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

Reconsideration Order MO-1200-R

Appeal MA-980189-1

Order MO-1167

Dufferin-Peel Catholic District School Board

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BACKGROUND:

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. The Board claimed that the remaining records fell within the parameters of section 52(3) of the Act, and therefore outside its jurisdiction. 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.

The records consist of 12 documents including 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.

On November 25, 1998, former Adjudicator Mumtaz Jiwan issued Order MO-1167. The former adjudicator found that the records did not relate to an employment-related matter in which the Board had an interest, and that the third requirement of section 52(3)3 was not established. Therefore, she found that the records were subject to the Act. In particular, she stated:

> ... 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. [emphasis in original]

As a result, former Adjudicator Jiwan ordered the Board to provide a decision letter to the appellant regarding access to the records.

NATURE OF THE APPEAL:

On December 14, 1998, the Board requested a reconsideration of Order MO-1167 on the basis that "there is a clerical error, accidental error or omission or other similar error in the decision". The Board stated that, in fact, "a grievance has been filed". The Board attached three pieces of correspondence, dated October 14, 19 and 20, 1998, in support of its claim.

A Notice of Reconsideration was sent to the appellant and the Board. Representations were received from both parties.

SHOULD ORDER MO-1167 BE RECONSIDERED

The reconsideration policy of the Commissioner's office provides as follows:

> A decision-maker may reconsider a decision where it is established that:
>
> (a) there is a fundamental defect in the adjudication process;
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> (b) there is some other jurisdictional defect in the decision; or
>
> (c) there is a clerical error, accidental error or omission or similar error in the decision.
>
> A decision-maker will not reconsider a decision simply on the basis that new evidence is provided, whether or not that evidence was obtainable at the time of the decision.

The Board states that Adjudicator Jiwan relied on the appellant's statement that she had not filed a grievance when, in fact, she is the subject of a grievance that was filed with the Board on October 14, 1998. The Board states that it had neglected to address the grievance in its original representations, and therefore failed to establish that the records relate to an employment-related matter that has the capacity to affect the legal interests of the Board. The correspondence provided by the Board establishes that the evidence of this grievance was available before Order MO-1167 was issued, and even before the Board provided its representations in the original inquiry.

The appellant argues that the information provided by the Board does not establish that the appellant filed a grievance, only that the union to which she belongs filed a grievance on behalf of one of its members. The appellant disputes the connection between this grievance, which relates to events which took place in 1998, and the requested records, all of which pre-date her original April 1998 request. The appellant points out that the October 1998 grievance is a "policy" grievance, and submits that "[h]istorical information from 1997 has no relevance to the present determination as to whether an employee can claim sick leave days".

The leading case on the ability of a tribunal to reconsider a decision is the Supreme Court of Canada decision in Chandler v. Alberta Assn. Of Architects (1989), 62 D.L.R. (4th) 577 (S.C.C.). The issue in that case was the application of the common law principle of functus officio to tribunals. This principle holds that once a matter has been determined by a decision-maker, generally speaking he or she has no jurisdiction to further consider the issue.

In Chandler, Sopinka J., writing for the majority, made the following statements:

> ... As a general rule, once [an administrative] tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal changes its mind, made an error within jurisdiction or because there has been a change in circumstances. It can only do so if authorized by statute or if there has been a slip or error within the exceptions enunciated in Paper Machinery Ltd. v. Ross Engineering Corp., supra [[1934] S.C.R. 186].
>
> To this extent, the principle of functus officio applies. It is based however, on the policy ground which favours finality of proceedings rather than the rule which was developed with respect to formal judgements of a Court whose decision was subject to a full appeal. For this reason I am of the opinion that its application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal.

In Reconsideration Order M-938, former Adjudicator Anita Fineberg applied the court's direction in Chandler to a situation where she was asked to reconsider her decision in Order M-913 that section 13 of the Municipal Freedom of Information and Protection of Privacy Act applied to the list of names of all police officers employed by the Metropolitan Toronto Police. The reconsideration request was based on a claim of new evidence which had recently become available (namely that several of the officers were publicly named in an Annual Report that had been published by the Police). Former Adjudicator Fineberg made the following statements:

> In my view, the Chandler decision stands for the proposition that once a tribunal has made its final decision, it is functus officio and cannot reopen its proceedings unless there are indications in the enabling statute that it can do so, or where the tribunal has made a jurisdictional error, or there is an accidental or similar error in the decision. This is consistent with the IPC's policy on reconsiderations.
>
> While Sopinka J. commented that the doctrine of functus officio should be "more flexible and less formalistic" when applied to tribunals, as opposed to courts, he does not, in my view, expand the exceptions to the doctrine beyond the parameters I have set out above. Therefore, unless I have made a jurisdictional error which renders my decision in Order M-913 a nullity, have made an accidental or similar error, or the Act indicates that I may reopen a final decision in the circumstances, the doctrine applies and I am functus.

