

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3227

Appeal MA14-404

Toronto District School Board

August 6, 2015

Summary: The appellant made a request to the board under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for a copy of the internal audit report on its Focus on Youth 2011 program. The board denied the request on the basis that the audit report is excluded from the operation of the *Act* by virtue of the exclusionary provision in section 52(3), which provides that the *Act* does not apply to certain employment-related records. The appellant appealed. In this order, the adjudicator finds that, although the audit report addresses some systemic issues, a primary focus of the audit report is the investigation into potential misconduct of a board employee in the course of employment. She upholds the decision of the board that the audit report is excluded from the operation of the *Act* pursuant to section 52(3).

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

Orders and Investigation Reports Considered: Order MO-2694.

Cases Considered: *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

OVERVIEW:

[1] The appellant made a request to the Toronto District School Board (the board) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a copy of the board's internal audit report on its Focus on Youth 2011 program.

[2] The board issued a decision in which it claimed that section 52(3) of the *Act* applies to exclude the record at issue from the *Act*, as it is a record prepared in relation to a labour relations or employment matter in which the board has an interest. In what appears to have been an alternative basis for its decision not to disclose the responsive record, the board also claimed that the record is exempt from disclosure pursuant to the discretionary exemption at section 6(1)(b) of the *Act* which applies to records whose disclosure would reveal the substance of a closed meeting.

[3] The appellant appealed the board's decision to this office. The parties were unable to resolve the issues under appeal through mediation, and the appeal was transferred to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*. During the course of adjudication, the board abandoned its reliance on the application of section 6(1)(b), leaving as the sole issue whether the record is excluded from the application of the *Act* by virtue of section 52(3).

[4] I sought and received representations on this issue from the board. Pursuant to section 7 of this office's *Code of Procedure and Practice Direction 7*, I shared the board's representations with the appellant, with portions of the board's representations that reveal the substance of the record at issue withheld. The appellant was given the opportunity to make representations but did not do so, other than to request that I consider ordering disclosure of a redacted form of the record.

[5] In this order, I find that the record at issue is excluded from the operation of the *Act* pursuant to the exclusion at section 52(3).

RECORD:

[6] The record at issue is an audit report on the board's Focus on Youth 2011 program (the audit report).

ISSUE:

[7] The only issue in this appeal is whether the audit report is excluded from the *Act* under section 52(3).

DISCUSSION:

[8] The board runs a summer program entitled Focus on Youth Toronto. According to the board's website, the objective of the program is to provide high quality summer program opportunities for children and youth in Toronto's urban inner city areas by:

- offering free use of school space for organized community-based programs, and
- providing employment opportunities and leadership activities for the youth of these communities.¹

[9] An audit of the 2011 Focus on Youth program was conducted in 2012. The resulting audit report is the subject of this appeal.

[10] The board submits that the audit report relates to an investigation into potential misconduct by a board employee in the course of employment. The board submits that the audit report is, therefore, excluded from the operation of the *Act* under section 52(3)3, which 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.

[11] If section 52(3) applies to the audit report, and none of the exceptions found in section 52(4) applies, the report is excluded from the scope of the *Act*. I find that none of the exceptions found in section 52(4) applies to the audit report.

[12] The term "labour relations" and "employment related" have been considered in previous orders. "Labour relations" refers to the collective bargaining relationship between an institution and its employees, or to analogous relationships. The meaning of "labour relations" is not restricted to employer-employee relationships.² "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

¹ <http://www.tdsb.on.ca/Community/CommunityUseofSchools/FocusonYouth.aspx>

² *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.

of a collective bargaining relationship.³

[13] 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.⁴

[14] For section 52(3)3 to apply, an 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.

[15] 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.⁵

Analysis and findings

Part 1: collected, prepared, maintained or used

[16] The board submits that the audit report was prepared on behalf of the board. Given that the appellant's request was for an audit report in respect of a board program, it stands to reason that the responsive record would have been prepared by or on behalf of the board. Indeed, from my review of the record and the confidential portion of the board's representations, it is clear that the audit report was prepared on behalf of the board.

Part 2: meetings, consultations, discussions or communications

[17] While the board has not made specific submissions on this requirement, it is clear to me from the face of the audit report that it would have formed the basis of subsequent meetings, consultations, discussions or communications of the board. Additionally, the report itself is a communication from its author to the board. I find, therefore, that the preparation of the audit report was "in relation" to meetings,

³ Order PO-2157.

⁴ *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.), cited above.

⁵ *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.

consultation, discussions or communications.

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

[18] The board submits that the audit report relates to an investigation into potential misconduct of a board employee in the course of employment. Details of the allegations are provided in the confidential portion of the board's representations. The board submits that its interest is not "mere curiosity or concern" as described in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*,⁶ the report relates to a matter affecting the board's legal rights with respect to its contractual employment relationship with the affected staff member.

[19] The board relies on Order MO-2694, in which Adjudicator Donald Hale applied the reasoning of the Divisional Court in *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*.⁷ In that decision, the court found that there must only be "some connection" between the records and the grounds identified in section 65 of the *Freedom of Information and Protection of Privacy Act* (the provincial counterpart to section 52(3) of the *Act*), and not necessarily a "substantial" connection. In Order MO-2694, which involved an investigation with a potential finding of employee misconduct, Adjudicator Hale stated:

Based on my review of the records and the representations of the parties, I am satisfied that the collection, preparation, maintenance or use of the records under consideration in this appeal, the interview materials collected by the investigator, was "in relation to" employment-related matters in which the institution has an interest. The appellant may be correct in identifying that a human rights investigation into the actions of board employees may result in systemic or other changes to board policies. In this case, however, I find that the board has established a sufficiently strong connection between the contents of the records and an employment-related matter, specifically related to the management of its employees, to warrant the application of the exclusion in section 52(3).

[20] Based on my review of the audit report, I agree with the board's submission that it relates to an investigation into the potential misconduct of a board employee in the course of employment. This is abundantly clear from a review of the report as a whole and, in particular, from its cover page and certain portions of pages 1 and 2. While the report addresses some systemic issues, a primary focus of the report is the investigation into potential misconduct on the part of a board employee. I also find that the potential employee misconduct in this case was an employment-related matter.

⁶ (2001) 55 O.R. (3d) 355 (C.A.).

⁷ 2010 ONSC 991 (Div. Ct.).

From my review of the audit report, particularly the cover page and pages 1 and 2, it is evident that the board was acting as an employer when it commissioned the report. I cannot be more specific without disclosing the content of the record, however. I also find that the board has an "interest" in the matter, as it involves the alleged misconduct of one of its own employees while in the course of employment.

Conclusion

[21] Accordingly, I find that the audit report is excluded from the operation of the *Act* pursuant to section 52(3).

ORDER:

The appeal is dismissed.

Original Signed by: _____
Gillian Shaw
Adjudicator

August 6, 2015