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

ORDER MO-2487

Appeal MA08-259

Ottawa-Carleton District School Board

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NATURE OF THE APPEAL:

The Ottawa-Carleton District School Board (the Board) received a multi-part request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) from the father of a student with the Board for access to information about his son. The request was for access to all documents, notes, records, data or other information in the possession of the Board or any of its employees or agents which is not contained in the son's Ontario Student Record folder. The requester wrote that:

> The information I am seeking includes all notes, records and documents including all documentation related to the suspension appeal hearing that was held on [a specified date] with regards to [his son]. This request also includes all psychological or educational assessment or any other assessment, evaluation or report of and concerning [his son] in the [Board's] possession.
>
> Please include all records of the meeting on [a specified date] itself including personal notes or email. The [Board] policy indicates that there is a formal letter regarding [his son] that is prepared as part of the results from the hearing on [a specified date] that will be presented to the [Board] …

The Board extended the time to respond to the request under section 20 of the *Act* and identified some records that are responsive to the request. After receiving the position of an affected party on disclosure of those records, the Board granted the requester partial access to them. The Board relied on the discretionary exemptions at sections 7(1) (advice or recommendations) and 12 (solicitor-client privilege), the mandatory exemption at section 10(1)(d) (third party information) and the exclusionary provision at section 52(3) to deny access to the records it withheld. The Board also took the position that it did not have custody or control of some records that may be responsive to the request.

The requester (now the appellant) appealed the Board's decision.

During mediation, the Board advised the mediator that records relating to psychological or educational assessment or any other assessment, evaluation or report pertaining to the appellant's son were not located in the course of its searches. However, copies of other responsive records in the Board's custody and control were located and disclosed to the appellant. Copies of the teacher's (the primary affected party's) notes and day books were not provided to the appellant or to this office, as the Board takes the position that they are not in its custody or under its control.

Also during mediation, the appellant advised that he was not pursuing access to the following:

- a record that the Board claimed was exempt under section 12 of the *Act*; and
- a 43-page submission from the appellant, the investigator's notes, interview notes, two incident reports and certain "process notes", all of which the Board had identified as being part of an investigation file.

As a result, those records and the application of section 12 are no longer at issue in this appeal.

Finally, at mediation the legal representative for the primary affected party took the position that the Board does not have custody or control of the primary affected party's notes and/or her day books, and objected to any disclosure of these records on that basis.

Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*. The Adjudicator assigned to the appeal sent a Notice of Inquiry setting out the facts and issues in the appeal to the Board and two affected parties, initially. Section 54(c) of the *Act* permits the exercise of rights under the *Act* on behalf of minors whereby a parent may, in certain circumstances, step into the shoes of his or her son or daughter and exercise the child's access rights under the *Act* on his or her behalf. As a result, because it appeared that the records contained in the personal information of both the appellant and his son, the Adjudicator was of the view that the discretionary exemption in sections 38(a) and (b) (invasion of privacy) of the *Act* may also apply in the circumstances of this appeal. Accordingly, he requested submissions on the application of sections 38(a) and (b) in the Notice of Inquiry.

Both the Board and the two affected parties provided representations in response to the Notice.

The assigned adjudicator then sought representations from the appellant on the facts and issues set out in the Notice of Inquiry and provided the appellant with copies of the non-confidential representations of the two affected parties and the Board. The appellant also provided this office with representations. The appeal file was subsequently assigned to me to complete the adjudication.

RECORDS:

At issue in this appeal is access to a 24-page investigation report. In addition, I must also determine whether the Board has custody or control of the primary affected party's notes and day books.

DISCUSSION:

CUSTODY OR CONTROL

General principles

Section 4(1) reads, in part:

> Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless . . .

Under section 4(1), the *Act* applies only to records that are in the custody or under the control of an institution.

The courts and this office have applied a broad and liberal approach to the custody or control question [*Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 4072 *Canada Post Corp. v. Canada (Minister of Public Works)* (1995), 30 Admin. L.R. (2d) 242 (Fed. C.A.), Order MO-1251].