Former Adjudicator Fineberg went on to find that she was precluded from reconsidering her decision, despite the existence of "new evidence" because the reconsideration request did not fit within the scope of Chandler and the Commissioner's reconsideration policy, and she was functus.

However, in my view, the circumstances in the present case are fundamentally different from those faced by former Adjudicator Fineberg in Order M-938. In Order M-938, the adjudicator was asked to reconsider her decision on the application of an exemption claim to certain records on the basis of evidence which existed but was not provided to her in the original inquiry. In the present case, the so-called "new evidence" provided by the Board does not deal with the application of an exemption claim; rather it goes directly to the issue of whether or not the records fall within the jurisdiction of the Act. In my view, different considerations must apply. Whether or not a relevant grievance was in existence at the time of Adjudicator Jiwan's original decision in Order MO-1167 was a material fact which was determinative of the issue of whether the Board "had an interest" in the employment-related matter which was the subject of the requested records. If there was a relevant grievance, then the "interest" would be present, and the records would be outside the jurisdiction of the Act; if there was no relevant grievance, then an "interest" would not be present, and the Act would apply.

The Ontario Court (General Division) Divisional Court considered a similar issue in the case of Grier v. Metro International Trucks Ltd. (1996), 28 O.R. (3d) 67. The issue in Grier was how much vacation pay an employee was entitled to, and the referee adjudicating the case under the Employment Standards Act made her decision on the basis of an incorrect date provided during the course of her deliberations. The Court found that because the decision was arrived at based on what was subsequently discovered to be incorrect information, the decision was a nullity and the decision maker could reopen the matter to correct the decision.

In reaching this decision, the Court referred to Sopinka J.'s comments in Chandler and stated:

> I believe that the flexibility of which Sopinka J. speaks in this passage is appropriate on the present application. Under the ESA [the Employment Standards Act] the referee is charged with interpreting the successor rights provisions. Referee Novick purported to do this in her first decision. However, the parties accidentally placed before her an important fact which was incorrect. On the face of her first decision it is clear that this incorrect fact influenced her decision. Moreover, if there were any doubt about this, Referee Novick expressly confirmed her reliance in her subsequent decision dealing with the request for a rehearing. In these circumstances, I think that a fair conclusion is that her first decision, like the tribunal's decision in Chandler, was a nullity. She intended to make a final disposition; however, that disposition was fatally tainted by her reliance on a crucial fact which both parties agree is incorrect. She should be permitted, as was the tribunal in Chandler, "to reconsider the matter afresh and render a valid decision". ...

> In the present case, the parties made a mistake. The mistake influenced the decision of the referee. I can see no compelling reason for concluding that the mistake should not be corrected and the matter placed back before the referee for a new decision which would be untainted by reliance on the incorrect fact.
>
> In conclusion, the flexibility in the application of the principle of functus officio articulated by Sopinka J. in Chandler permits a just resolution of the issues raised on this application. The parties are entitled to a decision on the merits based on a full and accurate statement of the facts.

The decision in Grier would appear to allow an adjudicator to reopen a case in order to correct a factual error of a fundamental nature going to the actual issue to be determined. In my view, Adjudicator Jiwan was faced with an error of this nature in reaching her decision in Order MO-1167. A grievance did in fact exist. Adjudicator Jiwan was unaware of it, and she relied on the appellant's statement that no grievance had been filed in finding that the Board did not have a "legal interest" for the purposes of section 52(3). This finding was fundamental to the outcome of Adjudicator Jiwan's conclusion that the records fell within the jurisdiction of the Act. In my view, this qualifies as an "accidental error" within the meaning of clause (c) of the Reconsideration Policy of the Commissioner's office. On this basis I am prepared to reconsider Order MO-1167 and to consider the new evidence which has been provided with respect to the grievance.

DISCUSSION:

JURISDICTION

The issue to be decided is whether sections 52(3) and (4) of the Act apply to the records. These two sections read as follows:

> (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.

The interpretation of sections 52(3) and (4) is a preliminary issue which goes to the application of the Act to the requested records.

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 outside the Commissioner's jurisdiction.

Section 52(3)3

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

1. they were 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]

Requirements 1 and 2

The appellant acknowledges that the records were collected and prepared by the Board. I concur.

I also accept the Board's position that this collection and preparation was in relation to "conversations, minutes of meetings, consultations, memos, reports, etc., in particular when an employee is a member of a union and covered under a collective agreement, in order to be able to respond to any anticipated legal proceedings."

Therefore, I agree with the original findings of former Adjudicator Jiwan in Order MO-1167, and find that the first two requirements of section 52(3)3 have been established.

