



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

# **ORDER MO-2545**

**Appeal MA09-426**

**Toronto Catholic District School Board**



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## **NATURE OF THE APPEAL:**

The Toronto Catholic District School Board (the Board or the TCDSB) received three separate requests from the same requester, under the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA or the Act)*, for access to information relating to a specified school.

In the first request, designated as request number 09-12 by the Board, the requester sought access to the following information:

... [W]as TCDSB ever given a copy of [a specific engineering report]? If so I am requesting a copy.

Lastly, I am requesting a copy of the application made by TCDSB to the Ministry of Education in 1999-2000 for a “one-time allocation of grant monies to address mould related issues.”

This grant is detailed in a memo from [named individual] to the Directors of Education dated April 20/2000 a copy of which I obtained from the Ministry of Education’s Office.

As part of the application school boards were asked to submit expenditures incurred to address mould-related issues between January 1/98 & October 31/99 and specifically to document the work undertaken at each school.

I am requesting a complete copy of this application.

Further I would like to know exactly how much of this \$50 million grant money earmarked for mould TCDSB received in 1999/2000.

[Above-named individual]’s memo goes on to say that the Ministry of Education also set up a series of workshops in May/June 2000 to “provide a forum to share information and successful practices that have been implemented at various boards to reduce the probability of the recurrence of mould in school facilities and actions that boards may wish to take should mould be discovered in their facilities in the future”.

I would like to know specifically who from TCDSB attended such workshops when and where.

...

The second request, designated as request number 09-13 by the Board, was for access to the following information:

...

The amount spent on [specified school] roof repairs summer 2009.

The amount spent on the [above-specified school] mould abatement and reconstruction summer 2009.

The contract or contracts including the total amount or amounts spent on asbestos repairs to date for [above-specified school] up to and including 2009.

Mechanical drawings for [above-specified school].

Copies of all leases between TCDSB and [a named organization] including all amendments and attachments and inspection/safety reports.

Copies of all tender contracts for work done at [above-specified school] including the amount of money paid for the work that was done.

Copies of any asbestos assessment reports for [above-specified school] done prior to April 28/09.

...

In response to this request, the Board wrote to the requester seeking clarification as follows:

...

You request contracts and expenditures related to asbestos repairs to date for [above- specified school]. Do you have a commencement date or do you expect the Board to research from today's date back to the time when the Board first entered into a lease arrangements with [a named organization] for the school?

Likewise, with your requests for leases, inspection reports, tenders, and asbestos assessment reports, what time frame are you looking at?

...

The requester then submitted a third request, designated as request number 09-14 by the Board, requesting the following information:

...

All leases and amendments to lease and any correspondence regarding the leases between [a named organization] and the Toronto Catholic District School Board and any other documents, letters, memos of communication, faxes, emails and any other communications pertaining to the leasing, repair, building conditions, inspections, rent and rent adjustment, potential breaches and matters of concern or

interest in connection with the buildings leased to TCDSB that are occupied by [above-specified school].

Communications with all contractors, consultants and inspectors about [above-specified school].

All communications, visit reports and work orders between the Ministry of Labour and TCDSB regarding [above-specified school].

Notes and transcripts of all committee and other meetings concerning [above-specified school].

All communications, letters, memos, faxes, emails and any other documents regarding whether any legal or other professional opinions have been sought by TCDSB with respect to the liability of TCDSB to teachers, support staff, students and parents over any mishandling of toxic mould, asbestos or pcbs.

...

Again, the Board wrote to the requester seeking clarification as follows:

...

What part of this request differs from any of your two previous requests on this topic? What time frame do you wish to have covered by this request? Is there any limit to the generalities you state?

...

The requester replied in an email to the Board as follows:

...

Regarding my FOIP Request #09-13 you are correct in assuming that the commencement date for all requested information is from today's date back to the time when the board first entered into a lease with [a named organization].

FOIP Request #09-14 further clarifies specifically all of the documentation I am looking for to date.

...

The Board issued one decision for all three requests, advising that access to any responsive records is denied on the basis that they fall outside the ambit of the *Act*, pursuant to the exclusionary provisions in sections 52(3)(1) and 52(3)(3) of the *Act*. In its decision letter, the Board further advised that "our decision in this matter is directly in response to your assertion

that the information is being collected to assist in the filing of a grievance with your collective bargaining unit and that unit's decision to fund the request as part of that process".

The requester (now the appellant) appealed the Board's decision. In response to the Confirmation of Appeal issued by this office to the Board, the Board advised as follows:

...