Factors relevant to determining "custody or control"

This office has developed a list of factors to consider in determining whether or not a record is in the custody or control of an institution, as follows [Orders 120, MO-1251]. The list is not intended to be exhaustive. Some of the listed factors may not apply in a specific case, while other unlisted factors may apply.

- Was the record created by an officer or employee of the institution? [Order P-120]
- What use did the creator intend to make of the record? [Orders P-120, P-239]
- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record? [Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, above]
- Is the activity in question a "core", "central" or "basic" function of the institution? [Order P-912]
- Does the content of the record relate to the institution's mandate and functions? [Orders P-120, P-239]
- Does the institution have physical possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement? [Orders P-120, P-239]
- If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee? [Orders P-120, P-239]
- Does the institution have a right to possession of the record? [Orders P-120, P-239]
- Does the institution have the authority to regulate the record's use and disposal? [Orders P-120, P-239]
- Are there any limits on the use to which the institution may put the record, what are those limits, and why do they apply to the record?
- To what extent has the institution relied upon the record? [Orders P-120, P-239]

- How closely is the record integrated with other records held by the institution? [Orders P-120, P-239]

- What is the customary practice of the institution and institutions similar to the institution in relation to possession or control of records of this nature, in similar circumstances? [Order MO-1251]

The following factors may apply where an individual or organization other than the institution holds the record:

- If the record is not in the physical possession of the institution, who has possession of the record, and why?

- Is the individual, agency or group who or which has physical possession of the record an "institution" for the purposes of the *Act*?

- Who owns the record? [Order M-315]

- Who paid for the creation of the record? [Order M-506]

- What are the circumstances surrounding the creation, use and retention of the record?

- Are there any provisions in any contracts between the institution and the individual who created the record in relation to the activity that resulted in the creation of the record, which expressly or by implication give the institution the right to possess or otherwise control the record? [*Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner),* [1999] B.C.J. No. 198 (S.C.)]

- Was there an understanding or agreement between the institution, the individual who created the record or any other party that the record was not to be disclosed to the Institution? [Order M-165] If so, what were the precise undertakings of confidentiality given by the individual who created the record, to whom were they given, when, why and in what form?

- Is there any other contract, practice, procedure or circumstance that affects the control, retention or disposal of the record by the institution?

- Was the individual who created the record an agent of the institution for the purposes of the activity in question? If so, what was the scope of that agency, and did it carry with it a right of the institution to possess or otherwise control the records? [*Walmsley v. Ontario (Attorney General)* (1997), 34 O.R. (3d) 611 (C.A.)]

- What is the customary practice of the individual who created the record and others in a similar trace, calling or profession in relation to possession or control of records of this nature, in similar circumstances? [Order MO-1251]

- To what extent, if any, should the fact that the individual or organization that created the record has refused to provide the institution with a copy of the record determine the control issue? [Order MO-1251]

Representations

The Board acknowledges that "as a general proposition, teacher notes and day books are in the possession and control of the institution." In the present situation, however, it has not obtained the teacher's notes or the relevant day books from the teacher. For this reason, the Board indicates that it "is not able to take a position with respect to the notes and day books as it has no knowledge of the contents of these documents."

The appellant maintains that the records fall within the control of the Board by virtue of the fact that they were created by a Board employee while in the performance of their duties and that they fall under the control of a Board employee.

The representative for the primary affected party has provided detailed representations setting out its position respecting the issue of custody or control over the primary affected party's notes. The primary affected party also acknowledges that the day books fall within the custody or under the control of the Board but objects to the production of the teacher's notes on the basis that these documents are "the personal property of the individual teachers." As there appears to be no dispute as to whether the day books maintained by teachers are within the custody or control of the Board, I will order the Board to provide the appellant with a decision under the *Act* respecting access to the information which they contain. I will, however, go on to consider whether the primary affected party's notes fall within the custody or control of the Board.

In support of this position, the primary affected party makes a number of submissions which I will summarize as follows:

- The notes are not and have never been in the physical possession of the Board and do not form part of the Board's records.
- The notes are maintained by the primary affected party at her home, either on her home computer or in handwritten form.
- Teachers' notes are not kept pursuant to any statutory, Ministry or Board requirements or policies. Rather, they are kept for the teacher's own personal use on an irregular basis for any number of different reasons, such as to assist in professional development, identifying strategies, planning programs or to assist in the preparation of student evaluation.
- The notes are used as an *aide memoire* and their contents may never find their way into any formal records or reports or be "relied upon for any professional purpose".

