



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

ORDER M-880

Appeal M_9600271

Essex County Board of Education



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NATURE OF THE APPEAL:

The appellant made a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) to the Ministry of Education and Training (the Ministry). The request was for access to the appellant's personnel file and any other file containing information relating to the appellant which was held by the Essex County Board of Education (the Board). The Ministry transferred the request to the Board.

The Board provided access to 70 records and partial access to three other records. Access was denied to 13 records. The Board informed the requester that these records or parts of records were not accessible as they fall outside the scope of the Act, pursuant to sections 52(3)1 and 3.

The appellant appealed the Board's decision. A Notice of Inquiry was sent to the Board and the appellant. Representations were received from the Board only.

DISCUSSION:

APPLICATION OF THE ACT

The interpretation of sections 52(3) and (4) is a preliminary issue which relates to the Commissioner's jurisdiction to continue an inquiry. These sections read:

- (3) 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.

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 record is excluded from the scope of the Act and not subject to the Commissioner's jurisdiction.

The Board claims that sections 52(3)1 and 52(3)3 are applicable in the circumstances of this appeal. The Board indicates that the appellant's employment with the Board was terminated in February 1996. Shortly thereafter, the Ontario Secondary School Teachers' Federation, on the appellant's behalf, launched a grievance against her termination under the collective agreement between the Board and the Ontario Secondary School Teachers' Federation, District 34 (OSSTF). The matter proceeded through the grievance procedure set out in the collective agreement, and was referred to arbitration by the union representing the appellant. In addition to instituting grievance and arbitration proceedings through her union, the appellant has also filed a human rights complaint against an employee of the Board. This complaint is currently being investigated by the Ontario Human Rights Commission pursuant to the terms of the Ontario Human Rights Code.

In order for a record to fall within the scope of section 52(3)1, the Board must establish that:

1. the record was collected, prepared, maintained or used by the Board or on its behalf; **and**
2. this collection, preparation, maintenance or usage was in relation to proceedings or anticipated proceedings before a court, tribunal or other entity; **and**
3. these proceedings or anticipated proceedings relate to labour relations or to the employment of a person by the Board.

(Order M-815)

The records to which access has been denied were all collected, prepared, maintained or used by an employee of the Board or legal counsel acting on the Board's behalf either immediately preceding or immediately following the Board's termination of the appellant's employment. Accordingly, I find that the first part of the test has been met.

In my view, the records relate directly to the decision of the Board to terminate the appellant's employment. The records represent a concerted effort to document the decision-making process and will be an integral and essential part of the matters subject to arbitration. Accordingly, I find that the second part of the test has been met.

In Order M-815, former Assistant Commissioner Tom Mitchinson developed a number of interpretations respecting the wording of section 52(3)1. Applying these various interpretations, I make the following findings under the second requirement of section 52(3)1:

- The arbitration process under the collective agreement between the Board and OSSTF is a dispute or complaint resolution process conducted by a court, tribunal or other entity which has, by law, binding agreement or mutual consent, the power to decide grievances. As such, hearings before an arbitrator are properly characterized as "proceedings".
- An arbitrator has the authority to conduct "proceedings", and the powers to determine matters affecting rights, and is properly characterized as an "other entity" for the purpose of section 52(3)1.
- The records at issue in this appeal were collected, prepared, maintained and/or used for the purpose of investigating the conduct of the appellant or to determine appropriate disciplinary action. Disciplinary action was subsequently taken, which lead to the grievance and subsequent arbitration. The records were and will be used in the arbitration hearing. This usage is for the purpose of and/or substantially connected to the arbitration, and therefore properly characterized as being "in relation to" it.

Accordingly, I find that the requirements of the second part of the test have been met.

In the circumstances of this appeal, the Board has established that the appellant, who was a member of OSSTF at the time, filed her grievance in accordance with the collective agreement between the Board and OSSTF. Therefore, I find that the grievance arbitration is a proceeding relating to labour relations, and the third requirement of section 52(3)1 has been established.

In summary, I find that the records at issue in this appeal were and will be used by the Board in relation to proceedings before an "other entity", the arbitrator, and that these proceedings relate to labour relations. All of the requirements of section 52(3)1 of the Act have thereby been established by the Board. None of the exceptions contained in section 52(4) are present in the circumstances of this appeal, and I find that the records are, therefore, excluded from the scope of the Act.

ORDER:

I uphold the Board's decision.

Original signed by: _____
Holly Big Canoe
Inquiry Officer

_____ December 19, 1996