

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4201

Appeal MA20-00270

Toronto Community Housing Corporation

May 24, 2022

Summary: The Toronto Community Housing Corporation (TCHC) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for emails pertaining to the requester involving specified email addresses during a certain time period. TCHC granted partial access to the responsive records, and withheld the remaining records under the exclusion at section 52(3) (labour relations and employment records) and/or the personal privacy exemptions at sections 14(1) and 38(b) of the *Act*. On appeal, TCHC issued two revised access decisions, raising the issue of custody or control and the mandatory exemption at section 10(1) (third party information), and claiming that some information in the records was non-responsive to the request. In this order, the adjudicator upholds TCHC's decision to withhold the records because she finds that some information is non-responsive, one group of records is not in TCHC's custody or control, and the remaining three groups of records are in its custody or control but are excluded from the *Act* under section 52(3) (labour relations or employment records). As a result, she does not consider TCHC's claims under sections 10(1), 14(1), and 38(b), and dismisses the appeal.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, sections 4(1), 17, and 52(3)3.

Orders Considered: Orders PO-3009-F, PO-3390, PO-4224, and MO-2660.

OVERVIEW:

[1] This order resolves an appeal for records generated because of issues relating to workplace accommodation and harassment. A unionized employee of the Toronto

Community Housing Corporation (TCHC) made a request to his employer under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), which was later clarified to be for emails pertaining to the requester during a specified time period, as follows:

Emails received by and sent by [a specified email address belonging to a representative of the union representing the appellant] that contains the following keywords:

- Supervisor/Employee confidentiality
- instructional guidelines.

[2] TCHC granted partial access to the responsive records. It withheld the remainder of the records under the exclusion at section 52(3) (labour relations or employment records) of the *Act* and/or the mandatory and discretionary personal privacy exemptions at sections 14(1) and 38(b), respectively, of the *Act*.

[3] The requester, now appellant, appealed TCHC's decision to the Information and Privacy Commissioner of Ontario (IPC).

[4] The IPC appointed a mediator to explore resolution. The appellant had some questions about the access decision and records withheld, and the mediator shared these questions with TCHC. TCHC responded in a letter that included the following statement: "Notwithstanding the fact that your requested records are excluded from the application of the legislation, [TCHC] disclosed to you the emails in which you were the sender and/or recipient." The appellant advised the mediator that he wants access to the records that were withheld.

[5] Since the issues could not be resolved at mediation, the appeal moved to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry.

[6] As the adjudicator of this appeal, I began an inquiry under the *Act* by issuing a Notice of Inquiry, setting out the facts and issues on appeal, to TCHC. TCHC then issued two revised access decisions in which it claimed that some portions of the records at issue were not responsive to the appellant's request, that some records were not in its custody or control, and in which it raised the mandatory exemption at section 10(1) (third party information) of the *Act*, in addition to the provisions it had claimed in its previous access decisions.¹

[7] As a result of these changes, I issued a supplementary Notice of Inquiry, setting

¹ This occurred after TCHC contacted the IPC to provide further clarification about the records at issue. In the course of that communication, I determined that TCHC's questions involved claims in relation to the issue of custody or control of the records, under section 4(1) of the *Act*, as well as the mandatory exemption at section 10(1) (third party information).

out the facts and additional issues on appeal, to TCHC and a union as an affected party. I sought and received written representations from TCHC and the union in response. I shared the non-confidential portions of these representations with the appellant, and withheld portions of the representations for confidentiality concerns.² Upon my review of the appellant's representations, I determined that the inquiry could close.

[8] For the reasons that follow, I uphold TCHC's decision regarding the non-responsiveness of certain portions of the records, the custody or control of some (but not all) records, and the application of the exclusion at section 52(3)3 to the remaining records at issue. As a result, it is not necessary for me to consider TCHC's alternate claims under sections 10(1), 14(1), and 38(b), and I dismiss the appeal.

RECORDS:

[9] The records at issue consist of emails (or email chains), some with attachments. TCHC identified the information at issue by page number, not record number, in its index of records. Based on my review of the records, I assigned record numbers to the information at issue because TCHC claimed the application of the labour and employment exclusion at section 52(3), and the IPC has held that when determining whether that exclusion applies, the record is examined as a whole, rather than by individual pages, paragraphs, sentences, or words. This whole-record method of analysis has also been described as the "record-by-record approach."³ I note that the record numbers I have assigned align with the union's detailed representations grouping certain page numbers together.

[10] TCHC provided a table to further understand the background and context of the records at issue, as follows. I have replaced page numbers provided by TCHC with the corresponding record numbers, and assigned names to the groups for ease of reference in this order.⁴

Group	Record number(s)	Parties to email communications in the records
1	Records 1, 3-7, and 13-16	Email communications among union

² In accordance with *Practice Direction 7* of the IPC's *Code of Procedure*.

³ See, for example, Orders M-352, PO-3642, MO-3798-I, MO-3927 and MO-3947. This whole-record approach would also apply had I needed to assess TCHC's claims that a personal privacy exemption applies to the records.

