



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER MO-1554

Appeal MA-010382-1

Toronto District School Board



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NATURE OF THE APPEAL:

The Toronto District School Board (the Board) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

- (a) all letters, memos, e-mails or written correspondence pertaining to the charges filed under the 'Education Act' on [the requester] by the T.D.S.B. and
- (b) also any disciplinary actions ie. Suspensions that may have resulted in this.

The Board located records responsive to part (a) of the request and denied access to them on the basis that, because of the operation of section 52(3) of the *Act*, the records do not fall within the ambit of the *Act*. It also indicated that no records responsive to part (b) of the request could be located. The Board advised the requester that in the event that section 52(3) was found not to apply to the records, it was relying on the exemptions contained in section 12 of the *Act* (solicitor-client privilege) for Records 10, 12, 13, 14 and 15.

The requester, now the appellant, appealed the Board's decision on the basis that he continues to seek access to records which fall within the ambit of part (a) of his request and that records responsive to part (b) of the request should exist.

During the mediation of the appeal, the appellant narrowed the scope of his request by withdrawing his position that records responsive to part (b) of the request should exist. As further mediation was not possible, the matter was moved to the adjudication stage of the appeal process. Following the issuance of the Mediator's Report, the appellant advised the Mediator that he intends to re-activate a grievance proceeding against the Board pursuant to the provisions of the collective agreement which governs his employment relationship with it. During mediation, the Board also confirmed that it is relying on the provisions of sections 52(3)1 and 3 to deny access to the records.

I decided to seek the representations of the Board, initially and issued to it a Notice of Inquiry soliciting its position with respect to the issue in this appeal. The Board made representations in response to the Notice in which it indicates that it is now prepared to disclose Records 5, 6 and 7 to the appellant. Portions of the Board's submissions were not shared with the appellant as to do so would result in the contents of some of the records being disclosed to him. The appellant was also provided with a copy of the Notice of Inquiry but did not make any submissions in response.

The records remaining at issue consist of 16 pages of handwritten notes, correspondence, a grievance form, e-mail messages and a report.

DISCUSSION:

DO THE RECORDS FALL OUTSIDE THE AMBIT OF THE ACT AS A RESULT OF THE OPERATION OF SECTIONS 52(3)1 AND 3?

If section 52(3) applies to the records, and none of the exceptions found in section 52(4) applies, section 52(3) has the effect of excluding records from the scope of the *Act*.

Section 52(3) has no application outside the employment or labour relations context. Therefore, unless the institution establishes that the anticipated proceedings for which the records are being maintained arise in an employment or labour relations context, the records do not relate to "labour relations or to the employment of a person by the institution", and section 52(3) does not apply.

[Orders P-1545, P-1563, P-1564 and PO-1772]

Section 52(3)1

General

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 institution.

[Order M-815]

The Position of the Board

With respect to the first part of the test under section 52(3)1, the Board submits that the records at issue were prepared by several of its employees and "serve to clarify the Board's position" with respect to a criminal proceeding involving the appellant and two grievances which he filed pursuant to the collective agreement governing his employment with the Board arising from the incidents documented in the records. The Board also indicates that these records were maintained in the appellant's employment file by the Board.

The Board takes the position that the second part of the test set out above has also been satisfied as the preparation and maintenance of the records was in relation to proceedings before a tribunal or other entity. The Board relies on the findings of Assistant Commissioner Tom Mitchinson in Order M-815 in which he held that a grievance proceeding under a collective agreement constitutes a "proceeding" for the purposes of section 52(3)1. The Board submits that as the appellant has indicated to the Mediator in this appeal his intention to "re-activate" his grievances against it, the threatened grievance proceedings represent more than just a "vague or theoretical possibility". The Board indicates that there exists a substantial connection between the content of the records and the proceeding in question as the records relate directly to the subject matter of the appellant's grievances.

The Board goes on to submit that the proceedings in question relate to “labour relations”, as well as its “employment of a person”. It argues that because the appellant’s grievances arise from an alleged violation of his rights under the collective agreement, “the proceeding is intimately ‘related to’ labour relations, in accordance with the decision in Order M-815.”

Findings

I find that the remaining records at issue were prepared and maintained by Board staff and that this preparation and maintenance was in relation to the grievance proceedings initiated by the appellant. Specifically, I find that the records relate directly to the subject matter of the appellant’s grievance and set forth the Board’s position on the issues raised in that proceeding. As a result, I find that the first two components of the test for the application of section 52(3)1 set out in Order M-815 have been satisfied.

In Order M-815, Assistant Commissioner Mitchinson made the following findings with respect to a situation where the records being requested relate to an outstanding grievance proceeding. He found that:

The term “labour relations” also appears in section 10(1) of the municipal *Act* and its provincial equivalent, section 17(1). In the context of section 17(1), Inquiry Officer Holly Big Canoe discussed the term “labour relations information” in Order P-653, and made the following statements:

In my view, the term "labour relations information" refers to information concerning the **collective** relationship between an employer and its employees. The information contained in the records was compiled in the course of the negotiation of pay equity plans which, when implemented, would affect the **collective** relationship between the employer and its employees.

Given the particular wording of section 52(3)1, I find that Inquiry Officer Big Canoe’s interpretation of the term is equally applicable in the context of paragraph 1. Therefore, I find that “labour relations” for the purposes of section 52(3)1 is properly defined as the collective relationship between an employer and its employees.

In the circumstances of this appeal, the City has established that the appellant, who was a member of CUPE at the time, filed his grievance in accordance with the collective agreement between the City and CUPE. 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 City 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 City. None of the exceptions contained in section 52(4) are present in the circumstances of this appeal, and I find that the records fall within the parameters of section 52(3)1 and therefore are excluded from the scope of the *Act*.

I adopt the reasoning expressed by the Assistant Commissioner in Order M-815 for the purposes of the present appeal. I find that the pending grievance proceeding initiated by the appellant relates to labour relations, as was the case in Order M-815. In addition, I find that the records address directly the issues which form the basis for the appellant's grievance and will be used by the Board in the course of those proceedings. The Board has, therefore, satisfied all three requirements of section 52(3)1. I also find that none of the exceptions in section 52(4) apply to the information contained in the records. As a result, the records at issue are subject to section 52(3)1 and are excluded from the scope of the *Act*.

ORDER:

I uphold the Board's decision.

Original signed by: _____
Donald Hale
Adjudicator

July 2, 2002