The affected parties also rely on several decisions of this office and the courts in support of its contention that the Board does not exercise the requisite degree of control over the records. In Order PO-2306, Assistant Commissioner Tom Mitchinson found that rough notes taken by a chartered accountant appointed by the Minister of Education to conduct an investigation under section 257.30(2) of the *Education Act* were not within the control of the Ministry. The Assistant Commissioner specifically found that the investigator in that case was not "acting as an officer or an employee of the Ministry in conducting his investigations" and that this was a strong consideration weighing against a finding that the Ministry exercised the necessary degree of control over the records to bring them within the ambit of the *Act*.

Similarly, in Order M-165, the Halton Police Service retained the services of psychologist to prepare a report about one of its employees. Again, the Commissioner's office found that the Police did not exercise control over the notes taken by the psychologist in the course of his interviews with the employee. In my view, a distinction can be made between notes made by an outside contractor, such as the chartered accountant or psychologist referred to in these decisions, and an employee of the institution like the teacher involved in the present appeal. I find that these cases do not assist the affected parties' case and I do not find them to be persuasive, given the very different circumstances present in this appeal.

Further, the affected parties rely on the findings of this office in Orders P-863 and P-505 where it was held that notes taken by members of administrative tribunals, the Rent Review Hearings Board and the Ontario Municipal Board respectively, were not in the custody or control of either the Ministry of Housing or the Ministry of the Attorney General. By analogy, the affected parties argue that notes may be taken by a teacher "to document incidents, problems or issues" involving students and that "teachers clearly would not be creating these notes in their capacity as a representative of the School Board but for their own personal reasons". I do not accept the affected parties' argument in this situation. The only reason the teacher would be keeping notes would be in her capacity as an education professional to fulfill her responsibilities in the performance of her job. The context of note-taking by a member of an administrative tribunal during the course of an oral hearing is quite distinct from the circumstances surrounding the creation of the notes at issue in the present appeal, in my view.

In a decision of the British Columbia Superior Court, *Ministry of Small Business, Tourism and Culture et al. v. The Information and Privacy Commissioner of the Province of British Columbia et al.* 2000 BCSC 929 (CanLII) [British Columbia], an application for judicial review arising from a decision of the British Columbia Information and Privacy Commissioner, the court held that personal notes in the form of a diary kept by a store manager to document what she perceived to be stalking activity by the requester of this information to be outside of the control of the Ministry, her employer. In my view, the diary being kept by the employee in this case was maintained primarily as means to document the employee's concerns about the requester and was not intended to simply document the day to day activities of the classroom, as was the case in the present appeal.

The affected parties also rely on the decision of this office in Order P-1532 where it was found that a daily personal journal maintained at his home when off-duty by an employee of the Ministry of the Environment was not under the control of the Ministry for the purposes of the

Act. The affected parties argue that the "character and nature" of the personal notes in the present appeal are similar to those present in Order P-1532. Again, I find that as they are described by the primary affected person, the notes relate primarily to the day to day activities in her classroom and can be distinguished from the kind of professional journals maintained by the affected party engineer in the appeal which gave rise to Order P-1532.

The affected parties also seek to distinguish the facts in the present appeal from those extant in another British Columbia court decision involving the judicial review of a decision of the B.C. Commissioner's office, *Neilson v. British Columbia (Information and Privacy Commissioner)* [1998] B.C.J. No. 1640 (S.C.). In that case, the court upheld the Commissioner's finding that a school board exercised the necessary degree of control over notes made by a guidance counsellor employed by the school board during interview with students. In that case, the court held that the notes were taken by the guidance counsellor in performance of his or her duties to interview students and to prepare school records about the subject matter of the interviews. The affected parties argue that because the counsellor was obliged to prepare school records based on the information contained in notes taken during student interviews, there was some statutory or other requirement that rendered the notes to be under the Board's control. I find that the facts in the *Neilson* case are similar to those in the present appeal and cannot be distinguished in the manner suggested by the affected parties.

