

Information and Privacy Commissioner,  
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,  
Ontario, Canada

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## ORDER MO-3010

Appeals MA13-345, MA13-575

Toronto Catholic District School Board

February 18, 2014

**Summary:** This order deals with requests made by two media organizations for records relating to a volunteer coaching position previously held by the Mayor of Toronto. The Toronto Catholic District School Board (the board) took the position that the records were excluded from the *Municipal Freedom of Information and Protection of Privacy Act* on the basis of the employment-related exclusion in section 52(3)3. The adjudicator finds that the records are covered by the *Act* and orders the board to issue access decisions.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 52(3)3.

**Orders and Investigation Reports Considered:** M-899; MO-1249; MO-2721-I and PO-2952.

**Cases Considered:** *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; *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.).

### BACKGROUND:

[1] The sole issue in these appeals is whether records relating to a volunteer coaching position previously held by the Mayor of Toronto (referred to here as "the Mayor" or "Mayor Ford") are excluded from the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*).

[2] Two appellants made separate requests under the *Act* to the Toronto Catholic District School Board (the board) for access to information relating to a volunteer coaching position previously held by the Mayor of Toronto (the “Mayor” or “Mayor Ford”) at one of its schools. Although the requests varied in wording and scope (for example, one of the appellants sought access to information about the Mayor’s coaching staff, including one named volunteer football coach, in addition to records about Mayor Ford), the board identified the same set of records as being responsive to the requests made by both appellants.

[3] In both cases, the board denied access in full on the basis that all records are excluded by the operation of section 52(3) (exclusion for labour relations or employment-related matters) of the *Act*. In its decision letter to the first appellant, the board elaborated on its reliance on the exclusion for the requested records:

Although Mr. Ford was not a salaried employee of the TCDSB, in our view his position as a volunteer coach placed him in a relationship of quasi-employment with the TCDSB, which would render any records related to his position with the board subject to exemption under the *Act*. As the *Act* is silent on the question of the status of volunteers specifically, we consider that it is the intent of the act to include the volunteer relationship to the institution under **Section 52(3)**.<sup>1</sup> [emphasis in original]

[4] The board’s decision on the second appellant’s request was to the same effect, indicating that although Mayor Ford and his coaching assistants were not salaried employees, their position as volunteer coaches placed them in a relationship of quasi-employment with the board.

[5] The board later clarified that it relies on paragraph 3 of the section 52(3) exclusion for all records.

[6] The first appellant appealed the board’s decision to this office and appeal file MA13-345 was opened. During the mediation stage of that appeal, the board produced an index of records setting out a general description of each record. The appellant advised the mediator that he is no longer seeking access to Records 44-46; these records were accordingly removed from the scope of the appeal. As no further mediation was possible, appeal MA13-345 was transferred to the inquiry stage of the appeal process, where an adjudicator conducts a written inquiry under the *Act*.

[7] This office subsequently received the second appellant’s appeal of the board’s decision on the same records, and appeal file MA13-575 was opened. In the circumstances, this office decided to stream appeal MA13-575 directly to the inquiry

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<sup>1</sup> The decision contained a typographical error, citing section 53(3).

stage of the appeal process. I decided to address the appeals together given that they relate to the same records and same issues.

[8] I sent a Notice of Inquiry to the board and to the Mayor, inviting their written representations on whether section 52(3)3 applies to exclude the records from the *Act*. I received representations from the board, but the Mayor declined to send representations, stating that he was content to rely on those of the board.

[9] On my review of the board's representations, the material before me and on consideration of the issues, I decided it was unnecessary to seek further representations.

[10] In this order, I find that the records are not excluded from the *Act*, and order the board to issue access decisions.

## **DISCUSSION:**

[11] Section 52(3)3 states:

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:

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

[12] 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*. In this case, it is unnecessary to consider the exceptions in section 52(4) and, in any event, it does not appear that any of them are relevant to the records at issue.

[13] For section 52(3)3 to apply, the institution 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.

[14] In this appeal, the board submits that matters concerning the relationship between it and Mayor Ford, when he served as a volunteer coach of a high school football team, are akin to "employment-related matters" within the meaning of section 52(3)3. The board submits,

In deliberating upon the initial *MFIPPA* request for records, we researched legislative direction in the matter of records deriving from a volunteer dismissal process. Finding no reference to the volunteer relationship to an institution in *MFIPPA* itself, and finding no case authority that considered the specific issues before us, we turned to Section 52(3)3, and determined that matters concerning the volunteer relationship are arguably characterized as an 'employee-related matter'.

Our decision to deny access to the records under 52(3)3 is, therefore, predicated upon our consideration that the process of deliberating upon the dismissal of a volunteer bears a resemblance to that of deliberating upon the dismissal of an employee. The board's further representations on this issue assumes that records deriving from volunteer dismissal deliberations can be treated in the same way as those deriving from "employment-related matters".

[15] The board refers to three orders that it submits are relevant to the records at issue.<sup>2</sup> In those orders, this office found an employee's dismissal, a voluntary exit program and a review of workload and working relations to be labour relations or employment-related matters. The board submits that the records at issue in this appeal fall within these general categories.

[16] The board also submits that the phrase "in which the institution has an interest" has been interpreted to mean more than a "mere curiosity or concern"<sup>3</sup> and, in this case, the decision to dismiss Mayor Ford cannot be said to derive from "mere curiosity or concern."

## **Analysis**

[17] In this appeal, there is no question that the records at issue were "collected, prepared, maintained, or used" by the board, in relation to "meetings, consultations, discussions or communications" about the relationship between itself and the Mayor.

[18] The more difficult question before me is whether the communications are about "labour relations" or "employment-related" matters.

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<sup>2</sup> Orders MO-1654-I, M-1074 and PO-2057.

