



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-1640

Appeal MA-020257-1

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/Télééc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

This is an appeal from a decision of the Dufferin-Peel Catholic District School Board (the Board), made under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The requester (now the appellant) is a member of the media, and sought access to certain records from the Board. The request covers

any and all financial accounting audit reports, forensic or otherwise, audit reports, as well as any letters, memos, analysis or responses written regarding the above reports, conducted over the last 24 months encompassing the Board's Program Departments.

The following background to this appeal is derived from the materials submitted by the Board. In the fall of 2001 the Board, through its legal counsel, retained a forensic consultant to undertake an investigation of one of its departments and the activities of employees within that department. The investigation was initiated as a result of information received by the Board about the activities of an employee who was billing the Board for services performed as a consultant. This investigation was conducted over the course of six months. The investigation resulted in a recommendation to the Board of Trustees that the employment of the supervisory officer in charge of the program be terminated. The officer appeared at meetings of the Board of Trustees with legal counsel, following which the Board terminated the officer's employment for cause. This officer has now sued the Board and its Director of Education for wrongful termination, and the litigation is ongoing.

In its decision, the Board differentiated between *financial accounting audit reports* and *forensic or other audit reports*. With respect to financial accounting audit reports, the Board provided access to a copy of its audited financial statement for the year ending August 31, 2001, and stated that the audited financial statement ending August 31, 2002 will not be available until March, 2003. Further, it indicated that there are no letters, memos, analyses or responses regarding this report.

With respect to request for all audit reports, forensic or otherwise, as well as any related letters, memos, analysis or responses, the Board referred to section 52(3) of the *Act*. The Board stated that its decision is that the requested records fall within the parameters of section 52(3) and are therefore excluded from the scope of the *Act*.

During mediation through this office, the Board also claimed, in the alternative, the application of certain sections under the *Act* to exempt the records from disclosure (with the exception of a record which the Board claims is non-responsive to the request in any event).

I sent a Notice of Inquiry to the Board, initially, inviting it to submit representations on the facts and issues raised by the appeal. As it appeared that the issue under section 52(3) of the *Act* might potentially dispose of the appeal, I bifurcated my inquiry and sought representations on the application of section 52(3) only at this stage.

I shared portions of the Board's representations with the appellant, who has submitted representations in response.

CONCLUSION:

Section 52(3)1 applies to the records at issue. Accordingly, they are excluded from the scope of the *Act*.

RECORDS:

The records at issue consist of:

- Record A: A forensic investigation report conducted by an external firm
- Record 1: An executive summary prepared by counsel for the Board
- Record 2: A response to Record A
- Record 3: Reasons of the Board of Trustees for termination
- Record 4: Handwritten notes of Board staff
- Record 5: Handwritten notes of Board staff
- Record 6: File notes of meeting
- Record 7: Draft letter
- Record 8: Memo
- Record 9: Memo
- Records 11 – 69: Correspondence and other documents, forming the correspondence brads and the note brads of a file maintained by legal counsel for the Board.

DISCUSSION:

Introduction

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 proceedings or anticipated proceedings arise in an employment or labour relations context, 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]

Requirement 1

The Board submits, and the appellant concedes, that all of the requested records were collected or prepared by the Board or on its behalf. Upon my review, I am satisfied that this requirement has been met, in relation to all of the records in dispute. It should be noted that some records that were not *prepared* by the Board (for instance, Record 2, which was prepared by counsel for the dismissed officer), were nonetheless *collected* by it. Further, they have been and are being maintained and used by the Board.

Requirements 2 and 3

Representations

The Board submits that all of the records in question have been prepared, maintained and/or used by the Board in a proceeding or are being maintained and will be used in anticipated proceedings before a court or other entity. The Board submits that the meetings of its Board of Trustees constitute “proceedings” for the purposes of section 52(3)1. It is submitted that Regulation 309, made under the *Education Act*, requires a board of education to provide supervisor officers with information about the grounds for termination as well as an opportunity to make submissions. This officer was given an opportunity to respond both in writing and in person, through legal counsel. The Board of Trustees made a decision under its statutory powers, in accordance with a duty of fairness.

Further, the Board submits that it is currently maintaining and will be using the records in its defence of the officer’s claim against the Board and its Director of Education. Their use is “in relation” to a proceeding or anticipated proceeding, as the records are “substantially connected” to the civil litigation. The present litigation between the parties is a court process, explicitly referred to in section 52(3)1. The process is neither vague nor theoretical, as pleadings have been served and filed. As well, some of the records form part of the discoverable documents in civil litigation.

It is submitted that the termination proceeding and the civil litigation relate to the employment of the supervisory officer. The Board states that from the outset of the investigation, the Board anticipated that there would at the very least be discipline of the supervisory officer for negligent management of the department. It submits that Records A, 1 and 2 were created for the purpose of disciplining the supervisory officer, or terminating that individual’s employment. Record 3 was the direct result of the termination of employment, and Records 4 through 69 were

substantially connected to the termination. Accordingly, all of the records “relate to” the employment of the supervisory officer.

The Board relies on Order M-815, in which Assistant Commissioner Tom Mitchinson considered records in relation to the investigation of an employee, termination of employment and subsequent grievance arbitration, and in which he found that the requirements of section 52(3)1 were met:

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...

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

The appellant submits that the audit was a broad investigation into the entire department at issue. Its purpose was to allow the Board to understand how public monies it controlled were being spent. It states that it is misleading to characterize the audit as an investigation into the actions of a single employee, as it was wide-ranging. The appellant describes the audit as “relating to the efficiency and effectiveness of the operation” rather than to employment matters.