The affected parties also seek to distinguish the present appeal from that which gave rise to Order MO-1770, a decision of Senior Adjudicator David Goodis involving a request for certain notes prepared by a principal and teacher prior to a meeting involving the requester's child. In finding that the records fell within the ambit of the Toronto District School Board, the Senior Adjudicator found that:

> The records were created by Board employees during the course of, and for the purpose of, their employment responsibilities. This case can be contrasted with other cases where individuals create records for reasons other than the fulfillment of an employment duty, such as where an employee had personal concerns that someone was stalking her [see *British Columbia (Ministry of Small Business, Tourism and Culture) v. British Columbia (Information and Privacy Commission)*, [2000] B.C.J. 1494 (S.C.)].

In addition, it should be noted that Senior Adjudicator Goodis adopted my findings in an earlier decision, Order MO-1574-F, which involved a request made to the Toronto District School Board for any records relating to the requester, his wife and their son, a student with the Board. In that case, I found that:

> Addressing the applicable factors outlined in Order 120, I find that the records at issue consist, in the main, of handwritten notes taken by educators and administrators within the schools attended by the appellant's son. These notes were intended to document the son's progress and his activities throughout the period for which they were kept. The records were maintained by Board staff on the Board's premises, regardless of the fact that they were not incorporated into the son's OSR and other permanent records. In addition, the records relate

> directly to the professional employment responsibilities of the staff person, recording the writer's observations and perceptions of the behaviour and progress of the son. As such, I find that the records relate directly to the mandate of the Board and the professional duties of their creators, which is the education and social development of the appellant's son.
>
> In my view, the records are not the personal records of the individuals who prepared them, but rather, were intended, as the Board concedes, as a "memory aid" to assist these individuals in their evaluation and treatment of the appellant's son and to assist in addressing the problems identified in them. They are, moreover, directly related to the work responsibilities of its employees and have been integrated into the workplace record-holdings of each of the individuals who created them, who are Board employees.
>
> Taking into consideration all of the indicia of control outlined by former Commissioner Linden in Order 120, I find that the records at issue are all in the Board's custody and that it also exercises the requisite degree of control for the purposes of section 4(1).

I adopt my findings in Order MO-1574-I for the purposes of the present appeal. While I accept that the teachers' notes in the present appeal were not maintained on the Board's premises, in my view the preponderance of facts weighs in favour of a finding that they fall within the control of the Board regardless of the location where they are maintained. The sole reason for the creation of the responsive notes was to assist the teacher in her professional responsibilities as an educator. The responsive information which they contain relates to events and individuals who are part of the teacher's work responsibilities. If these notes contain other information of a more personal nature or information about other students, that information may be subject to the personal privacy exemptions in the *Act* or found to be not responsive to the request, as framed. In my view, the responsive information found in the teacher's notes relates solely to her professional duties as a classroom teacher and would not have been created otherwise. For this reason, I conclude that the records fall within the Board's control and I will order the Board to provide the appellant with a decision letter respecting access to the notes under the *Act*.

LABOUR RELATIONS AND EMPLOYMENT RECORDS

The Board submits that the 24-page investigation report is excluded from the operation of the *Act* as a result of the application of section 52(3) of the *Act*, which reads:

> 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.

The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships. The meaning of "labour relations" is not restricted to employer-employee relationships. [*Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.). See also Order PO-2157.]

The term "employment of a person" refers to the relationship between an employer and an employee. The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship [Order PO-2157].

The type of records excluded from the *Act* by s. 52(3) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees' actions. [*Ministry of Correctional Services*, cited above]

Section 52(3) is record-specific and fact-specific. If section 52(3) applies to a record, it has the effect of excluding the record from the scope of the *Act*. If that is the case, I do not have jurisdiction to consider the issue of the denial of access by the Board and whether the record qualifies or does not qualify for exemption under the *Act*.

Section 52(4) provides exceptions to the section 52(3)3 exclusion, none of which apply to the records at issue here. I will first address the possible application of the exclusionary provision in section 52(3)3 to the investigation report which comprises the record in this appeal.

