Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3947

Appeal MA17-466

Waterloo Region District School Board

August 21, 2020

Summary: The Waterloo Region District School Board (the board) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a specified code of conduct report. The board took the positon that the report was excluded from the *Act* by operation of section 52(3)3 (employment or labour relations) but that if it were not, the code of conduct report qualified for exemption under sections 6(1)(b) (closed meeting), 12 (solicitor-client privilege) and 14(1) (personal privacy) of the *Act*. In this order, the adjudicator does not uphold the board's decision that section 52(3) applies to exclude the report from the scope of the *Act* but finds that the report qualifies for exemption under section 6(1)(b) 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, sections 2(1), 2(2.1), 2(2.2), 6(1)(b), 6(2) and 52(3); *Education Act,* RSO 1990, c E.2, section 207(2)(b).

Orders Considered: Order MO-2499-I.

BACKGROUND:

[1] The Waterloo Region District School Board (the board) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a specified code of conduct report as well as a summary of payments paid to an identified lawyer, or to his firm, regarding this report.

[2] The board identified responsive records and relying on sections 6(1)(b) (closed meeting) and 12 (solicitor-client privilege) denied access to them, in full.

[3] The requester (now the appellant) appealed the board's access decision.

[4] In the course of mediation, the board issued two supplementary decision letters. In the first decision the board indicated that it was also claiming that the report at issue qualified for exemption under section 14(1) (personal privacy), or was excluded from the *Act* by operation of section 52(3)3 (employment or labour relations). In the second decision the board disclosed some information to the appellant. At the close of mediation only access to the specified report remained at issue in the appeal.

[5] As mediation did not resolve the appeal, it was moved to the adjudication stage of the appeals process where an adjudicator may conduct an inquiry under the *Act*.

[6] The appellant and the board submitted representations, which were shared in accordance with this office's *Practice Direction 7*.

[7] In this order, I do not uphold the board's decision that section 52(3)3 applies to exclude the report from the scope of the *Act* but find that the report qualifies for exemption under section 6(1)(b) of the *Act* and dismiss the appeal.

RECORD:

[8] At issue in this appeal is a report prepared for the board by its external lawyer.

ISSUES:

A. Does section 52(3)3 exclude the report from the *Act?*

B. Does the discretionary exemption at section 6(1)(b) apply to the report?

C. Did the board exercise its discretion under section 6(1)(b)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

Issue A: Does section 52(3) exclude the report from the Act?

[9] 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:

> 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.
>
> 2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.
>
> 3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

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

[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.[1]

[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.[2]

[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.[3]

[14] 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.[4]

[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.[5]

---

[1] Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).
[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.
[3] Order PO-2157.
[4] *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.
[5] *Ontario (Ministry of Correctional Services) v Goodis*, 2008 Canlii 2603 (Div. Crt.).

Section 52(3)3: matters in which the institution has an interest

[16] 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.

The board's representations

[17] The board submits that the report was presented to the trustees at a closed meeting and voted upon. The board takes the position that the report was collected, prepared, maintained or used by or on behalf of the board and forms part of its internal investigation, as an employer, into the conduct of a trustee in relation to one of its employees. The board submits that the report pertains to "employment-related matters" on which the board sought legal advice.

The appellant's representations

[18] The appellant disagrees. He takes the position that the report does not deal with an employment-related matter but rather a political one. He submits that it is the result of an investigation into an allegation that an elected trustee, who is not a board employee, breached a board policy that governs the conduct of elected trustees. He argues that the fact that it may relate to a comment made by a trustee relating to a board employee does not turn it into an employment-related matter.

Analysis and finding

[19] I am satisfied that the board used the report for discussions at a meeting. In particular, it was used by the trustees at a closed meeting to inform its decision regarding the matter. Therefore, Parts 1 and 2 of the section 52(3) test are met.

[20] As noted above, 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.[6] 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.

---

[6] Order PO-2157.

[21] 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] The records collected, prepared, maintained or used by the institution 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.[8]

[22] This office has consistently taken the position that the exclusions at section 52(3) of the *Act* (and the equivalent section in the *Act*'s provincial counterpart[9]) are record-specific and fact-specific. This means that in order to qualify for an exclusion, a record is examined as a whole. This whole-record method of analysis has also been described as the "record-by-record" approach when applied by this office in considering the application of exemptions to records.