⁴ The following is the correspondence of record numbers with page numbers: record 1 (pages 3-4), record 2 (pages 5-7), record 3 (pages 8-10), record 4 (pages 11-14), record 5 (page 15), record 6 (pages 17-19), record 7 (pages 20-21), record 8 (page 22), record 9 (page 23), record 10 (page 24), record 11 (pages 25-26), record 12 (pages 27-28), record 13 (pages 29-31), record 14 (pages 32-81), record 15 (pages 82-89), record 16 (page 90), record 17 (page 91), record 18 (page 92), and record 19 (pages 93-94). Given my findings about responsiveness, custody or control, and section 52(3), it is not necessary to set out TCHC's alternate claims over any records.

		representatives
2	Records 2, 8-12, and 19	Email communications among union representatives and TCHC human resources staff
3	Record 17	Email communications among union representatives and TCHC human resources and operating unit staff
4	Record 18	Email communications among union representatives and TCHC operating unit staff

[11] TCHC withholds portions of records 2 (part of page 6 and all of page 7) and 15 (pages 83, 84, and 86-89, in full) as non-responsive to the request. TCHC also claims the exclusions at sections 52(3) over all of the records at issue (records 1-19). Records 6-19 have been withheld in full.

ISSUES:

- A. What is the scope of the request? What records are responsive to the request?
- B. Are the records "in the custody" or "under the control" of TCHC under section 4(1)?
- C. Does the section 52(3) exclusion for records relating to labour relations or employment matters apply to the records?

DISCUSSION:

Background information

[12] TCHC and the union provided some general background information, which I have summarized below, as it may be useful to providing context for my decision in this appeal.

[13] At all material times, the union was the trade union that is the exclusive bargaining agent for the appellant in all of his dealings with TCHC (the appellant's employer) vis-à-vis the appellant's employment. The union and TCHC are bound to a collective agreement that regulates the terms and conditions for employees in the bargaining unit represented by the union.

[14] The union explains that its representatives whose names appear in the records at issue in this appeal are responsible for coordinating the union's activities and for

providing confidential advice and services to the members of the bargaining unit. These union functions include:

- making grievance-filing and grievance-management decisions,
- negotiating with TCHC managers, and
- communicating with members of the bargaining unit about the operation of the collective agreement in the workplace.

[15] With respect to the email address specified in the request, TCHC explains that it is the TCHC work email address, on TCHC's email server, that is assigned to and used by another TCHC employee, whom I will refer to as "AB" in this order.⁵ During the relevant time period, although AB was employed by TCHC and had access to his TCHC work email address, he was on a leave of absence from TCHC to work full-time as a union officer for the union. TCHC states that AB's duties included acting as union official/representative with respect to employment and labour relations matters involving TCHC employees who were union members.⁶

[16] The appellant's request was for emails relating to himself and that were sent or received by AB, with certain search terms, in a certain time period.

[17] Based on my review of the records, I find that they are all emails (or email chains), some with attachments. This is not in dispute, given the wording of the request and the parties' representations.

Issue A: What is the scope of the request? What records are responsive to the request?

[18] TCHC's position is that some information at issue is non-responsive to the request, and therefore, should not be disclosed. As I will explain below, I uphold this decision.

[19] Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

- (1) A person seeking access to a record shall,

⁵ These are not the individual's real initials.

⁶ The appellant's initial request also sought access to records pertaining to the requester received by and sent by a second email address, AB's union email address. In its initial decision letter, TCHC informed the requester that the union is a separate entity from TCHC, and its email account is kept in a separate server that was not accessible to TCHC and was, therefore, outside of TCHC's custody or control. The requester clarified his request accordingly by removing the reference to the union email account.

(a) make a request in writing to the institution that the person believes has custody or control of the record;

(b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;

...

(2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[20] To be considered responsive to the request, records must "reasonably relate" to the request.⁷ Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.⁸

TCHC's position

[21] TCHC states that after conducting a search for records responsive to the appellant's access request, it identified various records, which were communications, including email chains and attachments, relating to employment and labour relations matters involving the appellant. TCHC explains that some of these records are communications between TCHC's human resources staff and union officers (including, but not limited to, AB). However, TCHC states that most of the communications are between union officers.

[22] TCHC explains that, in the course of considering and interpreting the request, TCHC staff had telephone meetings with the appellant to assist him in narrowing the scope of the search to target the specific records that were relevant. As a result, the initial request was clarified and TCHC submits it is now clear and unambiguous: it covers emails received by and sent from AB's TCHC email address, relating to the appellant, during a specific time period, containing specific key terms. TCHC submits that the records it located must pertain to the appellant in order to be responsive.

[23] After clarifying the request, TCHC staff obtained executive authorization to access AB's email account in order to search for the responsive records. Because a responsive record could include a number of pages and attachments, and not every responsive record contained the appellant's name, TCHC explains that a careful review of the content and context of each page was required in order to ascertain whether or not it related to the appellant in some way, or just happened to be in close proximity, similar to or attached to records that relate to the appellant but did not actually pertain

⁷ Orders P-880 and PO-2661.

⁸ Orders P-134 and P-880.

to him. TCHC states that this determination required a reasonable level of technical understanding of the context and content of the employment, labour relations and other matters contained in the records.

[24] After a closer examination of the records, and consultation with other TCHC staff that allowed for a more complete appreciation of their content and context, TCHC explains that it became clear to its staff that several portions of records 2 (on pages 6 in part, and 7, in full) and 15 (pages 83, 84, and 86-89, in full) did not relate to the appellant in any way. TCHC states that the information on these pages had initially been identified as being responsive, in error. TCHC submits that those portions of records 2 and 15 are non-responsive to the request because as they have nothing to do with the appellant.

[25] More specifically, TCHC explains that the portions of record 2 that it has identified as non-responsive are portions of a chart (which is an attachment to an email) containing a list of open grievances that was circulated by email between union representatives. TCHC states that there is only one item in the chart that relates to the appellant and his grievance. The rest of the chart contains information relating to grievances involving individuals other than the appellant. Therefore, TCHC submits that these portions of record 2 are non-responsive to the request.