<sup>3</sup> The board relies on *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.

[19] Generally, orders of this office have stated that the term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees.<sup>4</sup> However, section 52(3) or its provincial equivalent has also been applied to relationships involving individuals who are not "employees" in a traditional sense. Thus, in Order M-899, this office found that, while police officers are not considered "employees" under the common-law, their relationship with police services boards, as governed by the *Police Services Act*, constitutes employment.

[20] Order M-899 and the orders relied on by the board in its representations all dealt with individuals receiving remuneration for services to an institution. Few decisions of this office have considered whether unpaid activities fall under "labour relations" or "employment-related" matters. In one, Order MO-1249, records about volunteer auxiliary police officers were found not to relate to "employment" within the meaning of section 52(3). In another, Order MO-2721-I, this office determined that records prepared by a municipality as part of a comprehensive review of its fire department's management and organizational structure were about "labour relations" matters, despite the fact that the department was staffed almost entirely by volunteers. In the decision, the adjudicator noted that the records reviewed the fire department's operations and structure, "including the services provided by the volunteer fire fighters and the future management and staffing of the department."

[21] In Order MO-2721-I, the adjudicator relied on the decision in *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*<sup>5</sup>, in which the Court of Appeal found that "labour relations" can extend to relations and conditions of work beyond collective bargaining or even employer/employee relationships. The Court determined that, although physicians are not "employees" of the provincial government, the relationship between the government and physicians, and the work of an advisory committee representing physicians on issues such as remuneration, was covered by the provincial equivalent to section 52(3).<sup>6</sup>

[22] In the above decision, the Court interpreted the phrase "labour relations" in contrast to "employment-related matters". It found that non-employees can be covered by the phrase "labour relations", but did not specifically address whether the relations between non-employees and an institution could fall within the phrase "employment-related."

[23] From my review of the applicable law and principles, I arrive at the following conclusions. First, the ordinary meaning of "employment" is that it covers paid activities – the classic bargain entered into between an employer and employee is an exchange

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<sup>4</sup> Order PO-2157.

<sup>5</sup> [2003] O.J. No. 4123 (C.A.).

<sup>6</sup> See also Orders PO-3101 (court interpreters) and PO-2501 (Deputy Judges).

of labour for remuneration. There are many references to "employment", "employer" or "employee" in the *Act*. Without reviewing each in detail, and taken as a whole, they are consistent with a meaning of "employment" that is restricted to paid employment.

[24] Second, each case must be determined on its own facts and I do not preclude the possibility that unpaid employment *might*, in given circumstances, be sufficiently akin to paid employment that is covered by the section 52(3) exclusion. However, even if the language of the statute is capable of this interpretation, there must be a convincing factual basis for such a conclusion.

[25] It is clear from the decisions in this area that where the phrase "employment-related matters" has been extended to cover relationships between an institution and individuals who are not typical employees, those relationships contain many of the indicia of employment. In Order PO-2952, for instance, the adjudicator described, with respect to Order-in-Council appointees of the Ontario Rental Housing Tribunal, "all of the trappings of employment" in the facts before her:

In my view, regardless of the process through which board members attain their positions and the importance of maintaining independence in their decision-making, all of the trappings of employment are evident through adherence to the *Code of Conduct*, including performance reviews and discipline, all of which fall within the responsibility of the Board. The request in the current appeal was for records relating to performance issues, complaints and the manner in which the member's appointment was terminated. In my view, the records at issue and any other records that might be responsive to this request relate to matters which fall within the purview of the Board as an "employer."

[26] It is not hard to imagine the variety of volunteer relationships that can exist between a volunteer and an institution to which that person is devoting time. Some of these volunteer relationships bear little resemblance to others, in matters such as time commitment, control over the activities, performance expectations and recruitment process. Some, in short, may exhibit the "trappings of employment" while others do not. Extending the reach of the section 52(3)3 exclusion to a particular type of volunteer relationship (such as in Order MO-2721-I) may be consistent with the overall purposes of that exclusion,<sup>7</sup> but make little sense in another context.

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<sup>7</sup> As part of "An Act to restore balance and stability to labour relations and to promote economic prosperity and to make consequential changes to statutes concerning labour relations": Bill 7, 1st Session, 36th Legislature, 1995; "[a]lso, we propose to amend the *Freedom of Information and Protection of Privacy Act* ... to ensure the confidentiality of labour relations information": Hon. David Johnson (Chair of Management Board of Cabinet), *Official Report of Debates*, October 4, 1995, cited in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), above at footnote 3.

[27] In the appeal before me, I have almost no evidence about the role of volunteer football coaches with the board, and the extent to which their relationship with the board bears the indicia of employment. The very general submissions of the board and the information in the records do not establish that the relationship between Mayor Ford, as a volunteer football coach, and the board, has all the “trappings of employment”. The assertion that the decision to dismiss a volunteer football coach bears “a resemblance” to the decision to dismiss an employee is not in itself sufficient to establish that it is an “employment-related matter”. Although there may be some similarities between volunteers and paid employees, without evidence about such matters as recruitment, evaluation, performance standards, supervision – in other words, the “terms and conditions” under which board volunteers provide their services – I am unable to conclude that the dismissal of a volunteer football coach by the board is an “employment-related matter” for the purposes of section 52(3)3.

[28] I therefore conclude that the third part of the three-part test under section 52(3) is not established.

[29] As the records are covered by the *Act*, the board is obliged to issue decisions in response to the requests.

**ORDER:**

I order the board to issue access decisions to the appellants in accordance with the provisions of sections 19, 20 and 21 of the *Act*, treating the date of this order as the date of the request.

Original Signed By:  
Sherry Liang  
Senior Adjudicator

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February 18, 2014