Section 52(3)3: matters in which the institution has an interest

For section 52(3)3 to apply, the Board must establish that:

1. the record was collected, prepared, maintained or used by the Board or on its behalf;

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 institution has an interest.

Representations of the Board

In support of its position that the investigation report is excluded from the *Act* due to the operation of section 52(3), the Board submits that the report was prepared by an Investigation Advisor to the Board and was based on interviews she conducted with a number of Board employees, as well as the appellant and other individuals who are not employed by the Board. Further, the Board advises that a grievance has been filed against it by one of the affected parties alleging that the facts outlined in the investigation report give rise to a breach of the Board's obligations to the employee under the collective agreement between it and the employee's bargaining agent.

The Board further advises that the grievance is progressing through the steps outlined in the provisions of the collective agreement between it and the bargaining agent. The Board indicates that the information provided to the investigator was supplied with an expectation that it would be treated confidentially. In addition, the Board submits that there exists "the reasonable anticipation that the information contained in [the investigator's] report will be the subject of a proceeding before a board of arbitration convened pursuant to the collective agreement."

Neither the appellant nor the affected parties have made any submissions on this issue.

Analysis and Findings

The type of records excluded from the *Act* by section 52(3) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees' actions in the context of the institution's possible vicarious liability in relation to those actions, as opposed to the employment context. (See, *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 Div. Ct. (*Goodis*))

The term "in relation to" in section 52(3) means "for the purpose of, as a result of, or substantially connected to" [Order P-1223]. The phrase "labour relations or employment-related matters" has been found to apply in the context of:

- a job competition [Orders M-830, PO-2123]
- an employee's dismissal [Order MO-1654-I]
- a grievance under a collective agreement [Orders M-832, PO-1769]
- disciplinary proceedings under the *Police Services Act* [Order MO-1433-F]

- a review of "workload and working relationships" [Order PO-2057]

- the work of an advisory committee regarding the relationship between the government and physicians represented under the *Health Care Accessibility Act* [*Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)* , [2003] O.J. No. 4123 (C.A.)]

The phrase "labour relations or employment-related matters" has been found *not* to apply in the context of:

- an organizational or operational review [Orders M-941, P-1369]
- litigation in which the institution may be found vicariously liable for the actions of its employee [Order PO-1905 (upheld in *Goodis*)]

With respect to the scope of the exclusionary provision, Swinton J. for a unanimous Court, wrote in *Goodis* that:

> In *Reynolds v. Ontario (Information and Privacy Commissioner*, [2006] O.J. No. 4356, this Court applied the equivalent to s. 65(6) found in municipal freedom of information legislation to documents compiled by the Honourable Coulter Osborne while inquiring into the conduct of the City of Toronto in selecting a proposal to develop Union Station. The records he compiled in interviewing Ms. Reynolds, a former employee, were excluded from the *Act*, as Mr. Osborne was carrying out a kind of performance review, which was an employment-related exercise that led to her dismissal (at para. 66). At para. 60, Lane J. stated,
>
> > It seems probable that the intention of the amendment was to protect the interests of institutions by removing public rights of access to certain records relating to their relations with their own workforce.

Cautioning that there is no general proposition that all records pertaining to employee conduct are excluded from the *Act*, even if they are in files pertaining to civil litigation or complaints by a third party, Swinton J. also pointed out that "(w)hether or not a particular record is 'employment-related' will turn on an examination of the particular document."

I agree with and adopt the analysis set out above for the purpose of making my determinations in this appeal. I now turn to an analysis of the constituent parts of the section 52(3)3 test.

Part 1: collected, prepared, maintained or used

Clearly, the investigation report was prepared, maintained and used by the Board. The report was prepared by its internal Investigation Advisor at the request of a Board Superintendent. I am satisfied that the first part of the test under section 52(3)1 has been met.

Part 2: meetings, consultations, discussions or communications

The Board submits that the record resulted from the investigation of a harassment complaint brought by the appellant against his son's teacher. Accordingly, the Board submits that the record relates to communications within the Board that were made in the context of the teacher's employment. I have reviewed the record and the Board's submissions and am satisfied that the record was prepared, maintained or used by the Board, or on its behalf, in relation to meetings, consultations and communications pertaining to an investigation arising out of a harassment complaint involving the conduct of one of its employees.