[26] With respect to the portions of record 15 now identified as non-responsive by TCHC, TCHC states that these consist of records entitled "Grievance Hearings" containing the names of TCHC employees and union representatives and notes or minutes of discussions regarding grievances of individuals other than the appellant, and/or of a general or policy nature that do not relate to any specific individuals. TCHC notes that none of these pages in record 15 contain the appellant's name. Given the contents of these portions of record 15, TCHC submits that the information on those pages is non-responsive to the request.

The union's position

[27] In the alternative to its essential position in this appeal that all the records are excluded under section 52(3), the union submits that "with a minor exception," none of the records TCHC found are in fact responsive to the appellant's request. Noting the parameters of the request, that it include the key words "Supervisor/employee confidentiality," the union states that the phrase "Supervisor/Employee confidentiality" does not appear in any of the records at issue. Similarly, it notes that the word "confidentiality" appears repeatedly in a standard "notice of confidentiality" that is the footer of a number of emails, but the word "confidentiality" or "confidential" only appears in the emails found in record 5 (page 15). In addition, the union states that the "related words such as 'privacy'" only appear in the context of an email found in records 9-12 (pages 23-28).

[28] With respect to the other key phrase found in the request, "instructional

guidelines," the union states that this phrase does not appear in any of the records, and that neither the word "instructional" nor the word "guidelines," or any words similar to those words, appears in any of the records, either.

[29] Therefore, the union submits that with the exception of records 5, 9, 10, 11, and 12, the records are largely non-responsive to the request.

[30] Furthermore, the union submits that much of the content of records 9-12 themselves is also non-responsive. The union states that those records are email chains between a specified union representative (other than AB) and various TCHC officials. The union notes that the word "privacy" appears only in the original email from this other union representative.

The appellant's position

[31] The appellant's representations do not address the issue of scope of the request or the responsiveness of the records.

Analysis/findings

[32] Based on my review of the wording of the request and the representations of the parties, I find that the request provided enough detail to identify the types of records responsive to the request. The scope of the request is the emails received by, and sent from, the TCHC email address of AB during a specific time period, containing specific key terms.

[33] While I agree with the union that the specific key terms listed in the request are not found in most of the records, it is worth noting, again, that to be considered responsive to the request, records must "reasonably relate" to the request. Furthermore, as discussed, institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act* and ambiguity in the request should generally be resolved in the requester's favour. In my view, TCHC has adopted a liberal interpretation of the request, such that it has identified emails to or from AB, relating to the appellant, during the time period specified in the request. Since the appellant is not the recipient of most of the emails,⁹ it is reasonable to expect that he would not know exactly which key terms would be found in the emails relating to him that were sent or received by AB. I find that TCHC resolved such a disadvantage in his favour by identifying emails sent or received by AB relating to the appellant during the specified time period, even if the key words that the appellant thought would be found are not found in most of the records.

[34] Turning to the information in certain records that TCHC submits is non-

⁹ As indicated in the Overview, TCHC initially advised the appellant of the following: "Notwithstanding the fact that your requested records are excluded from the application of the legislation, [TCHC] disclosed to you the emails in which you were the sender and/or recipient."

responsive, based on my review of record 2, I find that portions of this record (on pages 6 and 7) contain information that does not relate to the appellant, and rather, relates to the grievances of other individuals. Therefore, I find that this information does not “reasonably relate” to the appellant’s request, and I uphold TCHC’s decision to withhold it as non-responsive to the request.

[35] Likewise, based on my review of record 15, I find that the information on pages 83, 84, and 86-89 relates to the grievances of other individuals and/or to grievance issues that do not relate to any individual in particular. As a result, I find that all of this information does not “reasonably relate” to the request and, I uphold TCHC’s decision to withhold these portions of record 15.

[36] Given these findings, I will not assess TCHC’s alternate claims over these portions of records 2 and 15. I uphold TCHC’s decision to deny access on the basis that this information is not responsive to the request.

Issue B: Are the records “in the custody” or “under the control” of TCHC under section 4(1)?

[37] TCHC’s position is that none of the records are in its custody or under its control. The union takes no position on this issue. For the following reasons, I uphold TCHC’s position, in part, because I find that the records in group 1 are not in its custody or under its control, but the remaining records (groups 2, 3, and 4) *are* in TCHC’s custody or under its control.

[38] Section 4(1) provides for a general right of access to records that are in the custody or under the control of an institution governed by the *Act*. It reads, in part:

Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless . . .

[39] Under section 4(1), the right of access applies to a record that is in the custody or under the control of an institution; the record need not be both.¹⁰

[40] There are exceptions to the general right of access set out in section 4(1).¹¹ The record may be excluded from the application of the *Act* by section 52, or may be subject to an exemption from the general right of access.¹² However, if the record is not in the custody or under the control of the institution, none of the exclusions or exemptions need to be considered since the general right of access in section 4(1) is not established. For the reasons I set out below, I find this to be the case for the records in group 1.

¹⁰ Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).

¹¹ Order PO-2836.

¹² Found at sections 6 through 15 and section 38 of the *Act*.

