Information and Privacy Commissioner,
Ontario, Canada

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

FINAL ORDER MO-4379-F

Appeal MA20-00405

Waterloo Region District School Board

May 23, 2023

Summary: The appellant, a Waterloo Region District School Board (the board) employee, sought access under the *Act* to all personal information about himself, including Human Resources Services Department records about disciplinary action taken against him by the board.

While taking the position that the *Act* does not apply to the records, the board disclosed some records to the appellant outside of the scheme of *Act*. However, it denied access to other records, relying on the labour relations and employment records exclusion in section 52(3)3 of the *Act*. The appellant appealed the board's decision to withhold records under section 52(3)3 to the Information and Privacy Commissioner of Ontario and also claimed that additional responsive records should exist.

In this final order, the adjudicator finds that the records are excluded from the application of the *Act* by reason of section 52(3)3 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 52(3)3, 52(4)1, and 52(4)3.

Orders Considered: Orders MO-4207-I, MO-4272-I, MO-1470, and PO-3686.

Cases Considered: *Brockville (City) v. Information and Privacy Commissioner, Ontario*, 2020 ONSC 4413 (Div. Ct.); *Kawartha Pine Ridge District School Board* v. *Elementary Teachers' Federation of Ontario*, 2008 CanLII 27810 (ON LA).

OVERVIEW:

[1] An employee of the Waterloo District School Board (the board) was the subject of investigation following a complaint about his behaviour. The employee made an access request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) for a copy of his human resources file and sought, in particular, records pertaining to the investigation.[1] This order concerns the decision of the board to deny access to the records pertaining to the investigation on the basis that these records are excluded from the application of the *Act*.

[2] In response to the access request, the board issued a decision letter denying access to the records it had identified as responsive to the request. Access to these records was denied based on the labour relations and employment records exclusion in section 52(3)3 of the *Act*.

[3] The requester, now the appellant, appealed the board's decision to the Information and Privacy Commissioner of Ontario (the IPC) and a mediator was assigned to attempt to achieve a resolution of this appeal with the parties.

[4] During mediation, the board provided the appellant with a copy of his employment file in accordance with its obligations under an applicable collective agreement and, it said, outside of the scheme of the *Act*.

[5] The board also conducted another search for records. In this search, it located emails and meeting notes about the investigation. The board argued that the investigation records are excluded from the application of the *Act* under section 52(3)3. Unlike the employment file, which it had provided outside of the scheme of the *Act*, the board withheld the investigation records.

[6] The parties were unable to resolve all the issues under appeal through the process of mediation. Accordingly, the file was moved to the adjudication stage, where an adjudicator may conduct an inquiry. I decided to conduct an inquiry and I sought the board's representations initially, which were shared with the appellant. The appellant provided representations in response.

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[1] The appellant's request for his personal information sought the following information in particular:

- All records of Human Relations at Waterloo Region District School Board whatsoever and whenever stored including records made, kept or maintained by [the board's Employee Wellness Officer, the board's Interim Manager, Human Resource Services, and the board's Senior Manager Human Resource Services];
- All statements and information provided by third parties to Human Relations at Waterloo Region District School Board including, but not limited to, those statements referenced by Human Relations in a meeting with [the appellant] conducted in or about [first date];
- All documentation related to the suspension of [the appellant], with pay, on or about [second date]; [and,]
- All documentation related to the reasons for and the demand for a neuropsychological assessment of [the appellant].

[7] I then issued Interim Order MO-4027-I (the first interim order), in which I ordered the board to conduct another search for responsive records and I deferred my decision on the applicability of the section 52(3)3 exclusion.

[8] In response to this interim order, the board conducted a further search for records and additional responsive records were located. The board made a supplemental decision to deny access in full to these newly-located records as being excluded from the *Act* by reason of section 52(3)3.

[9] The appellant responded, claiming that the board had still not conducted a reasonable search for responsive records. I invited and received representations from the board and the appellant on the board's search for records following the first interim order.

