

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-4250

Appeal MA20-00413

Middlesex-London Health Unit

September 6, 2022

**Summary:** This order concerns an access request to the Middlesex-London Health Unit (the health unit) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records about a change in the employment status of a medical officer of health. The health unit denied access to the responsive record, a letter from the health unit to the medical officer of health, relying on the labour relations or employment-related records exclusion in section 52(3)3 of the *Act*.

In this order, the adjudicator upholds the health unit's decision that the record is excluded from the application of the *Act* and dismisses the appeal.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990. C. F.31, as amended, section 52(3)3.

### OVERVIEW:

[1] This order concerns an access request for records about a change in the employment status of the institution's medical officer of health.

[2] A member of the media submitted an access request under the *Municipal Freedom of Information and Protection of Privacy Act* (MFIPPA or the *Act*) to the Middlesex-London Health Unit (the health unit) for information about the remuneration of a named doctor (the doctor), who had been both the health unit's medical officer of health and its chief executive officer but at the time of the request was only the health

unit's medical officer of health.

[3] The request in its entirety read:

1. [The doctor's] annual pay as [for a specific one-year period] is a matter of public record, from the 2019-20 budget year, in the Ontario Public Sector Salary Disclosure Law disclosures.
2. [The doctor's] annual pay now, after his recent relinquishment from two roles, (1) Medical Officer of Health and (2) Chief Executive Officer, to one role, the Medical Officer of Health.
3. Copies of all memoranda or reports by and to the board of health, including email, about the reasons for [the doctor's] recent relinquishment of the chief executive role.
4. Copies of all memoranda or reports by and to the board of health, including email, about whether [the doctor's] status at the health unit might change at a later date.

[4] The health unit issued a decision in which it took the position that the requested records are "employment-related records" that fall outside the scope of the *Act* pursuant to the exclusion for labour relations or employment-related records in section 52(3) of *MFIPPA*.

[5] The appellant appealed the decision to the Information and Privacy Commissioner of Ontario (the IPC). During the early stages of processing the appeal, the appellant confirmed that she is not appealing the health unit's decision respecting item 1 of the request, because the information had been disclosed publicly (pursuant to the *Public Sector Salary Disclosure Act*).

[6] A mediator was appointed to explore the possibility of resolution and discussions ensued between the mediator and both parties about the remaining three parts of the request. The appellant further narrowed the request to remove any compensation information from the scope, therefore, parts 1 and 2 of the request were no longer at issue.

[7] Remaining at issue were the memoranda and reports records listed in items 3 and 4. The appellant, in an email to the health unit, clarified and explained her interest in particular information within those records and raised the issue of the public interest in disclosure of this information. As a result, the only record remaining at issue at the end of mediation is one letter, which is a letter responsive to item 3 of the request.

[8] The health unit maintained its position that the employment-related records exclusion in section 52(3) of the *Act* applies to the record remaining at issue. The appellant subsequently advised the mediator that she wanted to proceed to

adjudication to seek access to the letter. The appellant also again raised the application of the public interest override in section 16 of the *Act*.

[9] As a mediated resolution of the appeal was not possible, it moved to adjudication where an adjudicator may conduct an inquiry. The former adjudicator assigned to this appeal decided to conduct an inquiry into this appeal. She began her inquiry by sending a Notice of Inquiry to the health unit, seeking representations (and a copy of the record at issue). The health unit provided representations and a copy of the record. In its representations, the health unit advised that it relies on section 52(3)3.<sup>1</sup>

[10] The former adjudicator sent a Notice of Inquiry to the appellant, along with a non-confidential version of the health unit's representations. Portions of the health unit's representations were withheld because portions met the confidentiality criteria in *IPC Practice Direction 7*.

[11] The file was then transferred to me to continue the adjudication of the appeal.<sup>2</sup>

[12] In this order, I uphold the health unit's decision that the record is excluded from the application of the *Act* because of section 52(3)3 and I dismiss the appeal.

## **RECORD:**

[13] The record at issue is responsive to item 3 of the request and is a letter from the health unit to the doctor.

## **DISCUSSION:**

### **Does the section 52(3)3 exclusion for records relating to labour relations or employment matters apply to the record?**

[14] There is only one record at issue in this appeal, which is a letter that contains information about the reasons related to the doctor's (a medical officer of health) relinquishment of the chief executive officer role at the health unit.<sup>3</sup>

[15] 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

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<sup>1</sup> Although the appellant has argued that there is a public interest in disclosure of the record, the former adjudicator did not seek the health unit's representations on section 16 of the *Act* because the public interest override can only apply to records to which the *Act* applies. Accordingly, section 16 may only be considered if the exclusion in section 52(3) does not apply.

<sup>2</sup> I reviewed this appeal file and determined that I did not need any further information before rendering a decision.

<sup>3</sup> As the record is responsive to item 3 of the appellant's request.

it outside of the *Act's* access scheme.<sup>4</sup>

[16] The purpose of this exclusion is to protect some confidential aspects of labour relations and employment-related matters.<sup>5</sup>

[17] 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.

[18] 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*.

[19] 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.<sup>6</sup>

[20] 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.<sup>7</sup>

[21] 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.<sup>8</sup>

[22] 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.<sup>9</sup>

[23] 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, given that accountability for public expenditures is a core focus of freedom of information legislation, accounting documents that detail an institution's expenditures

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<sup>4</sup> Order PO-2639.

<sup>5</sup> *Ontario (Ministry of Community and Social Services) v. John Doe*, (invalid CanLII citation) 2015 ONCA 107 (CanLII).