[23] On my review of the record's contents and in consideration of the purpose of the record and meeting - to document and discuss an investigation into the conduct of a school trustee, who does not qualify as an employee of the board,[10] I am not satisfied that the record qualifies for the section 52(3)3 exclusion. As set out above, the type of records excluded from the *Act* by section 52(3)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. In that regard, although a board employee is mentioned in the report, the report and meeting relate to an investigation of a trustee's conduct, not the employee's. In my view, the quality of the board employee's involvement is incidental and does not change the nature of the record to be employment-related because the employment connection is too minimal so as to meet the threshold of "some connection" to employment or labour relations. As the application of the 52(3)3 exclusion is record specific and fact specific, I conclude that the record does not qualify for exclusion.

[24] As I have found that the exclusion does not apply, I will go on to consider the application of the exemptions claimed by the board.

Issue B: Does the discretionary exemption at section 6(1)(b) apply to the report?

[25] Section 6(1)(b) reads:

> A head may refuse to disclose a record,
>
> > that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public.

---

[7] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner),* cited above.
[8] *Ontario (Ministry of Correctional Services) v. Goodis,* cited above.
[9] *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31, section 65(6).
[10] See in this regard the discussion in Order MO-3031.

[26] For this exemption to apply, the institution must establish that:

1. a council, board, commission or other body, or a committee of one of them, held a meeting;

2. a statute authorizes the holding of the meeting in the absence of the public; and

3. disclosure of the record would reveal the actual substance of the deliberations of the meeting.[11]

[27] Previous orders have found that:

- "deliberations" refer to discussions conducted with a view towards making a decision;[12] and

- "substance" generally means more than just the subject of the meeting.[13]

[28] Section 6(1)(b) is not intended to protect records merely because they refer to matters discussed at a closed meeting. For example, it has been found not to apply to the names of individuals attending meetings, and the dates, times and locations of meetings.[14]

[29] The first and second parts of the test for exemption under section 6(1)(b) require the institution to establish that a meeting was held by the institution and that it was properly held *in camera*.[15]

[30] In determining whether there was statutory authority to hold a meeting *in camera* under part two of the test, was the purpose of the meeting to deal with the specific subject matter described in the statute authorizing the holding of a closed meeting?[16]

[31] With respect to the third requirement set out above, the wording of the provision and previous decisions of this office make it clear that in order to qualify for exemption under section 6(1)(b), there must be more than merely the authority to hold a meeting in the absence of the public. Section 6(1)(b) of the *Act* specifically requires that disclosure of the record would reveal the actual substance of deliberations which took place at the institution's *in camera* meeting, not merely the subject of the deliberations.[17]

---

[11] Orders M-64, M-102 and MO-1248.
[12] Order M-184.
[13] Orders M-703 and MO-1344.
[14] Order MO-1344.
[15] Order M-102.
[16] *St. Catharines (City) v. IPCO*, 2011 ONSC 2346 (Div. Ct.).
[17] Orders MO-1344, MO-2389 and MO-2499-I.

Section 6(2): exceptions to the exemption

[32] Section 6(2) of the *Act* sets out exceptions to sections 6(1)(a) and/or (b). It reads:

> Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record if,
>
> > (a) in the case of a record under clause (1)(a), the draft has been considered in a meeting open to the public;
> >
> > (b) in the case of a record under clause (1)(b), the subject matter of the deliberations has been considered in a meeting open to the public; or
> >
> > (c) the record is more than twenty years old.

The board's representations

[33] The board submits that the report contains personal information in respect of a member of the board. The board submits that the decision to hire the investigator who prepared the report, and the presentation of the report, took place at closed meetings.

[34] It also states that the trustees were authorized to hold these meetings in the absence of the public pursuant to section 207(2)(b) of the *Education Act*[18], which states:

> A meeting of a committee of a board, including a committee of the whole board, may be closed to the public when the subject-matter under consideration involves,
>
> > (b) the disclosure of intimate, personal or financial information in respect of a member of the board or committee, an employee or prospective employee of the board or a pupil or his or her parent or guardian;

[35] The Board submits that the meetings were properly constituted as meetings closed to the public under section 207(2)(b) of the *Education Act* due to the subject matter under consideration.

[36] The board argues that even if information relates to an individual in a professional capacity, it may still qualify as personal information if it reveals something of a personal nature about the individual.

---

[18] RSO 1990, c E.2.

