA 107 (CanLII).

³ *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.

⁴ *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)."

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 PO-2157.

accordingly I have not considered if sections 52(3)1 and 2 also apply.

[14] 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 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.

[15] The phrase "labour relations or employment-related matters" has been found to apply in the context of a job competition,⁷ an employee's dismissal,⁸ and a "voluntary exit program."⁹ It has been found to not apply in the context of an organizational or operational review,¹⁰ or litigation in which the institution may be found vicariously liable for the actions of its employee.¹¹ Additionally, 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.¹²

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

[16] If the letter falls within any of the exceptions in section 52(4), it is not excluded from the application of the *Act*. Section 52(4) 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.

⁷ Orders M-830 and PO-2123.

⁸ Order MO-1654-I.

⁹ Order M-1074.

¹⁰ Orders M-941 and P-1369.

¹¹ Orders PO-1722, PO-1905 and *Ontario (Ministry of Correctional Services) v. Goodis*, cited above.

¹² *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above.

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.

Representations

[17] The municipality states that the letter was prepared by the municipality in discussions or communications relating to the termination of the individual's employment, and that it contains information related to the former CAO's employment and termination of employment with the municipality. It states that based on the contents of the letter, it is evident that it relates to matters arising from a relationship between employer and employee.

[18] With respect to the section 52(4) exceptions to the exclusion, it states that all of the exceptions in sections 52(4)1 to 3 relate to an agreement between an institution and another party, and section 52(4)4 does not apply to the letter. It submits that the letter cannot be considered an "agreement" between the municipality and the former CAO within the meaning of section 52(4), as no agreement between the municipality and former CAO exists.¹³

[19] The appellant submits that the employment exclusion should not apply to the letter, stating that he has already sought and received an "expense account submitted by an employee of the institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment." Speaking about the application of the section 16 public interest override, and generally about the importance of the letter being disclosed, he states that accountability and transparency to taxpayers was never considered during the events leading up to the letter and the events that followed. He referenced news articles about the termination of the municipality's CAO and emphasized the importance of transparency in the matter. He states that the overall situation appears to be an attempt to hide staff and council errors that he fears may be repeated in the future.

[20] Regarding the section 52(4) exceptions to the exclusion, he submits that previous orders have established that the contents of agreements entered into between institutions and senior employees represent the sort of records for which a high degree of public scrutiny is warranted. In response to the municipality's arguments about the letter being excluded from the *Act*, he questions if the letter was structured specifically to avoid scrutiny through the access to information and IPC appeal processes.

¹³ The municipality also included contextual information about the letter that it requested remain confidential. I determined that this information met the confidentiality criteria in *Practice Direction 7* and have not reproduced it here. Regardless of the specifics of the confidential information however, the central point of the municipality's argument is that the letter does not constitute an agreement.

Analysis and finding

[21] The record at issue in this appeal is, as described by the parties during mediation, a letter that discusses the termination of a municipal employee, in this case the former CAO of the municipality. Based on the parties' representations, it is not disputed that the letter is, on its face, related to the employment relationship between the former CAO and the municipality. Therefore, the letter would generally fall within the section 52(3)3 exclusion.

[22] In any case, regarding the three-part test outlined above, I find that all three parts of the test are met. The letter, being a document sent on behalf of the municipality to the former CAO, was prepared by the municipality or on its behalf, satisfying the first part of the test. Additionally, a termination letter is necessarily prepared and used in relation to meetings, consultations, discussions, or communications about the specific termination that it addresses, satisfying the second part of the test. With respect to the third part of the test, it is also undisputed that meetings, consultations, discussions, or communications about the termination of the municipality's CAO are considered employment-related matters in which the municipality has an interest.

[23] As I have found that the letter meets the section 52(3)3 criteria, I do not need to consider if it also meets the criteria for 52(3)1 or 2.

[24] The appellant highlighted the importance of the record in bringing transparency to the termination of a high-level municipal employee and the costs that this imposed on taxpayers. While I acknowledge that how a municipality uses taxpayer funds is generally an important concern, if the letter is excluded from the scope of the *Act* I cannot determine if there is a public interest in its disclosure. In this case, having found that the section 52(3)3 exclusion applies to the termination letter, the next issue to be considered is if it is covered by one or more of the section 52(4) exceptions to the exclusion.

[25] The IPC has previously found, such as in Orders MO-1622 and MO-2318, that "final agreements" between an institution and an employee generally fall within the scope of agreements covered by section 52(4), but records that constitute steps in a negotiation do not. I adopt and apply this reasoning to the present appeal. In order for any of the section 52(4)1 to 3 exceptions to apply (the section 52(4)4 exception, relating to expense accounts, is not relevant to the appeal), the letter must constitute a "final agreement."

[26] Having reviewed the letter, its surrounding context, and the municipality's confidential representations, I accept the municipality's submission that no agreement between the municipality and former employee exists. As such, the letter cannot be considered to be a "final agreement," as determined to be required in previous IPC decisions. Accordingly, I find that none of the section 52(4) exceptions to the exclusion apply, and the letter is excluded from the scope of the *Act*. While I understand the appellant's concerns about the importance of transparency surrounding the dismissal of the CAO, with the letter excluded from the scope of the *Act*, I cannot consider if the

personal privacy exemptions or the public interest override apply.

ORDER:

I dismiss the appeal.

Original signed by: _____
Chris Anzenberger
Adjudicator

_____ May 17, 2024