<sup>6</sup> *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.

<sup>7</sup> *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)."

<sup>8</sup> *Ministry of Correctional Services*, cited above.

<sup>9</sup> Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

on legal and other services in collective bargaining negotiations do not have "some connection" to labour relations.<sup>10</sup>

[24] 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.<sup>11</sup>

[25] 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.<sup>12</sup>

[26] 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 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***

[27] The health unit states that it is clear from the face of the record that it was prepared, maintained and used by it.

[28] The appellant did not address section 52(3)3 directly; instead her representations focus on why the record should be disclosed in the public interest.

*Findings re part 1*

[29] Based on my review of the record and the health unit's confidential and non-confidential representations, I agree with the health unit, that the record, which is a letter to the doctor, was prepared, maintained and used by the health unit. Therefore, part 1 of the test has been met.

***Part 2: meetings, consultations, discussions or communications***

[30] All of the health unit's representations on this part were confidential. In general,

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<sup>10</sup> Order MO-3664, *Brockville (City) v. Information and Privacy Commissioner, Ontario*, 2020 ONSC 4413 (Div Ct.).

<sup>11</sup> *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.

<sup>12</sup> Order PO-2157.

these representations provided context about the letter.

*Findings re part 2*

[31] Based on my review of the record and the health unit's confidential representations I find that the record was prepared, maintained and used in relation to the health unit's communication with the doctor. Therefore, part 2 of the test has been met.

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

[32] In its non-confidential representations, the health unit states that the record is a communication about an employment-related matter in which it has an interest.

*Findings re part 3*

[33] For section 52(3)3 to apply, I must find that the communications are about labour relations or employment related matters in which the institution has an interest

[34] The phrase "labour relations or employment-related matters" has been found to apply in the context of:

- a job competition;<sup>13</sup>
- an employee's dismissal;<sup>14</sup>
- a grievance under a collective agreement;<sup>15</sup>
- disciplinary proceedings under the *Police Services Act*;<sup>16</sup>
- a "voluntary exit program";<sup>17</sup>
- a review of "workload and working relationships";<sup>18</sup> and
- the work of an advisory committee regarding the relationship between the government and physicians represented under the *Health Care Accessibility Act*.<sup>19</sup>

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<sup>13</sup> Orders M-830 and PO-2123.

<sup>14</sup> Order MO-1654-I.

<sup>15</sup> Orders M-832 and PO-1769.

<sup>16</sup> Order MO-1433-F.

<sup>17</sup> Order M-1074.

<sup>18</sup> Order PO-2057.

<sup>19</sup> *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above.

[35] The phrase “labour relations or employment-related matters” has been found not to apply in the context of:

- an organizational or operational review;<sup>20</sup> or
- litigation in which the institution may be found vicariously liable for the actions of its employee.<sup>21</sup>

[36] 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.<sup>22</sup>

[37] 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).<sup>23</sup>

[38] As set out above, the record at issue is a letter from the health unit to the doctor that contains information about the reasons for the doctor’s relinquishment of the chief executive officer role at the health unit.

[39] Based on my review of the record and the health unit’s representations, I find that the record contains information about a change in the doctor’s employment with the health unit and is a communication about employment-related matters about the doctor.

[40] The record refers to the relationship between the health unit as the employer and the doctor as an employee and refers to human resources or staff relations issues arising from their relationship.

[41] The record relates to matters in which the health unit is acting as an employer, and terms and conditions of employment or human resources questions are at issue.

[42] I find that the communications in the record are about employment-related matters in which the health unit has an interest as employer. Therefore, I find that part 3 of the test has been met and the record is excluded from the application of the *Act*, subject to my review of the exceptions to section 52(3) in section 52(4).

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

[43] 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

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<sup>20</sup> Orders M-941 and P-1369.

<sup>21</sup> Orders PO-1722, PO-1905 and *Ontario (Ministry of Correctional Services) v. Goodis*, cited above.

<sup>22</sup> *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above.

<sup>23</sup> *Ministry of Correctional Services*, cited above.

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.

[44] Because there is no trade union involved in the circumstances of the present appeal, only paragraphs 2-4 are possibly relevant.

[45] The health unit submits that none of the exceptions in section 52(4) of the *Act* apply, given that it is apparent on the face of the record that it is not an agreement that ended a proceeding, it is not an agreement resulting from negotiations nor is it an expense account as specified in section 52(4).

[46] The appellant submits that if the statements made by the health unit and the medical officer of health at the time of the *MFIPPA* request are accurate, the change in the medical officer of health's role clearly would have been preceded by negotiations with the institution. She queries whether the record is an agreement resulting from negotiations about the medical officer of health's role as the chief executive and, therefore, subject to the exception in 52(4)3.

*Findings re section 52(4)*

[47] I find that the record does not fall within any of the exceptions in section 52(4). It is not an agreement and it is not an expense account.

[48] Although the record contains information about the doctor's role with the health unit, it is not an agreement between the health unit and the doctor, an employee of the health unit. Therefore, in response to the appellant's query in her representations, the record is not subject to the exception in section 52(4)3 related to agreements resulting from negotiations about employment related matters.

[49] I find that the record does not fall within any of the exceptions listed in section 52(4). The record, is therefore excluded from the application of the *Act*.



**ORDER:**

I uphold the health unit's decision that the record is excluded from the application of the *Act* and I dismiss the appeal.

Original Signed by: \_\_\_\_\_  
Diane Smith  
Adjudicator

September 6, 2022 \_\_\_\_\_