



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

ORDER MO-1226

Appeal MA-980298-1

Northwest 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 appellant made a request to the Northwest Catholic District School Board (the Board) under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for all documents held by the Board that relate in any way to a letter of concern written by the appellant dated September 1998. The letter of concern was about an employee at the appellant's child's school.

The Board denied access to any responsive records on the basis that they fall outside the scope of the Act pursuant to paragraph 3 of section 52(3) of the Act. In appealing the denial of access, the appellant indicates that she does not dispute that some of the responsive records may be part of a performance review process, however, she believes that other records are curricular and program based and should, therefore, be subject to the Act.

I sent a Notice of Inquiry to the Board and the appellant. Representations were received from both parties.

RECORDS:

The Board identified 25 records which relate to the request and has provided this office with an index of these records. The Board notes on the index that it has not identified as responsive any records that are already in the possession of the appellant. The appellant agrees that the responsive information already in her possession is not at issue in the appeal. Accordingly, there remain 19 records at issue. These records consist of letters, notes and attachments and a report.

DISCUSSION:

JURISDICTION

The sole issue in this appeal is whether the records fall within the scope of sections 52(3)3 and 52(4) of the Act. These provisions read, in part:

- (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:
 - ...
 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 52(4) are present, then the record is not subject to the right of access under section 4(1) of the Act.

Section 52(3)3

In order 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.

Requirements 1 and 2

The Board states that all of the records were collected or created as part of an investigation into a complaint of inappropriate workplace conduct, and consist of: documents provided to a workplace investigator, such as statements, records of meetings, correspondence and responses from the employee regarding the complaint; report of the investigation into the employee's management style and method of operation, including all records used in this investigation; and performance related documents such as those which would be used in conducting a performance appraisal. The Board acknowledges that some of the records

pertain to the operation of the school. However, given the nature of the complaint made against the employee, I accept that these records are tied to the employee's performance and that they would have been used in the investigation into this person's workplace conduct.

I am satisfied that the records were collected, prepared, maintained or used by the Board or on its behalf in relation to meetings, consultations, discussions or communications about the complaint made against an employee of the Board by the appellant. Therefore, I find that the first two parts of the section 52(3)3 test have been met.

Requirement 3

The appellant submits that the records do not relate to labour relations or an employment-related matter.

As I noted above, the Board indicates that the records relate to a complaint made by the appellant against the employee regarding this person's workplace conduct. The Board submits, and I agree, that the complaint and subsequent investigation are "employment-related matters".

The only remaining issue is whether this is an employment-related matter in which the Board "has an interest".

In Order P-1242, Assistant Commissioner Tom Mitchinson stated the following regarding the meaning of the term "has an interest":

Taken together, these [previously discussed] authorities support the position that an "interest" is more than mere curiosity or concern. An "interest" must be a legal interest in the sense that the matter in which the Ministry has an interest must have the capacity to affect the Ministry's legal rights or obligations.

However, several recent orders of this office have considered the application of section 65(6)3 (and its municipal equivalent in section 52(3)3 in circumstances where there is no reasonable prospect of the institution's "legal interest" in the matter being engaged (Orders P-1575, P-1586, M-1128, P-1618 and M-1161). The conclusion of this line of orders has essentially been that an institution must establish an interest that has the capacity to affect its legal rights or obligations, and that there must be a reasonable prospect that this interest will be engaged. The passage of time, inactivity by the parties, loss of forum or conclusion of a matter have all been considered in arriving at a determination of whether an institution has a legal interest in the records.

With respect to its "legal interest" in this employment-related matter, the Board states that the allegations against the employee included in the appellant's complaint raised issues which could become part of an employment related legal proceeding before the courts. In this regard, the Board outlines the events which

have transpired from the date of the request in September 1998 to the present relating to actions taken by the Board with respect to the employee as a result of the complaint. The Board states that it considered the complaint to be very serious and the investigation and resultant actions taken by it against the employee were intended to address it. The Board anticipates that these actions will be contested by the employee.

The Board submits further that the complaint raised issues which could become the subject of a complaint under the Ontario Human Rights Code. The Board indicates that although a human rights complaint has not yet been brought, the appellant's complaint to it related to discrimination in services. The Board submits that a human rights complaint remains a very real possibility.

The Board states further that the appellant has indicated her intention to file a complaint about the incident before the College of Teachers which would have a direct employment related consequence for the employee. The Board submits that a complaint of this nature would impact on the Board in such a way as to engage its legal interests.

The appellant does not give any indication of her intention in this regard. However, she submits that there is no reasonable prospect that the Board's legal interest will be engaged in this matter from her perspective as "the only remaining option open to the appellant is the withdrawal of her child from the school system."

The appellant stresses that the Act was passed to protect the privacy of individuals while making public information more accessible and thus permitting the public to hold institutions more accountable. She points out that the current process pits the average citizen against the large institution. In this regard, she submits that it would "be a shameful miscarriage of justice if institutions are permitted to use the Labour Relations and Employment Statute Law Amendment Act to abrogate their responsibilities under the Act".

I am sympathetic to the appellant's concerns about the impact of section 52(3) on the public's ability to hold institutions and those who work in them accountable in cases where their conduct has been brought into question. However, in my view, these concerns do not factor into an assessment of the application of the exclusion.

In considering whether the Board has established a legal interest in the records at issue, I note that the complaint, the subsequent investigation by the Board and the resulting consequences for the employee occurred within this past school year and are, therefore, quite recent. Moreover, the complaint was serious as were the consequences for the employee.

Based on the representations of both parties, I am not persuaded that there is a reasonable prospect that the appellant will take any further action against it or the employee. However, I accept the Board's submissions that there is a reasonable prospect that the employee will respond to the actions taken by the Board in such a way as to engage the Board's legal interests. Therefore, I find that the Board has established a current

legal interest in the employment-related matter to which the records at issue relate and the third requirement for section 52(3)3 has been met.

ORDER:

I uphold the Board's decision.

Original signed by: _____
Laurel Cropley
Adjudicator

_____ July 16, 1999