Requirement 3

The meetings, consultations, discussions or communications referred to under Requirements 2 all relate to the appellant's long-term disability benefit claims and her return to work. These are clearly employment-related matters. In my view, the existence of a dispute between the Board and the appellant regarding these benefit claims, in which her union is a participant, also renders them "about labour relations" for the purposes of Requirement 3.

The only remaining issue is whether these activities are about labour relations or employment-related matters "in which the Board has an interest".

Previous orders of this office 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 legal rights or obligations of the Board (Orders P-1242 and M-1147).

Several recent and relevant orders have considered the question of whether a "legal interest" existed for the purposes of section 52(3) or its equivalent in the Freedom of Information and Protection of Privacy Act, section 65(3) (e.g. Orders P-1575, P-1586, M-1128, P-1618, M-1161, and PO-1658). The conclusion of this line of orders is essentially that for a "legal interest" to exist, 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.

The Board states that the October 14, 1998 grievance was filed on the appellant's behalf by the Ontario English Catholic Teachers' Association. The Board submits that the records at issue in this appeal are connected and relevant to the grievance process. The Board goes on to state:

> They [the records] will be used by management, by staff, or by counsel representing the Board at a grievance hearing. The outcome of the hearing has the potential to affect the Board's legal rights and/or obligations.

The appellant makes extensive representations on this issue. They are summarized, in part, by the following conclusions outlined in the representations:

- the records do not have a primary employment or labour relations interest;
- the employment or labour relations function of a document abates as time passes, particularly where in [the appellant's] case there has been intervening employment between the records noted in the Index of Records and the present;
- the records are not documents which themselves can be the subject of a grievance or if they could such a grievance would be out of time;
- the existence or use of rehabilitation records are not matters which can be the subject of a grievance by a teacher. Rehabilitation records exist for administrative purposes primarily to satisfy the needs of the private disability insurer.

The appellant's representations implicitly acknowledge that the October 14, 1998 grievance involves the appellant, but the gist of the appellant's position is that this "policy" grievance relates to different matters than those dealt with in 1997, which are the subject matter of her request. In the appellant's view:

> ... the policy grievance referred to by [the Board] is a grievance dealing with the existence of or crediting of sick leave credits to a teacher in the fall of 1998 as required by a collective agreement. The provision of sick leave to a teacher in the fall of 1998 relates to information provided by the teacher which describes the medical disability in the fall of 1998 that presents (sic) a teacher from working. Historical information from 1997 has no relevance to the present determination as to whether an employee can claim sick leave days.

The appellant also suggests that even if the records themselves could be the subject of a grievance, such a grievance would be out of time due to the date of the records.

The appellant attached copies of correspondence from October-November 1998 between the Board and the union representing the appellant in support of her position that the October 1998 grievance is unrelated

to the 1997 records. Although this correspondence was prepared in the context of the October 1998 grievance, two of these letters, one from the Board and the other from the union, make specific reference to the appellant's disability claim and activities which took place during 1997. This fact, together with the Board's statement that the records at issue in this appeal as well as records involving the appellant which date from as far back as 1993 will be used in the upcoming hearing relating to the October 1998 grievance, persuade me that the Board has the requisite legal interest in the labour relations or employment-related matter for the purposes of section 52(3)3. Accordingly, I find that Requirement 3 has been established.

In summary, I find that the records were collected, prepared and are being maintained by the Board in relation to meetings, consultation and discussions about labour relations and employment-related matters, specifically the grievance process initiated by the appellant's union, and that this is a matter in which the Board has a legal interest. Therefore, the records fall within the scope of section 52(3)3 and are outside the jurisdiction of the Act.

In addition, I find that the records qualify under the wording of section 52(3)1, which also brings them outside the jurisdiction of the Act. Specifically, they are being maintained by the Board in relation to anticipated proceedings before a tribunal, specifically an arbitration board established under the Ontario Labour Relations Act, and these anticipated proceedings relate to labour relations or to the employment of the appellant by the Board.

After submitting her representations, the appellant wrote to me attaching a record which she feels is responsive to her request, but was not included in the Board's Index of Records. The appellant takes offence at the content of the record, and also implicitly questions the adequacy of the Board's search in not identifying this record in response to her original request. I have considered this record and find that it falls into the same category as the other records in this appeal, and is outside the jurisdiction of the Act. I also find that any other responsive records, should they be identified, would fall into the same category, given the particular circumstances of this appeal. Accordingly, no useful purpose would be served in dealing further with the issue of whether the Board's searches for responsive records were adequate.

ORDER:

1. Order MO-1167 is rescinded.

2. I find that the records fall within the scope of sections 52(3)1 and 52(3)3, and are therefore outside the jurisdiction of the Act.

Original signed by: March 25, 1999
Tom Mitchinson
Assistant Commissioner