

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3470

Appeal MA15-625

Durham District School Board

July 14, 2017

Summary: The appellant seeks access to records relating to social workers' job position and compensation evaluations with the board. The board located records responsive to the request and granted the appellant partial access. Initially, the board claimed a number of exemptions to withhold portions of the records. However, during mediation, the board raised the issue of the possible application of the exclusion in section 52(3)3 (employment or labour relations) to the records. The appellant appealed the board's decision. In this order, the adjudicator finds that the records fall outside the scope of the *Act* by virtue of section 52(3)3 of the *Act* and dismisses the appeal.

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: Orders MO-1264 and MO-1735

OVERVIEW:

[1] The appellant made an access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Durham District School Board (the board) for the following:

1. All information/documentation related to the social work Hay Review 2015;
2. All information/documentation related to the social work Hay Review 1999; and
3. All information/documentation related to the Pay Equity review of social work and attendance initiated in 1990 and the Pay Equity Plan issued in August 1991.

[2] The board located responsive records and issued a decision granting the appellant partial access. The board disclosed some records to the appellant in their entirety, but denied access to others, claiming the application of the mandatory exemption in section 10(1)(a), (c) and (d) (third party information) and the discretionary exemptions in sections 7(1) (advice or recommendations) and 11(a), (c), (e) and (f) (economic and other interests). The board advised the appellant that with respect to parts 1 and 2 of the request, it withheld access to records used in "the preparation of confidential information and reports provided at in-camera meetings of Administrative Council."

[3] With respect to part 3 of the request, the board advised the appellant that it could not locate the Pay Equity Plan from 1991, but provided her with a revised plan posted in 1993 that was located during its search.

[4] The appellant filed an appeal of the board's decision to this office.

[5] During mediation, the appellant confirmed that she pursues access to the information withheld from disclosure. In addition, the appellant stated that she wanted to know if additional responsive records existed, specifically those relating to pay equity records. The board advised the appellant to refer to its decision letter, in which it provided her with details of its search and confirmed that no other responsive records exist. The appellant accepted the board's explanation regarding its search but maintained her position that the records should be disclosed to her, in full.

[6] The board issued a supplementary decision letter to the appellant advising that it also claimed the exclusion in section 52(3) to the records at issue. The board indicated that it located a copy of the original Pay Equity Plan and granted the appellant access to it.

[7] Mediation did not resolve this appeal and it was transferred to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry. The adjudicator originally assigned to the appeal invited the board to provide representations in response to a Notice of Inquiry. The board submitted representations. The adjudicator then invited the appellant to submit representations in response to the board's representations, which were shared in accordance with Practice Direction Number 7 of the IPC's Code of Procedure. The appellant did not submit representations.

[8] The appeal was then transferred to me. In the discussion that follows, I uphold the board's decision that the records fall outside the scope of the *Act* by virtue of section 52(3)3 of the *Act*.

RECORDS:

[9] There are eight pages of records at issue. They consist of handwritten notes, two administrative reports and a document titled "Hay Review Outcomes & Notes."

DISCUSSION:

Does section 52(3)3 apply to exclude the records from the scope of the *Act*?

[10] Section 52(3) states, in part:

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

[12] For the collection, preparation, maintenance or use of a record to be *in relation to* the subjects mentioned in paragraph 1, 2 or 3 of this section, it must be reasonable to conclude that there is *some connection* between them.¹

[13] 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.²

[14] 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.³

[15] Section 52(3) may apply where the institution that received the request is not the same institution that originally “collected, prepared, maintained or used” the records, even where the original institution is an institution under the *Act*.⁴

[16] 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.⁵

[17] For section 52(3)3 to apply, the board must establish that:

¹ Order MO-2589; see also *Ministry of the Attorney General v. Toronto Star et al.*, 2010 ONSC 991 (Div. Ct.).

² *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] OJ No. 4123 (C.A.); see also Order PO-2157.

³ Order PO-2157.

⁴ Orders P-1560 and PO-2106.

⁵ *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 OR (3d) 457, [2008] OJ No. 289 (Div. Ct.).

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.

[18] The phrase “labour relations or employment-related matters” has been found to apply in the context of a job competition⁶ and a grievance under a collective agreement.⁷ It has been found not to apply in the context of an organizational or operational review.⁸

[19] The phrase “in which the institution has an interest” means more than a “mere curiosity or concern” and refers to matters involving the institution’s own workforce.⁹

Representations

[20] As background, the board states that it employs approximately 7,000 staff members and educates approximately 47,000 elementary and 22,000 secondary school students in the Regional Municipality of Durham, which includes Pickering, Ajax, Whitby, Uxbridge, Brock, Scugog and Oshawa. Of these staff, the board states that it employs approximately 23 individuals as permanent Social Workers.

[21] The board states that all positions (i.e. jobs) with the board are evaluated by a Hay Review Committee (the Committee) comprised of board representatives. The board states that the Committee uses the Hay Job Evaluation Process (Hay Review) which is a job evaluation tool developed by the Hay Group.

[22] The board states that the Hay Review is used to establish points for each position under the categories of Know-How, Problem-Solving, Accountability and Working Conditions based on the information received about the job in detailed fact sheets and information obtained through clarifying questions answered by representatives of the position(s) evaluated. The board states that the Committee compares the jobs being evaluated with other jobs with similar points on each of the categories to ensure that the evaluation is consistent and to rank the jobs appropriately in relation to each other. Each job and position is then placed in corresponding pay bands based on the points established under the Hay Review.

