

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3942

Appeal MA18-541

Ottawa-Carleton District School Board

August 12, 2020

Summary: The Ottawa-Carleton District School Board (the board) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the employee file of a specified teacher. The board denied access in full to the responsive records, relying on the mandatory personal privacy exemption in section 14(1) of the *Act*. The requester, now the appellant, appealed the decision to this office. After the appeal was transferred to adjudication, the board issued a revised decision stating that the records are excluded from the *Act* pursuant to section 52(3)3 (employment or labour relations). In this order, the adjudicator finds that section 52(3)3 applies to exclude the records from the scope of the *Act*, and dismisses the appeal.

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

OVERVIEW:

[1] The Ottawa-Carleton District School Board (the board or OCDSB) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information:

OCDSB employee file on [named individual] a teacher employed by the Board.

[2] The board located the responsive records and denied access to them in full in accordance with the mandatory personal privacy exemption in section 14(1), with reference to section 14(3)(d) (employment or educational history) of the *Act*.

[3] The requester, now the appellant, appealed the decision to this office.

[4] During the course of mediation, the appellant raised the application of section 16 (public interest override) to the withheld records and requested that section 16 be added as an issue on appeal. The board maintained its position denying access to the records in full and provided an Index of Records to the appellant.

[5] As a mediated resolution was not possible, the appeal was transferred to the adjudication stage for an inquiry under the Act. After the appeal was transferred to adjudication, the board issued a revised decision stating that the records at issue are excluded from the *Act* pursuant to section 52(3)3 (employment or labour relations). I commenced an inquiry by inviting representations from the board, initially. The board's representations were shared with the appellant, who provided representations in response.

[6] In this order, I find that section 52(3)3 applies to exclude the records at issue from the scope of the *Act*, and dismiss the appeal.

RECORDS:

[7] The records at issue are listed in the board's Index of Records and consist of the named individual's complete OCDSB employee file.

DISCUSSION:

Does the exclusion at section 52(3)3 of the *Act* apply to the records at issue?

[8] The board relies on section 52(3)3 in denying access to the records at issue. 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.

[9] 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.

[10] 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*. 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.¹

[11] 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.²

[12] 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.³

[13] 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.⁴

[14] 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 *Municipal Freedom of Information and Protection of Privacy Act*.⁵

[15] 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.⁶

Representations of the board

[16] The board submits that section 52(3)3 applies to exclude the records at issue

¹ *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.

² Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

³ *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.

⁴ Order PO-2157.

⁵ Orders P-1560 and PO-2106.

⁶ Ministry of Correctional Services, cited above.

from the scope of the *Act*. The board submits that the records at issue were prepared, collected, maintained and used by the board, and form part of the employee file of the specified employee.

[17] The board submits that the records at issue are letters, a memorandum, and statements of payment, all of which are used to communicate employment-related matters between the specified employee and the board.

[18] The board submits that as the employer of the specific employee, it collected, prepared, maintained and used the records contained in his employment file, and the file chronicles the interactions between the board, the specified employee and others. The board further submits that since the board employed the specified employee, it has an interest in his employment.

[19] The board submits that the records were clearly excluded from the *Act* at the time they were created, and therefore, in accordance with section 52(3)3, should be excluded from the *Act* on appeal. The board further submits that none of the exceptions found in section 52(4) apply to the records at issue.

Representations of the appellant

[20] The appellant's representations with respect to the application of section 52(3)3 are brief. The appellant agrees that the records at issue consist of the employment file of the specified employee, and that it contains some information related to labour relations and employment, as well as personal information. The appellant argues, however, that this does not constitute an absolute barrier to the release of the records.

Analysis and findings

[21] Based on my review of the records, I find that section 52(3)3 applies to exclude them from the scope of the *Act*.

[22] As previously noted, in order for section 52(3)3 to apply, all three parts of the test set out above must be met.

Part 1 and 2: collected, prepared, maintained or used in relation to meetings, consultations, discussions or communications

[23] After reviewing the records at issue, I am satisfied that they were collected, prepared, maintained or used by the board in its capacity as the specified employee's employer. The records at issue form the specified employee's employment file, which contain employment type documents such as hiring documentation, performance reviews, etc. These types of documents are typically collected, prepared, maintained or used by an employer. Accordingly, I find that part 1 of the test has been met.

[24] I am also satisfied that the records at issue, which comprise of the specified employee's employment file, were collected, prepared, maintained or used in relation to

meetings, consultations, discussions or communications by the board with or in relation to the specified employee. Therefore, I find that part 2 of the test has been met.

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

[25] The records are excluded only if the meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest. 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.⁷

[26] Examples of when this office has found the phrase "labour relations or employment-related matters" applicable, include a job competition⁸, an employee's dismissal⁹, and a grievance under a collective agreement¹⁰.

[27] The phrase "labour relations or employment-related matters" has been found not to apply in the context of an organizational or operational review¹¹ and litigation in which the institution may be found vicariously liable for the actions of its employee.¹²

[28] Based on my review of the records, I find that they were collected, prepared, maintained or used by the board in relation to meetings, consultations, discussions or communications about labour relations or employment related matters in which the board has an interest.

[29] I am satisfied that the records at issue meet the requirement that they be about employment-related matters, because they comprise the specified employee's employment file with the board, and contain correspondence and interactions between the specified employee and the board with respect to his employment.

[30] I am also satisfied that the board has an interest in these records in its capacity as an employer, because the specified employee was employed by the board, and the board clearly "has an interest" in the information contained in the records. Accordingly, I find that part 3 of the test is met.

[31] The board submits, and I find, that none of the exceptions in section 52(4) apply to the records at issue. I note that while the board submits that the records contain

⁷ *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above

⁸ Orders M-830 and PO-2123.

⁹ Order MO-1654-I.

¹⁰ Orders M-832 and PO-1769.

¹¹ Orders M-941 and P-1369.

¹² Orders PO-1722, PO-1905 and *Ontario (Ministry of Correctional Services) v. Goodis*, cited above.

statements of payment, these are the specified employee's pay stubs, and not an expense account submitted by an employee to which the section 52(4)4 exception would apply.

[32] Since all three parts of the section 52(3)3 test have been met and none of the exceptions in section 52(4) apply, I find that the records are excluded from the scope of the *Act*. Therefore, the appellant has no right of access to these records under the *Act*, and I do not need to address whether the exemption in section 14(1) applies to them.

[33] I note that the appellant argues that the section 16 public interest override should apply, and he made representations on that issue. However, section 16 can only override the exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 of the *Act*. As I have found that the exclusion in section 52(3)3 applies to exclude the records from the scope of the *Act*, section 16 cannot operate to bring them back under the *Act*.

ORDER:

I uphold the board's decision that the records at issue are excluded from the scope of the *Act* pursuant to section 52(3)3 of the *Act*, and dismiss the appeal.

Original signed by: _____
Anna Truong
Adjudicator

_____ August 12, 2020