[41] The courts and the IPC have applied a broad and liberal approach to the custody or control question.¹³ In deciding whether a record is in the custody or control of an institution, the factors outlined below are considered in context and in light of the purposes of the *Act*.¹⁴

Factors relevant to determining "custody or control" when an institution holds the record

[42] The IPC considers the following non-exhaustive list of factors when deciding if a record is in the custody or under the control of an institution.¹⁵

- Was the record created by an officer or employee of the institution?¹⁶
- What use did the creator intend to make of the record?¹⁷
- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record?¹⁸
- Is the activity in question a "core," "central" or "basic" function of the institution?¹⁹
- Does the content of the record relate to the institution's mandate and functions?²⁰
- Does the institution have physical possession of the record, because its creator provided it voluntarily or pursuant to a statutory or employment requirement?²¹
- If the institution does have possession of the record, is it more than "bare possession"? In other words, does the institution have the right to deal with the record in some way and does it have some responsibility for its care and protection?²²

¹³ *Ontario Criminal Code Review Board v. Hale*, 1999 CanLII 3805 (ON CA); *Canada Post Corp. v. Canada (Minister of Public Works)*, 1995 CanLII 3574 (FCA), [1995] 2 FC 110; and Order MO-1251.

¹⁴ *City of Ottawa v. Ontario*, 2010 ONSC 6835 (Div. Ct.), leave to appeal refused (March 30, 2011), Doc. M39605 (C.A.).

¹⁵ Orders 120, MO-1251, PO-2306 and PO-2683.

¹⁶ Order 120.

¹⁷ Orders 120 and P-239.

¹⁸ Order P-912, upheld in *Ontario Criminal Code Review Board v. Hale*, cited above.

¹⁹ Order P-912.

²⁰ *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above; *City of Ottawa v. Ontario*, cited above, and Orders 120 and P-239.

²¹ Orders 120 and P-239.

²² Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.

- If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of their duties as an officer or employee?²³
- Does the institution have a right to possession of the record?²⁴
- Does the institution have the authority to regulate the record's content, use and disposal?²⁵
- Are there any limits on the ways the institution may use the record? If so, what are those limits, and why do they apply to the record?²⁶
- To what extent has the institution relied on the record?²⁷
- How closely is the record integrated with other records held by the institution?²⁸
- What is the usual practice of the institution and institutions similar to the institution in relation to possession or control of records of this nature?²⁹

[43] This list is not exhaustive. Some of these factors may not apply in a specific case, while other factors not listed above may apply.³⁰

[44] The parties were provided with the above list of custody or control factors developed by the IPC in the Notice of Inquiry issued to each of them, and the questions posed in relation to those factors. In this order, I will discuss those factors that I find relevant, based on the evidence before me.

Was the record created by an officer or employee of the institution?

[45] With its representations, TCHC provided me with a reference list of key individuals who are senders and/or recipients identified in the records. This reference list shows the names and positions of these individuals, and further divides them up by employer (whether TCHC or the union, or both).³¹

²³ Orders 120 and P-239.

²⁴ Orders 120 and P-239.

²⁵ Orders 120 and P-239.

²⁶ *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.

²⁷ *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above, and Orders 120 and P-239.

²⁸ Orders 120 and P-239.

²⁹ Order MO-1251.

³⁰ Since the records at issue were located by TCHC in its record-holdings, it is not necessary to also discuss factors that may be relevant considerations where an individual or organization other than the institution holds the record.

³¹ This portion of TCHC's representations was not shared with the appellant, since doing so would reveal the content of the records.

[46] TCHC states that “many” of the emails were entirely between senior officials of the union (such as those on the aforementioned list), or emails in which these union officers were the recipients or senders. TCHC also states that the records were sent to, or created by, AB exclusively in his role as full-time union officer, not in his capacity as a TCHC employee (as AB was on leave from his TCHC employment at the time). Therefore, TCHC submits that, when viewed within their proper context, the records were not created by AB on behalf of TCHC.

[47] The appellant’s representations were brief, and only appear to address AB’s capacity, asserting that AB denied any involvement in the appellant’s labour relations matters and asserting that AB’s union duties do not involve labour relations or advocacy, as those duties were carried out by individuals in two other roles. However, based on my review of the much more detailed representations of the union and TCHC, I accept that AB’s inclusion in the records as creator (or recipient) of the records at issue was in his capacity as a union representative.

[48] Having reviewed the parties’ representations, the records, and TCHC’s reference list, I find that some records were created by AB (or contain emails created by AB), but most were not. The remainder of the records are (or contain) emails sent by union representatives other than AB, or TCHC employees. Specifically, the records in groups 2, 3, and 4 all involve TCHC employees as senders or recipients.

Does the institution have physical possession of the record, because its creator provided it voluntarily or pursuant to a statutory or employment requirement?

[49] TCHC states that it had possession of the records, and was able to access them by conducting an electronic search, only because AB sent and received them on his TCHC email account, instead of his union email account or on any union server (which is inaccessible to TCHC). TCHC states that there is nothing to suggest that using TCHC’s email system was anything other than a matter of convenience, rather than a deliberate intention to share or provide access to TCHC, considering the subject matter of the records and the union’s role and interests. TCHC submits that it is reasonable to assume that AB did not intend these records to be shared, used by, or accessible to, TCHC.

[50] I accept TCHC’s position only with respect to the records in group 1. I accept that AB used his TCHC account as a matter of convenience, and that TCHC was able to access these emails because he did so. Although TCHC’s representations do not address the many records created by union representatives other than AB, I am also willing to accept that these union representatives used their TCHC email accounts as a matter of convenience too.

[51] However, I find that TCHC has not sufficiently explained why any emails created by its own employees, or sent by AB (or any other union member) to its own employees, were not *provided voluntarily or pursuant to TCHC’s obligations* as the

appellant's employer, especially considering TCHC's description of these employees (as TCHC human resources or operational staff). Since the records in groups 2, 3, and 4 all involve TCHC employees as senders or recipients, I find that TCHC has physical possession of these records because the creators of the records provided them to TCHC voluntarily, or pursuant to TCHC's obligations as the appellant's employer. The contents of the records in groups 2, 3, and 4, in my view, also support my finding that TCHC has physical possession of them because the creators of these records voluntarily provided them to TCHC, or because of the fact that TCHC is the appellant's employer.