The appellant's representations

[37] The appellant disagrees. He submits that to qualify as personal information, the information must reveal something of a personal nature about the individual. The appellant asserts that information pertaining to someone acting in a business, professional or official capacity is not personal information. The appellant submits that the board chose to hire a lawyer to examine the conduct of an elected official under a policy it established to hold elected officials to a professional standard. The appellant asserts that the content of the report does not qualify as personal information because it is about the conduct of individuals in their professional or official capacity and is not about them personally.

Analysis and finding

[38] I find that the *in camera* meeting regarding the report did take place, satisfying the first requirement under section 6(1)(b).

[39] Turning to the second requirement, the *Education Act* refers to the term "personal information" in various sections and in section 266.1 refers specifically to the *MFIPPA* definition of "personal information"[19]. However, for the purposes of this appeal it does not provide an associated definition of "personal information" that is applicable to section 207(2)(b).

[40] In Order MO-2499-I, Adjudicator John Higgins dealt with the issue in the following way:

> Turning to the second requirement … Prior orders of this office have found that the term "personal matters" as used in the *Municipal Act* (also frequently referenced in connection with section 6(1)(b) of the *Act*) is analogous to the term "personal information" used in the *Act* (Orders MO-2473 and MO-2368). In Order MO-2473, Adjudicator Colin Bhattacharjee stated the following in regard to section 239(2)(b) of the *Municipal Act*:
>
> > In my view, the purpose of section 239(2)(b) is to provide a municipal council, board or committee with the discretion to close a meeting or part of a meeting to the public to protect the privacy of an identifiable individual, but only if "personal matters" relating to that individual is the subject matter actually being considered.
>
> I agree with Adjudicator Bhattacharjee's reasoning and apply it here. I am satisfied from the representations taken as a whole, and the records that were provided to this office at the intake stage of this appeal, that the

[19] Section 266.1 reads: In sections 266.2 to 266.5, "personal information" means personal information within the meaning of section 38 of the *Freedom of Information and Protection of Privacy Act* and section 28 of the *Municipal Freedom of Information and Protection of Privacy Act*.

> Board's in camera meetings were properly constituted under section 207(2)(b) because they involved intimate, personal or financial information in respect of a member of the Board.
>
> In arriving at this finding, I have relied, in part, on the confidential portions of the representations of the Board which I cannot set out in this order. I have also taken into account previous orders of this office dealing with records about the termination of a person's employment or office (see Orders MO-1269, M-978, M-736, M-273, M-184 and M-47).

[41] Whether by reference to the provision in the *Education Act* that refers back to the *MFIPPA* definition of "personal information" or by the application of Adjudicator Higgins' reasoning, the result is the same. The term "personal information" in section 2(1) of *MFIPPA* means "recorded information about an identifiable individual." Section 2(1) also lists examples of "personal information", but the listed examples are not exhaustive. Therefore, information that does not fall under the listed examples may still qualify as personal information.[20]

[42] In addition to the definition of personal information at section 2(1) of the *Act*, sections 2(2.1) and 2(2.2) also relate to the definition of personal information. These sections state:

> (2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.
>
> (2.2) For greater certainty, subsection (2.1) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[43] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.[21]

[44] However, even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.[22]

[45] This office has held that if the focus of a record is whether professional, official or business conduct was appropriate, the information takes on a more personal

---

[20] Order 11.
[21] Orders P-257, P-427, P-1412, P-1621, R-980015 and PO-2225.
[22] Orders P-1409, R-980015, PO-2225 and MO-2344.

quality.[23] Accordingly, although the record at issue pertains to the identifiable individual in his conduct as trustee, I find that it contains his personal information because it relates to allegations of misconduct on his part in the course of performing his role as trustee.[24]

[46] I find, therefore, that the report contains personal information of the subject trustee. The board says that the report was presented at the closed meeting. I am satisfied in these circumstances that the subject matter under consideration at that meeting involved the disclosure of personal information about the subject trustee. I am satisfied, therefore, that the *Education Act* authorized the meeting to be held in a closed session.

[47] The only issue remaining is whether the disclosure of the report would reveal the substance of the deliberations at a closed meeting.

[48] Based on my review of the report and the representations of the parties, I accept that the report, in its entirety, would have been reviewed, and significant portions of it included in the discussions of the board members at the closed meeting. In this case, there is no evidence before me that issues pertaining to the trustee had been previously decided, and I accept that the report did form the substance of deliberations with a view to making a decision.

[49] Having regard to the evidence that is before me, I find that the disclosure of the report would reveal the substance of the deliberations at the *in camera* meeting as it contains the facts and a recommended course of action that was the very substance of the discussions that took place. Therefore, the third requirement for the application of section 6(1)(b) has been met.