Please note that the Board has not proceeded with the collection of all information responsive to these access requests. We are, therefore, unable to identify any records that may be excluded from disclosure should the IPC rule against the Board in our application of section 52. In addition, the Board has not submitted to the appellant a fees estimate based on the volume of records she has requested. Should the IPC rule in the appellant's favour, we reserve the right to issue a fees estimate and to demand pre-payment of the 50% maximum allowable under the Act. Our estimate at this time, not including my review, preparation time, and photocopying charges is approximately forty days at eight hours per day. Based on the provisions of the Act, our initial estimate would be \$9,600.00, 50% of which would be \$4,800.00.

...

With the Board's consent, the mediator relayed this information to the appellant to determine if, based on the above, the appellant wished to narrow the scope of her request. After further discussions and exchange of correspondence, the appellant decided to continue with all three requests, as originally formulated, and the Board confirmed that it is relying on sections 52(3)1) and 52(3)(3) to withhold any responsive records.

No further mediation was possible and the file was moved to the adjudication stage of the appeal process. I received and exchanged the representations of the parties through the issuance of a Notice of Inquiry in accordance with IPC Practice Direction 7. In addition, I received further representations from the Board by way of reply.

Following the conclusion of the inquiry process in this appeal, a decision of the Ontario Divisional Court, *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991, was issued. In that decision, the Court defined the term "relating to" in section 65(5.2) of the provincial *Act (FIPPA)* as requiring "some connection" between the records and the subject matter of that section. As a result, I provided a further supplementary Notice of Inquiry requesting that the parties consider the impact of this decision on the issues in the present appeal and provide me with further representations. Specifically, I invited the parties to make additional submissions on the meaning of the term "in relation to" in section 52(3), given what the Court found in its decision. I received additional submissions from the Board and on behalf of the appellant.

## **RECORDS:**

Although the Board has not identified or provided a copy of the records responsive to the requests, it takes the position that any responsive records are excluded from the *Act* on the basis that they would fall within the exclusions provided in sections 52(3)(1) and 52(3)(3).

## **DISCUSSION:**

### **LABOUR RELATIONS AND EMPLOYMENT RECORDS**

#### **General Principles**

The Board claims that any records that are responsive to the requests as framed fall outside the ambit of the *Act* as a result of the operation of sections 52(3)1 and 3, which state:

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.
- ...
3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

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

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].

If section 52(3) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507].

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 [*Ministry of Correctional Services*, cited above].

### **Section 52(3)1: court or tribunal proceedings**

For section 52(3)1 to apply, the Board must establish that:

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

### **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 records were collected, prepared, maintained or used by an institution 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.

### ***Part 1: collected, prepared, maintained or used***

Given the nature of the request, any responsive records would have been collected, prepared, maintained or used by the Board or on its behalf. Clearly, any responsive records which relate directly to "leasing, repair, building conditions, inspections, rent and rent adjustment, potential breaches and matters of concern or interest in connection with the buildings leased to TCDSB that are occupied by [the appellant's school]" were collected, prepared, maintained or used by the Board as part of its mandate as the lessee of the school facility. In my view, the responsive

records would clearly fall within the ambit of the records described in part one of the test under both paragraphs 1 and 3 of section 52(3).

***Part 2: “in relation to” proceedings before a court or tribunal or meetings, consultations, discussions or communications***

The word “proceedings” means a dispute or complaint resolution process conducted by a court, tribunal or other entity which has the power, by law, binding agreement or mutual consent, to decide the matters at issue [Orders P-1223 and PO-2105-F].

For proceedings to be “anticipated”, they must be more than a vague or theoretical possibility. There must be a reasonable prospect of such proceedings at the time the record was collected, prepared, maintained or used [Orders P-1223 and PO-2105-F].

A “tribunal” is a body that has a statutory mandate to adjudicate and resolve conflicts between parties and render a decision that affects the parties’ legal rights or obligations [Order M-815].

“Other entity” means a body or person that presides over proceedings distinct from, but in the same class as, those before a court or tribunal. To qualify as an “other entity”, the body or person must have the authority to conduct proceedings and the power, by law, binding agreement or mutual consent, to decide the matters at issue [Order M-815].

The Board argues that the records are excluded from the operation of the *Act* by virtue of section 52(3)1 because the appellant intends to rely on the information contained in them in a grievance proceeding pursuant to the collective agreement which governs her employment with the Board. The Board argues that this grievance was filed on the appellant’s behalf in October 2009 and that the appellant has indicated that she is seeking access to the requested records in order to bolster her arguments in support of her position in the grievance proceeding. Similarly, the Board asserts that the subject matter of the responsive records has given rise to various meetings, consultations, discussions and communications, many of which directly involved the requester, thereby satisfying part two of the test under section 52(3)3 as well.