If the institution does have possession of the record, is it more than "bare possession"? In other words, does the institution have the right to deal with the record in some way and does it have some responsibility for its care and protection?

[52] TCHC submits that previous IPC orders have determined that mere physical possession is not automatically determinative of the custody or control issue. In the circumstances of this request, TCHC states that the location of the records in the TCHC email account is of secondary relevance to the contextual analysis and consideration of the relevant factors that it submits are relevant. Due to AB's use of his TCHC email account on TCHC's server out of convenience (instead of the union email account on the union's server), TCHC submits that viewing the records in "their proper context," TCHC does not claim "any ownership or entitlement to use" the records.

[53] I agree with TCHC only to the extent that some emails found in the email chains are exclusively between union members (group 1). As noted in Order PO-4224, the courts and past IPC decisions have repeatedly found that communications about matters unrelated to an employee's work for an institution do not become records within the custody or under the control of that institution simply because the communications went through a work email address.³² IPC Orders PO-3009-F and PO-4224 dealt with records relating to union business (and not the respective institutions' mandates), and as a result, the adjudicators found that the records were not in the custody or the control of the institutions. I agree with this reasoning and adopt it in this appeal in relation to group 1. Therefore, I find that TCHC has only "bare possession" of the records in group 1 because it is reasonable to accept that TCHC does not have a *right to deal with* the records in some way.

[54] With respect to the rest of the records (groups 2, 3, and 4), as emails involving one or more TCHC employees as a sender and/or recipient, I am not persuaded that TCHC only has "bare possession" of these records. I find that TCHC has *the right to deal with* records involving its employees, as senders and/or recipients of emails, and as participants in grievance hearings. I also find that TCHC has some responsibility for the *care and protection* of these records.

³² Citing *City of Ottawa v. Ontario*, 2010 ONSC 6835 (Div. Ct.), leave to appeal refused (March 30, 2011), Doc. M39605 (C.A.).

Does the institution have a right to possession of the record?

[55] TCHC's evidence regarding AB's use of his TCHC email account to conduct union business, out of convenience, does not directly address the records created by other union representatives, or TCHC human resources or operational staff.

[56] For similar reasons as I have just discussed, I find that TCHC does not have a right of possession of emails between only union representatives (group 1).

[57] However, and again for similar reasons as those expressed above, I find that TCHC has a right of possession of all records where TCHC employees are senders and/or recipients of the emails (groups 2, 3, and 4). In my view, the contents of these emails support this finding, as they contain communications between TCHC employees about human resources and/or operational matters.

What use did the creator intend to make of the record?

[58] TCHC submits that the disclosure of the records "would primarily reveal information about the communications, strategy and actions taken by the union, rather than about [TCHC]." TCHC submits that this disclosure would fall outside of the purpose of the *Act* to provide transparency in relation to institutions that are subject to the *Act*, rather than to third parties.

[59] I accept TCHC's submissions as they relate to group 1, and find that the creators of the group 1 emails intended to have email communications among (only) union representatives.

[60] However, based on TCHC's breakdown of the records by "parties to the email communications" (groups 2, 3, and 4), and my review of the records, I find that the records in groups 2, 3, and 4 are email communications between union representatives, on the one hand, and TCHC human resources staff or TCHC operating staff, or both, on the other. Given the nature of these records, as emails, I find that the creators of the records in groups 2, 3, and 4 intended to communicate with (or forward information to) the respective recipients of the emails. Since TCHC human resources and/or operational staff are the senders and/or recipients of the records in groups 2, 3, and 4, I find that the intent of the creators of these records was to include TCHC in the appellant's labour relations or employment-related matters, as the appellant's employer.

Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record?

[61] With respect to group 1, I find no basis for concluding that TCHC has a statutory power or duty to carry out the activity that resulted in the creation of emails shared only between union representatives.

[62] However, I find it reasonable to conclude that TCHC's human resources and

operational staff have a statutory power or duty, acting on behalf of TCHC, the appellant's employer, to create or respond to emails relating to the appellant's labour relations and/or employment-related matters. This finding relates to the records in groups 2, 3, and 4.

Is the activity in question a "core," "central" or "basic" function of the institution?

[63] TCHC states that it is a non-profit social housing provider, wholly owned by the City of Toronto, which provides housing to approximately 165,000 residents in more than 2,000 buildings. TCHC states that it is the largest social housing provider in Canada and employs approximately 1,600 employees, some of whom are members of a labour union and covered by a collective agreement.

[64] TCHC states that the emails "do not in any way pertain to [AB's] role as a TCHC employee or the business of TCHC."

[65] In addition, TCHC relies on past IPC orders which have held that emails sent and received by an employee of an institution that are unrelated to the business of the institution are not within its custody or control, since the intention behind the *Act* is to provide access to information about institutions.³³

[66] While I agree that records relating to TCHC's labour and/or employment matters do not pertain to the provision of social housing in itself, I do not agree that the records "do not in any way pertain to . . . the business of TCHC." In Order MO-2660, the IPC recognized that "[a]ll institutions operate through their employees" and that "[e]mployees are the means by which all institutions provide services to the public." Although this recognition is found in the context of appeals considering whether records are excluded from the scope of the *Act*,³⁴ I find this reasoning relevant here. I adopt the reasoning in Order MO-2660 for the purpose of considering TCHC's position that the records at issue "do not pertain in any way" to its business because I find no basis for concluding that TCHC carries out its business without its employees.