[50] I have reviewed the exceptions to the exemption set out in section 6(2) and find that none is established in the circumstances of this appeal. In my view, the release of the conclusion of the report at a public meeting does not amount to "consideration" of the subject matter of the board's deliberations for the purposes of section 6(2)(b).[25] I find, therefore, that section 6(2)(b) does not apply.

[51] As all three requirements for the application of section 6(1)(b) have been met and the exception does not apply, I find that the report is exempt pursuant to section 6(1)(b).

[52] Given my findings regarding the application of section 6(1)(b), it is not necessary for me to consider whether the other exemption claimed for the report applies. However, I must go on to review the board's exercise of discretion.

---

[23] Order PO-2524.
[24] Orders MO-2499-I and PO-2524.
[25] See in this regard Orders M-241, MO-2087, MO-2177 and MO-3462.

Issue C: Did the institution exercise its discretion under section 6(1)(b)? If so, should this office uphold the exercise of discretion?

[53] The section 6(1)(b) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[54] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[55] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[26] This office may not, however, substitute its own discretion for that of the institution.[27]

The board's representations

[56] The board submits that because the incident that led to the complaint and subsequent investigation occurred during a public committee of the whole meeting the board properly exercised its discretion by publicly reporting the report's conclusion at a subsequent public meeting. The board submitted that this reflected its consideration of whether the disclosure would increase public confidence in the board.

The appellant's representations

[57] The appellant fails to see how the full report is less worthy of publication than its conclusion. He submits:

> Disclosure might increase public confidence in the institution by revealing how its code of conduct works and was investigated. It might decrease public confidence by revealing discord among trustees. Either way the public deserves to know after spending $14,981 on an investigation. It should not be up to trustees, who initiated a political investigation at public expense, to decide if they want to make the report public based on whether they like what it says about them.

[26] Order MO-1573.
[27] Section 43(2).

The board's reply representations

[58] The board submits that its Code of Conduct Policy is publicly available and provides a detailed description of the process. The disclosure of the report's conclusion that there was no evidence or facts to support a violation of the Code of Conduct was an exercise of its discretion in reporting the information it considered to be relevant and of interest to the public thereby satisfying any requirement for public scrutiny.

[59] The board submits:

> … Historically, the content of closed meeting reports and deliberations has not been released to the public. The final vote on any matter debated in a closed session will also be conducted in public; however, the substance of the matter may not be disclosed.

The appellant's sur-reply representations

[60] The appellant argues that since the investigation is not about personal information but is about professional conduct, the board has no right to decide what it wishes to release and what it wishes to withhold. He submits that:

> … It can't be left to the board to decide what it considers "to be relevant and of interest to the public," to cite the board's position. On a matter relating to the professional conduct of an elected trustee it should be up to the public to decide what it considers relevant and of interest, which can only be achieved by a full release of findings.

Analysis and finding

[61] An institution's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law.[28] It is my responsibility to ensure that this exercise of discretion is in accordance with the *Act*. If I conclude that discretion has not been exercised properly, I can order the institution to reconsider the exercise of discretion.[29]

[62] I have considered the arguments of the appellant for the exercise of discretion in his favour. However, I find that there is insufficient evidence before me to establish that the board exercised its discretion in bad faith, or for an improper purpose, or took into account irrelevant considerations. I am satisfied that the board was aware of the wording and purpose of section 6(1)(b) and that it was withholding the report under that section.

[63] I am satisfied that the board was aware of the reason for the request, why the

---

[28] Order MO-1287-I.
[29] Order P-58.

appellant wished to obtain the information, and the appellant's arguments as to why it should disclose the information. I am satisfied that in proceeding as it did, and based on all the circumstances, the board also considered why the appellant sought access to the information, whether the appellant had a sympathetic or compelling need to receive the information, the nature of the information and the extent to which it is significant and/or sensitive to the institution or an affected person. Finally, I am satisfied that the board considered whether disclosure of the report would increase public confidence in the operation of the institution. I note that the board did release the conclusion of the report at a public meeting.

[64] In all the circumstances and for the reasons set out above, I uphold the board's exercise of discretion.

ORDER:

1. I do not uphold the board's decision that section 52(3)3 applies to exclude the report from the scope of the *Act* .

2. I find that the report qualifies for exemption under section 6(1)(b) of the *Act* and dismiss the appeal.

Original signed by: August 21, 2020

Steven Faughnan
Adjudicator