



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

# **ORDER MO-1167**

**Appeal MA-980189-1**

**Dufferin-Peel Catholic District School Board**



80 Bloor Street West,  
Suite 1700,  
Toronto, Ontario  
M5S 2V1

80, rue Bloor ouest  
Bureau 1700  
Toronto (Ontario)  
M5S 2V1

416-326-3333  
1-800-387-0073  
Fax/Télé: 416-325-9195  
TTY: 416-325-7539  
<http://www.ipc.on.ca>

## **NATURE OF THE APPEAL:**

The Dufferin-Peel Catholic District School Board (the Board) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to the requester's personal information located in the files of a named disability management officer. The Board located a number of responsive records and granted access to some of them. Access was denied to the remaining 13 records, pursuant to section 52(3) of the Act, as the Board indicated that they fell outside the ambit of the Act. The appellant appealed the decision to deny access.

The appellant, an employee with the Board, had been away from work due to illness and the records relate to her receipt of Long-Term Disability benefits, the termination of those benefits and her return to work.

This office provided a Notice of Inquiry to the appellant and the Board. Representations were received from both parties. In its representations, the Board indicated that it had granted access to an additional record.

The records that remain at issue in this appeal consist of 12 documents which include a six-page Claim History, 22 pages of internal e-mail, a one-page internal memorandum, a two-page summary and a five-page summary and comments. These records appear as items A-D and F-M on the Index of Records prepared by the Board and provided to the appellant and to this office.

## **DISCUSSION:**

### **JURISDICTION**

The interpretation of sections 52(3) and (4) of the Act 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 submits that the records fall outside the ambit of the Act because of the application of section 52(3)3.

### **Section 52(3)3**

In order for a record to fall within the scope of paragraph 3 of section 52(3), 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 meetings, consultations, discussions or communications; **and**
3. These meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the Board has an interest.

[Order P-1242]

The Board submits that all of the records fall within the scope of section 52(3)3 and are, therefore, outside the ambit of the Act. The Board argues that the records were prepared and used by staff in various departments: benefits, disability management, teacher personnel, school administrators and employee relations.

The appellant agrees that the records were collected, prepared, maintained or used by the Board or on its behalf.

The Board states that the records relate to the appellant's ongoing entitlement claim to Long-Term Disability Benefits, the decision by the Board's carrier to terminate benefits, the possibility of legal action against the Board, the process of assisting the appellant's return to work, sick leave credits and the determination of the appellant's employment status under the Secondary Teachers' Collective Agreement, should the appellant not return to work.

I have carefully reviewed all the records. I find that they were collected, prepared, maintained or used by the Board in relation to various meetings, discussions and consultations which took place regarding the appellant's long-term disability benefit claims and her return to work. I also find that because these meetings, discussions, consultations were concerned with the appellant's employment with the Board, they were clearly about an employment-related matter.

I must now determine whether these records concern an employment-related matter in which the Board 'has an interest'.

The Board submits that the records relate to the appellant's application for long-term disability benefits. The Board states that under the Ontario Human Rights Code, it has a duty to accommodate an employee with a disability. Further, that under the Secondary School Teachers Collective Agreement, it has an obligation to provide rehabilitative assistance to members of the bargaining unit. The Board submits that should it become necessary for the Board to determine a change in the employment status of the appellant, the matter would become grievable under the collective agreement. The Board argues that this would have the potential to affect its legal rights or obligations and it would, therefore, have a legal interest in the matter.

The appellant relies on Order 52 in which former Commissioner Sidney B. Linden addressed the interpretation of the term "anticipated" in the context of the litigation under section 19 (solicitor-client privilege) of the Act. She notes that the former Commissioner found that "there must be a reasonable prospect of such litigation at the time of the preparation of the document - litigation must be more than just a vague or theoretical possibility." The appellant states that "[t]he corollary of this, of course, is that time mitigates against the concept of "anticipated proceedings", which is to say that, absent any facts which demonstrate the need to prepare a record for a future anticipated proceeding, the more time between the date that the record was created and the request, the less the possibility of an "anticipated" proceeding."