[67] Therefore, I accept TCHC's position about whether the activity in question (communicating by email) is a *core, central* or *basic function* with respect to group 1 only, as those emails were just between union representatives. However, I find the records in groups 2, 3, and 4 do reflect activity that is a *core, central, or basic function* of TCHC because these records involve TCHC's human resources and/or operational staff, communicating on behalf of TCHC as an employer, whose *core, central, or basic functions* cannot be carried out without TCHC's employees.

Does the content of the record relate to the institution's mandate and functions?

[68] Relying on its submission that many of the emails were entirely between senior

³³ Orders PO-3666, MO-2993, and MO-3000.

³⁴ See Order MO-2660, and, for example, Orders MO-3904 and PO-4223.

officials of the union, or are emails in which these union representatives were the recipients or senders," TCHC submits that this "underscores that the content of these records relates to the union's specific mandate and duties and not those of TCHC."

[69] In addition, TCHC states that the contents of the records "clearly relate entirely to the mandate, business, interests and activities of [the union], i.e. they relate to representing the labour relations interests of employees in [the union] bargaining unit."

[70] TCHC states that the contents of the records do not relate to "the mandate and business of TCHC as an employer and provider of social housing."

[71] TCHC relies on past IPC orders which have held that emails sent and received by an employee of an institution that are unrelated to the business of the institution are not within its custody or control, since the intention behind the *Act* is to provide access to information about institutions.³⁵

[72] I accept TCHC's position only as it relates to group 1 because those records are email communications between only union representatives, carrying out their mandate as union representatives. As mentioned, this is consistent with past IPC orders, such as Order PO-4224, which also dealt with records regarding union business.

[73] However, for the same reasons I discussed above regarding TCHC's *core, central, or basic function*, I find that the records in groups 2, 3, and 4 relate to the *mandate* and business of TCHC as provider of social housing, which it carries out through its employees, as an employer.

Does the institution have the authority to regulate the record's content, use and disposal?

[74] Given the background about AB's leave of absence from TCHC as an employee at the time, and TCHC's position that the contents of the records do not pertain to TCHC's business, TCHC submits that that it did not have the authority to regulate the creation, contents or purpose of the records.

[75] Again, I agree with TCHC's position only to the extent that it applies to group 1, as I accept that TCHC does not have the authority to regulate the contents and use of email communications strictly between union members. Since these records exist on TCHC's server, however, it is not clear on the evidence before me that TCHC does not have the authority to regulate the disposal of the records. This is not determinative though.

[76] With respect to the records in groups 2, 3, and 4, I find that TCHC has the authority to regulate the content, use, and disposal of all of them, as one or more TCHC employees from its human resources or operating staff are senders and/or recipients of

³⁵ Orders PO-3666, MO-2993, and MO-3000.

these emails in the context of their respective roles as TCHC's human resources or operating staff.

To what extent has the institution relied on the record?

[77] TCHC states that it does not use or rely upon internal communications involving the union in the ordinary course of conducting TCHC's business.

[78] I accept TCHC's position only as it applies to those emails strictly between union members (group 1). However, I am not persuaded that this reasonably extends to records where one or more TCHC employee is a sender and/or recipient (groups 2, 3, and 4) in their respective capacities as TCHC's human resources or operating staff.

How closely is the record integrated with other records held by the institution?

[79] TCHC explains that, ordinarily, the types of records at issue are maintained by the union on a separate union email address and server, which TCHC does not have access to.

[80] I accept this explanation only with respect to emails in group 1, as being email communications strictly between union members. However, I am not persuaded to accept this about groups 2, 3, and 4. I find that records where one or more TCHC employee is a sender and/or recipient of an email in their capacity as TCHC's human resources or operating staff are records that can be considered closely integrated with other records held by TCHC.

What is the usual practice of the institution and institutions similar to the institution in relation to possession or control of records of this nature?³⁶

[81] As mentioned, TCHC explains that, ordinarily, these types of records are maintained by the union on a separate union email address and server, which is inaccessible to TCHC. TCHC states that this is done to ensure that confidentiality is maintained.

[82] In addition, TCHC states that it recognizes that the relationship between employees and their union is an important one that requires a zone of confidentiality in order to function effectively. It argues that providing access to union communications through a freedom of information request made to an institution (the employer) "would undermine the labour relations process and the ability of unions and institutions to represent and protect their respective interests." Furthermore, TCHC argues that it would "also detrimentally affect the institution's relationship with its union stakeholders by undermining a cornerstone of the relationship which requires confidentiality to be maintained with respect to union communications."

³⁶ Order MO-1251.

[83] I accept TCHC's position as it pertains only to emails in group 1. However, I am unpersuaded that TCHC's position can reasonably be accepted with respect to records where one or more TCHC employee is a sender and/or recipient (groups 2, 3, and 4) because these records are not communications strictly between union representatives, or even union representatives and union member employees. Rather, they are records in which the employer's employees are communicating with union representatives about matters that concern the employee *and* the employer (the institution).

Weighing the factors

[84] On balance, the vast majority of the factors relevant in the circumstances, and for which I have received evidence, weigh in favour of a finding that the records in group 1 are not in the custody or the control of TCHC. Accordingly, these emails cannot be accessed by the appellant through the *Act*, and I will not consider TCHC's alternate claims in respect of this group of records. I uphold TCHC's decision to deny access to them on the basis that it does not have custody or control of them.