As a result, I find that part two of the test under section 52(3)3 has been satisfied.

Part 3: labour relations or employment related matters in which the Board has an interest

Examining the context in which the investigation was undertaken by the Board's employee, it is clear that the Board was acting in its capacity as an employer. The investigation into the teacher's conduct was based on a review of various Board policies and procedures, and directly addressed certain aspects of the employee-employer relationship. I find that the Investigation Report is not an organizational or operational review, but rather a report which sets out the results of the investigation into the allegation of harassment of a student brought by the appellant against the teacher. In my view, the record was prepared, maintained or used by the Board, or on its behalf, in relation to meetings, consultations and communications about the investigation of the conduct of one of its employees. I am, therefore, satisfied that the record relates directly to "employment-related matters" for the purpose of section 52(3)3.

The next question under part 3 is whether the employment-related matters are matters in which the Board "has an interest." The meaning of this phrase was addressed in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to the S.C.C dismissed [2001] SCCA No. 509 [*Solicitor General*]. The Court stated (at paragraph 35):

> … Examined in the general context of subsection 6, the words "in which the institution has an interest" appear on their face to relate simply to matters involving the institution's own workforce.
>
> …
>
> Subclause 3 deals with records relating to a miscellaneous category of events "about labour relations or employment-related matters in which the institution has an interest". Having regard to the purpose for which the section was enacted, and the wording of the subsection as a whole, the words "in which the institution has an interest" in subclause 3 operate simply to restrict the categories of excluded records to those records relating to the institutions' own workforce where the focus has shifted from "employment of a person" to "employment-related matters". …

The Court also indicated that the word "interest" must refer to "more than mere curiosity or concern." (see paragraph 34)

As set out above, in the circumstances of this appeal, it is clear that the record was created or maintained in relation to the Board's investigation into the appellant's harassment complaint. In this situation, I am satisfied that the context of the investigation is one in which the institution was acting as an employer, and that human resources questions were at issue, as referenced by Swinton J. in the *Goodis* case, cited above. Accordingly, I find that the Investigation Report describes employment-related matters in which the Board "has an interest" within the meaning of section 52(3)3.

Therefore, I conclude that the Board has an interest in the employment-related matters that are the subject of the responsive record for the purposes of the exclusionary provision in section 54(3)3. Accordingly, I find that part three of the section 52(3)3 test has been met.

In summary, I find that the Board has established all of the requirements of section 52(3)3; the record was collected, maintained and used by the Board in relation to meetings, consultations and/or communications about employment-related matters in which the Board has an interest. Also, I find that none of the exceptions in section 52(4) applies. Accordingly, I find that the record falls within the parameters of section 52(3)3 and is, therefore, excluded from the scope of the *Act*.

As a result, it is not necessary for me to determine whether the record is also excluded under section 52(3)1 and 2. In addition, because I have found that the investigation report is excluded from the operation of the *Act*, it is not necessary for me to determine whether it qualifies for exemption under mandatory third party information exemption in section 10(1) of the *Act*.

ORDER:

1. I order the Board to provide the appellant with a decision respecting access to the information contained in both the day books and the primary affected person's notes, using the date of this order as the date of the request for the purposes of sections 19, 21 and 22 of the *Act*.

2. I find that the *Act* does not apply to the Investigation Report which comprises the record in this appeal.

Original signed by: December 21, 2009
Donald Hale
Adjudicator

POSTSCRIPT:

It is unclear from the material before me whether the Board ever asked the teacher to produce the documents so that it might determine whether they contain information that is responsive to the request. By declining to do so, I am of the view that the Board failed to meet its obligations to the appellant under section 4(1) of the *Act*. This provision implicitly requires the Board to take all necessary steps to obtain all of the responsive records, including the teacher's Day Books, which it acknowledges fall within its custody or control. As a result of this order, the Board is required to obtain the responsive records, including any notes taken by the primary affected party and her Day Books, and provide the appellant with a decision letter respecting access to them.