The appellant submits that while a board of arbitration may be an “other entity” for the purposes of section 52(3)1, no evidence has been tendered in support of the Board’s argument that the collection, preparation, maintenance or usage of any of the responsive records was “in relation to” the grievance proceeding. Rather, she points out that while the grievance referred to by the Board was filed in 2009, “most if not all of the records at issue were prepared well in advance of that grievance. None of the documents in this request have been asserted in the grievance arbitration to date.” The appellant goes on to submit that “[T]he records would appear to relate much more broadly to the actual building referred to as [the appellant’s school], the leasehold arrangements in connection with the building and the property, the maintenance and upkeep of the building, the existence of mould, asbestos or PCBs in the building, and the removal of such substances.”

In addition, the appellant indicates that the Board has operated the school in question for many years and would have collected, prepared, maintained and used the records which are the subject



matter of the requests “to meet the instructional needs of students in its care, and to discharge any obligations it may have under its leasehold arrangements” over a period of many years prior to the institution of the grievance proceeding. As was the case in Order MO-2352, the appellant argues that “the proceedings upon which the institution relies for the application of section 52(3) did not exist and could not have been reasonably contemplated at the time of the records’ creation.”

In its reply representations, the Board asserts that the responsive records will be “collected or used” by the Board in its response to the grievance, particularly since the appellant has indicated that she intends to rely on this information in support of the rights she asserts in the grievance proceeding. The Board goes on to suggest that “it is irrelevant when the documents were prepared nor is it relevant that the appellant has not asserted them in her grievance” which is currently at the initial stage in the process.

In *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991, the Ontario Divisional Court defined “relating to” in section 65(5.2) of the provincial *Act (FIPPA)* as requiring “some connection” between the records and the subject matter of that section. Adopting that definition for the words “in relation to” in section 52(3), requires that there must be some connection between “a record” and “proceedings or anticipated proceedings” which relate to labour relations or to the employment of a person by the institution in the case of section 52(3)1. In the case of section 52(3)3, there must be some connection between the collection, preparation, maintenance or use of the records and meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

In the present appeal, I find that the requisite connection between the subject matter of the records which are responsive to the request as framed, some of which predate by many years the filing of the grievance, and the subject matter of both sections 52(3)1 and 3 is not present. In the case of section 52(3)1, I do not agree with the position taken by the Board that because the information contained in the records may ultimately be relied upon by either party to the grievance, they fall within the ambit of section 52(3)1. At the time that the records responsive to the requests were created, in 1999-2000 and then during 2009, I find that there did not exist a reasonable prospect of a possible grievance proceeding arising from their subject matter.

I further note that the first request clearly seeks access to information relating to the manner in which the Board addressed the issue of mould remediation in 1999/2000. The second request deals with asbestos removal and roof repairs in 2009 while the third request specifically seeks access to reports, leases and other documentation relating to the Board’s operation of the school that was compiled from the date the Board leased the subject school property up to the date of the request. In my view, the Board has not demonstrated that there exists “some connection” between the records responsive to these requests and the grievance proceedings which were instituted by the appellant in October 2009. I find that the second requirement under section 52(3)1 is not met, and the records cannot be excluded on that basis.

Similarly, I find that the Board has failed to demonstrate that there exists “some connection” between the collection, preparation, maintenance or use of the responsive records and meetings, consultations, discussions or communications “about labour relations or employment-related matters”, as is required under part two of the test under section 52(3)3. For similar reasons to those articulated in my discussion of section 52(3)1, I conclude that the responsive records do not meet the second requirement of the test for exclusion under section 52(3)3 of the *Act*. In the circumstances, I am not satisfied that the preparation, maintenance or use of the record was “in relation to” meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest, as the required degree of “connection” between them has not been established. Specifically, I reject the suggestion that there existed such “an interest” at the time the records were created. Since there does not exist the required connection between the creation of the record and any labour relations or employment-related matter in which the Board might be said to have an interest, I find that part two of the test under section 52(3)3 is not met, and any responsive records are not excluded from the *Act* under that provision.

As the exclusionary provisions in section 52(3)1 and 3 have no application to any records that may be responsive to the requests, as framed, I will order the Board to issue to the appellant a decision regarding access to them.

**ORDER:**

1. I do not uphold the Board’s determination that any records responsive to the requests are excluded from the scope of the *Act* under section 52(3).
2. I order the Board to provide the appellant with a decision respecting access to the responsive records in accordance with the provisions of section 19 of the *Act* and without records to a time extension under section 20 of the *Act*.

Original Signed By: \_\_\_\_\_

August 17, 2010

Donald Hale  
Adjudicator