[85] On the other hand, the evidence before me establishes that the relevant factors weigh in favour of finding that the remaining records (those in groups 2, 3, and 4) are in the custody or control of the TCHC within the meaning of section 4(1) of the *Act*. I will, therefore, consider TCHC's alternate claims with respect to these records below, and will refer to them as the remaining records at issue.

Issue C: Does the section 52(3) exclusion for records relating to labour relations or employment matters apply to the records?

[86] TCHC and the union submit that all the records are excluded from the scope of the *Act* under section 52(3).³⁷ For the reasons that follow, I find that the remaining records at issue are excluded from the scope of the *Act* under section 52(3)3.

[87] Section 52(3) of the *Act* excludes certain records held by an institution that relate to labour relations or employment matters. If the exclusion applies, the record is not subject to the access scheme in the *Act*, although the institution may choose to disclose it outside of the *Act*'s access scheme.³⁸

[88] The purpose of this exclusion is to protect some confidential aspects of labour relations and employment-related matters.³⁹

[89] In this order, the relevant portion of section 52(3) is section 52(3)3, which says:

³⁷ TCHC claimed section 52(3)1 over certain records and section 52(3)3 over all of the records.

³⁸ Order PO-2639.

³⁹ *Ontario (Ministry of Community and Social Services) v. John Doe*, 2015 ONCA 107 (CanLII).

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.

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

[91] If section 52(3) applied at the time the record was collected, prepared, maintained or used, it does not stop applying at a later date.⁴⁰

[92] When determining whether the section 52(3) exclusion applies, the record is examined as a whole, rather than by individual pages, paragraphs, sentences, or words. This whole-record method of analysis has also been described as the "record-by-record approach."⁴¹

What types of records are covered by this exclusion?

[93] The type of records excluded from the *Act* by section 52(3) are those relating to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue.⁴²

[94] Section 52(3) does not exclude all records concerning the actions or inactions of an employee of the institution simply because their conduct could give rise to a civil action in which the institution could be held vicariously liable for its employees' actions.⁴³

"In relation to"

[95] For the collection, preparation, maintenance or use of a record to be "in relation to" one of the three subjects mentioned in this section, there must be "some connection" between them.⁴⁴

[96] The "some connection" standard must, however, involve a connection relevant to the scheme and purpose of the *Act*, understood in their proper context. For example,

⁴⁰ *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. 509.

⁴¹ See, for example, Orders M-352, PO-3642, MO-3798-I, MO-3927 and MO-3947.

⁴² *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.). The CanLII citation is "2008 CanLII 2603 (ON SCDC)."

⁴³ *Ministry of Correctional Services*, cited above.

⁴⁴ Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

given that accountability for public expenditures is a core focus of freedom of information legislation, accounting documents that detail an institution's expenditures on legal and other services in collective bargaining negotiations do not have "some connection" to labour relations.⁴⁵

"Labour relations"

[97] The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to similar relationships. The meaning of "labour relations" is not restricted to employer-employee relationships.⁴⁶

"Employment-related matters"

[98] 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.⁴⁷

Section 52(3)3: labour relations or employment-related matters in which the institution has an interest

[99] For section 52(3)3 to apply, TCHC 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 use 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.

Part 1: collected, prepared, maintained or used

[100] TCHC states that the responsive records are internal email communications and related records, which were not prepared or used by, or on behalf of, TCHC, but rather were prepared or used by AB, on behalf of the union. Nevertheless, TCHC states that the records were *collected* and/or *maintained* by TCHC since they were sent to, or received by, a TCHC email account and were physically located, created, and saved on TCHC computer equipment (as opposed to being stored on the union's email server). TCHC states that the records were in its possession, retained and kept secure by TCHC

⁴⁵ Order MO-3664, *Brockville (City) v. Information and Privacy Commissioner, Ontario*, 2020 ONSC 4413 (Div Ct.).

⁴⁶ *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.

⁴⁷ Order PO-2157.

on its server, over a number of years and were not removed. Since the records were *collected* and *maintained* by TCHC, TCHC states that it could search and locate them more than three years after they were created, in response to this request. As a result, TCHC submits that the records meet the first part of the test for section 52(3)3 because they were collected and/or *maintained* by TCHC.

[101] The union submits that the records were *maintained* on TCHC's email server and, therefore, a person or body *maintained* the record on behalf of an institution, meeting part one of the test.

[102] The appellant's representations do not address part one of the test.

[103] Based on my review of the parties' representations and the records themselves, I find that because the remaining records at issue were prepared by, or sent to, TCHC's human resources and/or operational staff, the records were *collected* (as emails sent to TCHC staff) or *prepared* by TCHC staff (as emails sent by TCHC staff), on TCHC's behalf. As a result, I find that the records meet part one of the test for section 52(3)3.

Part 2: meetings, consultations, discussions or communications

[104] TCHC submits that it is evident on the face of all the responsive records that they arise out of, and relate to, *meetings, consultations, discussions, or communications* involving union staff, or TCHC and union staff.

[105] As mentioned, the union provided background information evidencing its role as exclusive bargaining agent for the appellant in all of his dealings with TCHC concerning his employment. The union also provided detailed representations about each record, describing each as emails or email chains (with or without attachments, as applicable). For each record, the union submits that it consists of *discussions* or *communications*.

[106] The appellant's representations do not address part two of the test.

[107] Based on my review of the parties' representations and the records themselves, I find that the remaining records at issue are all emails or email chains, and that accordingly, they constitute *discussions* or *communications*. As a result, I find that the remaining records at issue meet part two of the test for section 52(3)3.