Further, the appellant submits that what the Board characterizes as a “termination proceeding” was not a proceeding for the purpose of section 52(3)1, but an internal process. The *Statutory Powers Procedure Act* did not apply to the termination. In this sense, this case is distinguishable from Orders M-815 and P-1223, relied on by the Board.

With respect to the wrongful dismissal proceedings, the appellant submits that none of the records were “collected or prepared for” or “maintained and used for” that litigation. At the time the audit was requested, the possibility of wrongful termination proceedings was at best vague or theoretical. As such, it was not collected or prepared for the wrongful dismissal litigation. This is also true for the other requested records, most of which relate to the Board’s response to the audit.

The appellant refers to the threshold for discovery of documents in a civil suit, based on a document possessing a “semblance of relevance” to the matters in dispute. The appellant submits that a requested document cannot be exempt from the *Act* simply because it has a “semblance of relevance” to a legal proceeding. The appellant relies on the decision in *Lavigne v. Canada (Office of Commissioner of Official Languages)*, [2002] S.C.J. No. 55, asserting that this decision requires that exemptions from privacy legislation be applied narrowly. The appellant states that section 52(3)1 should not be interpreted so broadly as to encompass

documents collected and used for a government audit and fully and properly disclosable as such simply because they may be used at some later date in employment proceedings. If the threshold for non-application of the *Act* were as low as the Board claims, it would be meaningless. The appellant submits that the Board has failed to show that any of the requested documents contain anything more than a semblance of relevance to the legal proceedings.

The appellant urges restraint in the application of section 52(3)1, and warns against sweeping large numbers of records together in a broad manner. Further, the appellant submits that the words “collection”, “preparation” and “use” should be interpreted as requiring that the collection, preparation or use be for the “dominant purpose” of employment proceedings.

Analysis

I find that, at the very least, the records at issue have been and are maintained by the Board in relation to proceedings before the courts relating to the employment of the supervisory officer. It is not necessary to determine whether, as the Board submits, the termination process before its Board of Trustees was a “proceeding”. It is sufficient that the wrongful dismissal suit qualifies as a court proceeding for the purposes of section 52(3)1, and that the records are maintained and will be used for that litigation.

In Order P-1223 [dealing with the provincial equivalent of section 52(3)], Assistant Commissioner Tom Mitchinson discussed the meaning of the term “in relation to”, finding that if the preparation, collection, maintenance or use of a record was “for the purpose of, as a result of, or substantially connected to an activity listed in this section, it would be “in relation” to that activity. Adopting this analysis, with which I agree, I am satisfied that the maintenance and use of the records is substantially connected to the wrongful dismissal action brought by the supervisory officer, which is a “proceeding before a court” referred to in section 52(3)1. I accept the Board’s submissions that they will be used by the Board in its defence against the lawsuit, in preparation for and conduct of the litigation.

I do not agree with the appellant that the result of my finding is that requested documents can be exempted from the *Act* simply because they meet the requirements for discovery in civil proceedings that they have a “semblance of relevance” to the dispute. Although the Board has submitted that some of these documents meet the requirements for discovery, it has not taken the position that this alone is a sufficient basis for the application of section 52(3)1 of the *Act*. Nor is my decision that the records meet the second requirement of section 52(3) based on any finding about whether they might qualify for discovery. It is unnecessary for me to explore the relationship between the rules governing discovery of documents in a civil proceeding, and the elements of section 52(3)1. Applying the principles established in prior cases in this area, I am satisfied that the records meet the second and third requirements of this section.

I have reviewed the decision in *Lavigne*, referred to by the appellant, and am satisfied that my decision is compatible with the principles expressed there. It should be noted that the discussion in *Lavigne* relates to the right of access to one’s own personal information. The case before me originates in a request by a member of the media, and does not relate to the requester’s own

personal information. In any event, whether the provisions of section 52(3)1 are strictly construed or broadly construed, on the facts of this case, the results would be the same.

On a general note, some of the appellant's submissions are directed to a concern that each record be considered on its own merits. The appellant states, for instance, that the Board should "not be able to avoid disclosure of all the Records by painting them with the same "employment-related" brush." Related to this, the appellant disputes the characterization of many of the records, particularly the "audit" (more accurately referred to as an "investigation report", or Record A), as being "employment-related." As I have indicated, the appellant views Record A as pertaining to broader issues of the use of public funds within a public institution. I have considered these submissions carefully. I do not find persuasive the appellant's submissions in relation to Record A. Although there is no doubt that Record A represents an investigation into the use of public funds, it is not simply a "policy" review. It arose out of a concern of potential misconduct or negligence on the part of Board employees. I accept the Board's submission, which is substantiated in the records themselves, that from the outset, individual employee accountability was an issue to be addressed by the investigation. In this respect, Record A is different from the organizational review under consideration in Order M-941, referred to by the appellant.

I have also reviewed the records individually, and am satisfied that my findings apply to each one on its own merits.

Finally, I wish to address the appellant's submission that I ought to apply a "dominant purpose" test to the collection, preparation or use of the records in employment-related proceedings. I am not convinced that such a test is to be preferred over the one established by Order P-1223, which refers to "for the purpose of, as a result of, or substantially connected"; the appellant has provided no persuasive reason for departing from that order.

In sum, I find that the records at issue in this appeal have been and are maintained and will be used by the Board in relation to proceedings before a court, and that these proceedings relate to the employment of a person by the Board. All of the requirements of section 52(3)1 of the *Act* have been established, and none of the exceptions contained in section 52(4) are present. I find that the records fall within the parameters of section 52(3)1 and therefore are excluded from the scope of the *Act*.

ORDER:

I uphold the Board's decision.

Original Signed By: _____

Sherry Liang
Adjudicator

April 28, 2003