[23] With regard to the records at issue, the board states that its social workers filed a Job Re-evaluation request form on February 4, 2015. The board advised the social workers of the results from the Hay Review on October 1, 2015.

⁶ Orders M-830 and PO-2123.

⁷ Orders M-832 and PO-1769.

⁸ Orders M-941 and P-1369.

⁹ *Ontario (Solicitor General) v. Mitchinson*, 2001 CanLII 8582 (ON CA).

[24] The board submits that it prepared, maintained and used the records. The board states that the Committee is comprised of board representatives and supported by an external consultant from the Hay Group. The board submits that the Committee member's notes are used to determine the number of points to be allocated to the position(s) evaluated. Further, the board submits that the Administrative Council report is the mechanism by which the Committee's findings and recommendations are communicated to the board's senior staff for formal approval. The board submits that the information contained in the records was prepared in accordance with the Hay Review process.

[25] The board submits that the records at issue are comprised exclusively of data and information concerning *employment-related matters*. The board submits that the Hay Review process depends on an objective application process and the disclosure of the point system, Committee members' notes and the Administrative Council Reports would harm this objectivity. The board submits that the Job Re-Evaluation Request forms must be completed based on the actual nature of the job(s) reviewed and not customized to exploit the Hay Review to yield the greatest number of points.

[26] The board submits that it has "a very real interest" in preserving the integrity of the Hay Review process. The board submits that disclosing the records would risk exposing all positions to re-evaluation based on the released information, which may have a significant financial impact on the board. In addition, the board submits that its compensation structures and internal equity may be disrupted if the Hay Review process were compromised. The board submits that the records relate *directly* to the compensation of the board's workforce.

[27] Finally, the board submits that the exceptions in section 52(4) do not apply to the records at issue.

[28] The appellant did not submit representations in response to the Notice of Inquiry.

Findings

[29] From my review of the records at issue, it is clear that they satisfy the requirements for the application of the exclusion in section 52(3)3 of the *Act*. The board, through the Hay Committee, collected, prepared, maintained or used each one of the records on its own behalf as the employer of the social workers it employs. Therefore, I find that the first requirement of section 52(3)3 is satisfied.

[30] In addition, I find that the board collected, maintained and used the records in relations to meetings, consultations, discussions or communications relating to the Hay Review and compensation to be provided to its social workers. From a review of the board's representations, it is clear that these records were prepared during discussions on the points to be allocated to, and the corresponding compensation for, the social work position being evaluated. Furthermore, the Administrative Council report was used during discussions or communications amongst the board's senior staff for formal

approval. Accordingly, I find that the second requirement of section 52(3)3 is satisfied.

[31] Finally, I am satisfied that these meetings, consultations, discussions or communications are about employment related matters in which the board has an interest. In Order MO-1264, Adjudicator Laurel Cropley considered whether certain reports fit the requirements under part three of the section 52(3)3 test. Adjudicator Cropley stated as follows:

The City [of Barrie] states that the reports were requested, obtained and utilized by it for the review of its compensation plans relating to both its unionized and non-union employees. The City submits that there is a clear labour relations issue when dealing with a compensation plan for employees.

As I suggested in Order MO-1249, remuneration for the services performed by individuals is an integral part of the "employment" relationship. In my view, "remuneration" is of vital importance in defining this relationship. Activities undertaken by the city to address this component of the employment relationship, in my view, clearly relate to or are "about" labour relations or employment-related matters. Therefore, I find that the meetings, consultations, discussions and/or communications were about labour relations or employment-related matters.

[32] Adjudicator Cropley's analysis was adopted by Senior Adjudicator Frank DeVries in Order MO-1735, in which he found:

The records which the TTC claims fall outside of the jurisdiction of the *Act* are a Compensation Program Review document, a chart containing the summary of point scores for each position, and a position evaluation and point scores for a specifically identified position.

I am satisfied that these records relate to the review of the compensation package for the TTC's employees, and that this information, including the compensation payable to employees and the implementation of a new compensation plan philosophy, are employment-related matters for the purpose of section 52(3)3 of the *Act*.

[33] I adopt the approach taken in Orders MO-1264 and MO-1735 for the purposes of this appeal. Similar to the records at issue in Order MO-1735, the records before me relate to a review of the social worker position with the board, a summary of the point scores for that position and corresponding compensation recommendations and discussions relating to that position. Based on my review of the records, I am satisfied that they relate to the board's review of the compensation for its employees, namely social workers, and this information relates to or is *about* labour relations or employment related matters. As Adjudicator Cropley articulated in Order MO-1264, compensation or remuneration of employees is a vital component of the employer-

employee relationship between the board and the social workers. Therefore, the meetings, discussions, consultations or communications that are the subject of the records at issue were about labour relations or employment related matters.

[34] In addition, I accept that the board *has an interest* in the employment related matter that is the subject of the records. In my view, the board clearly has more than a mere curiosity or concern about the information contained in the records, as these records relate to the compensation for its own employees, namely, social workers. Accordingly, I find that the board has an *interest* in the information at issue, and that the second part of the third requirement is met.

[35] I reviewed the exceptions listed in section 52(4) and find that none apply.

[36] In conclusion, I find that the board established all of the requirements of section 52(3)3 and the records at issue fall outside the scope of the *Act*.

ORDER:

I uphold the board's decision and dismiss the appeal.

Original signed by: _____
Justine Wai
Adjudicator

_____ July 14, 2017