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

[108] The phrase "labour relations or employment-related matters" has been found to apply in the context of, for example: an employee's dismissal,⁴⁸ a grievance under a collective agreement,⁴⁹ a "voluntary exit program,"⁵⁰ and a review of "workload and

⁴⁸ Order MO-1654-I.

⁴⁹ Orders M-832 and PO-1769.

working relationships.”⁵¹

[109] The phrase “labour relations or employment-related matters” has been found not to apply in the context of an organizational or operational review⁵² or litigation in which the institution may be found vicariously liable for the actions of its employee.⁵³

[110] 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.⁵⁴

[111] 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. Matters related to the actions of employees, for which an institution may be responsible are not employment-related matters for the purpose of section 52(3).⁵⁵

[112] TCHC submits that it is clear from the records themselves that they arise out of and relate to *meetings, consultations, discussions, or communications* involving union staff, or TCHC and union staff, in relation to *employment-related matters or labour relations* specifically. After describing details of the records in confidential representations, TCHC submits that the records clearly fall within the meaning of *employment-related matters*, and that those records specifically dealing with a grievance also fall within the meaning of *labour relations* as that term is understood in past IPC orders (referring to the collective bargaining relationship between an institution and its employees).

[113] TCHC submits that the matters to which the records relate are matters in which it has a strong interest as the employer, and that records that relate to an institution’s management of its own workforce are *matters in which it has an interest*.

[114] In addition, TCHC submits that withholding the records is consistent with the rationale and purpose of the exclusion at section 52(3), to protect the interests of institutions by removing the public right of access to certain records relating to institutions’ relations with their own workforce. On the other hand, TCHC submits that requiring it to disclose the records to the appellant in these circumstances could reasonably be expected to detrimentally impact TCHC’s management of its relationships with its employees, as well as with its union stakeholders (who would reasonably consider that a zone of confidentiality exists for its own communications and communications with the employer). Therefore, TCHC submits that disclosure would be contrary to the key purpose underlying the exclusion at section 52(3).

⁵⁰ Order M-1074.

⁵¹ Order PO-2057.

⁵² Orders M-941 and P-1369.

⁵³ Orders PO-1722, PO-1905 and *Ontario (Ministry of Correctional Services) v. Goodis*, cited above.

⁵⁴ *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above.

⁵⁵ *Ministry of Correctional Services*, cited above.

[115] Turning to the union's position, it is not necessary to set out all of the details of each record found in its representations, as they were substantially shared with the appellant in the inquiry. For the purpose of my determination regarding section 52(3)3, what is important is the union's position that all of the *discussions* or *communications* relate to the appellant's employment-related matters at TCHC, and ongoing labour relations issues (such as grievance-related issues). The union submits that the analysis in Order PO-3390 applies here: communications between members of the bargaining unit with union officials, or between union officials, with regard to matters in which TCHC has an interest meet the test of subsection 52(3) of the *Act*.

[116] The appellant's brief representations do not directly address part three of the test, but he alleges that AB denied any involvement in his labour relations matters (in a highly redacted email chain) and that AB's duties did not involve labour relations or advocacy because under the by-laws (which he attached), two other specified union roles were responsible for that.

[117] However, as discussed, on balance, the evidence before me establishes that AB's emails relate to his activity in his capacity as a union representative. Most of the emails were not created by AB, but AB was the intended recipient (or one of them) of most of the emails. I find that this is because of his role as a union representative. The evidence before me is that AB was on leave from TCHC employment and that AB was one of the individuals identified by TCHC and the union as union representatives. There is nothing to suggest, in the evidence before me, that AB was a sender or recipient of the emails in his TCHC employee capacity (that is, in the role from which AB was on leave). In addition, as mentioned, I am unable to conclude from the highly redacted email chain sent with the appellant's representations that AB was not involved in the appellant's labour relations matters. The records before me show that other union representatives, and several TCHC human resources and/or operations staff, communicated with him by email.

[118] From my review of the records, I agree with the union that the reasoning in Order PO-3990 applies here, and I adopt it. I find that the *discussions* or *communications* in the records are all *in relation* to the appellant's employment at TCHC and/or his labour relations issues arising out of that employment. Further, these were matters in which TCHC has an interest as the appellant's employer. Therefore, the records meet part three of the test for section 52(3)3.

[119] Since the remaining records at issue meet all three parts of the test for section 52(3)3, I find that they are excluded from the operation of the *Act*, subject to my determination of whether one of the exceptions at section 52(4) applies.

Section 52(4): exceptions to section 52(3)

[120] If the records fall within any of the exceptions in section 52(4), the records are not excluded from the application of the *Act*. Section 52(4) states that the *Act* applies to

the following records:

1. An agreement between an institution and a trade union.
2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.
3. An agreement between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees.
4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment.

[121] TCHC and the union submit that none of the records fall within any of these exceptions. The appellant does not address the exceptions at section 52(4).

[122] Based on my review of the parties' representations and the records themselves, I find that none of the exceptions listed in section 52(4) are relevant in this appeal because none of the records are *agreements* or *expense accounts*, but rather, are emails or email chains.

[123] For these reasons, I find that all three parts of the test for section 52(3)3 are met. As a result, the *Act* does not apply to any of the remaining records at issue. This means that the appellant does not have a right of access to these records through the *Act*. Given this finding, it is not necessary to consider TCHC's alternate claims over the records, and as a result, the appeal is dismissed.

ORDER:

I uphold TCHC's decision to withhold the records, and dismiss the appeal.

Original Signed by: _____
Marian Sami
Adjudicator

_____ May 24, 2022