The appellant refers to Macdonald v. Hamilton-Wentworth R.C.S.S. Board (1985) 52 O.R. (2d) 346, which held that a teacher cannot sue a school board where the matter is the subject of a collective agreement. The appellant confirms that she cannot and has not filed suit against the Board. The appellant points out that the only remedy for a teacher is to file a grievance pursuant to the collective agreement. Again, she states she has not initiated a grievance in her own name or collectively with other teachers against the Board nor has there been any concomitant action by the Board against her.

Previous orders of the Commissioner have held that an interest is more than mere curiosity or concern. An “interest” for the purposes of section 52(3)3 must be a legal interest in the sense that the matter in which the Board has an interest must have the capacity to affect the Board’s legal rights or obligations (Orders P-1242 and M-1147). This interpretation has been expanded in recent orders.

In Order P-1575, Assistant Commissioner Tom Mitchinson dealt with a request for notes made during an employee performance and evaluation process. He noted that while the institution had an interest in administering its performance appraisal process fairly, that was not sufficient to bring the employment-related matter within the scope of section 65(6)3 of the provincial Act, which is the equivalent to section 52(3)3 of the Act. To meet the requirements of this section, the Ministry must establish an interest that has the capacity to affect its legal rights or obligations. He considered whether the performance appraisal process was grievable under the collective agreement and the Ontario Labour Relations Act. The Assistant Commissioner found that there was no evidence that a grievance had been filed, nor was there evidence of arbitrary discrimination or unfair actions on the part of the Ministry. He found that several months had passed since the appellant had received her performance appraisal and concluded that there was no evidence that “exceptional circumstances” existed which would allow her to take any steps in now bringing a complaint.

In Order P-1586, the Assistant Commissioner looked at records related to meeting minutes regarding the resignation of a named individual. In considering the institution’s legal obligations to properly discharge its responsibilities under the Power Corporation Act, he found that several months had elapsed since the named individual’s employment had ended, and the matters under consideration at the meeting were concluded. The Assistant Commissioner found that the context had changed and that there was no evidence to suggest that there was an ongoing dispute or other employment-related matter involving the institution and the named individual that had the capacity to affect the institution’s legal rights or obligations.

I adopt the reasoning and the approach taken by Assistant Commissioner Mitchinson with respect to the analysis of the impact which the passage of time may have on the question of the possible impact on the Board’s legal interests. With respect to the Board’s submissions that it has duties and obligations under the Ontario Human Rights Code and the collective agreement, I agree. However, the Board has not provided any evidence that these duties and obligations have translated into actions which could engage the Board’s legal rights and obligations in the current or reasonably foreseeable future. I note that almost 12 months have elapsed since the appellant resumed her responsibilities with the Board. The appellant has confirmed that she has not initiated a grievance nor is she the subject of any employment-related action by the Board. The Board’s submissions clearly state that the matter would **become** a grievable matter, **if** the Board determines a change in the employment status of the appellant. Based on the evidence before me, I find that the Board has not established that there exists any employment-related matter, either pending or reasonably foreseeable, which has the potential capacity to affect the legal interests or obligations of the Board. I find therefore, that the Board has not established a sufficient legal interest to bring the records within the scope of section 52(3)3. These records are, accordingly, within the ambit of the Act.

**ORDER:**

1. I order the Board to issue a decision letter to the appellant in accordance with the provisions of section 19, 21 and 22 of the Act, regarding access to the requested records, treating the date of this order as the date of the request. Should the appellant not be satisfied with the Board's decision letter, she may exercise her right to file an appeal.
2. In order to verify compliance with the terms of this order, I reserve the right to require the Board to provide me with a copy of the decision letter issued to the appellant pursuant to Provision 1.

Original signed by: \_\_\_\_\_

Mumtaz Jiwan  
Adjudicator

\_\_\_\_\_ November 25, 1998