[10] I then issued a second interim order, Interim Order 4272-I (the second interim order), in which I upheld the board's search for records. As the search issue was concluded, I continued the inquiry to adjudicate on the applicability of the section 52(3)3 exclusion to all of the records withheld by the board.

[11] In this order, I find that the records are excluded from the application of the *Act* because of the labour relations and employment records exclusion at section 52(3)3. I uphold the board's decision and dismiss the appeal.

DISCUSSION:

Does section 52(3)3 labour relations and employment records exclusion exclude the records from the *Act*?

[12] By way of background, as noted above, the appellant's access request to the board sought all personal information recorded about himself. The appellant seeks, specifically, records relating to a disciplinary investigation that occurred in response to a complaint about the appellant's conduct (the complaint).

[13] In response to the appellant's request, and prior to the first interim order, the board conducted searches for records and located responsive records. Pursuant to its human resources policy and the collective agreement that governs the appellant (but, the board maintained, outside of the scheme of the *Act*), the board provided the following records to the appellant:

- The appellant's 140-page employment file (the human resources – central file);
- The appellant's 33-page school site file;
- The emails it sent to the appellant; and,

- A discipline letter and a letter of expectation it sent to the appellant.

[14] These records are not at issue in this appeal.

[15] Prior to the first interim order, the board located and did not disclose records pertaining to its Human Resources Services department's discipline investigation into the complaint. It identified these records in the updated May 4, 2021 index of records as emails (with a date and time for the top email in each email chain) and meeting notes (with a date for each).

[16] Following the first interim order, the board conducted another search for responsive records. The board advised that in its further searches following the first interim order, it located a further 173 pages of records that it identified as "disciplinary records." These records included emails, notes, and a grievance file. The board withheld these records in full.

[17] The board also denied access to these records on the basis that they are excluded from the *Act* under the labour relations and employment records exclusion in section 52(3)3. This section reads:

[18] 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.

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

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

[21] The "some connection" standard must involve a connection that is relevant to the statutory scheme and purpose understood in their proper context. For example, the relationship between labour relations and accounting documents that detail an institution's expenditures on legal and other services in collective bargaining

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

negotiations is not enough to meet the "some connection" standard.[3]

[22] 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.[4]

[23] 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.[5]

[24] 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.[6]

[25] 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.[7]

[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.

Representations

[27] The board states that records are specific to its Human Resources Department's investigation into the complaint and include email threads, meeting notes, and correspondence related to the investigation and the board's subsequent request that the appellant undertake a specified assessment.

[28] The board states that it placed the appellant on leave from his employment

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[3] Order MO-3664, *Brockville (City) v. Information and Privacy Commissioner, Ontario* (*Brockville*), 2020 ONSC 4413 (Div. Ct.).
[4] *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.
[5] Order PO-2157.
[6] *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.
[7] *Ministry of Correctional Services*, cited above.

pending the results of an assessment it had requested the appellant to undertake.

[29] The board states that the appellant refused to sign the consent form for this assessment to be conducted. Therefore, the board's Human Resources Department continued with the investigation into the allegations, and issued a letter of discipline to the appellant after meeting with him.

[30] It states:

> In accordance with board procedures and the collective agreement of the appellant, the board has granted the appellant access to his human resources - central file, including emails which the appellant received during the process of trying to setup the neuropsychological assessment.

[31] As explained below, the appellant is of the view that because his request is for his own personal information – a request made under section 36 of the *Act* – the exclusion cannot apply.

[32] The appellant submits that section 52(3)3 is unnecessarily broad but cannot apply to exclude a right of access to his own personal information. He relies on section 1(b) of the *Act* which provides that one of the purposes of the *Act* is:

> …to protect the privacy of individuals with respect to personal information about themselves held by institutions and <u>to provide individuals with a right of access to that information</u>. [Emphasis on this part of section 1(b) added by the appellant].

[33] He submits that there is no wording in section 52(3) that suggests that it is relevant to access requests for one's own personal information. He states that section 38[8] lists all the exemptions which apply to one's own personal information and that,

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[8] Section 38 reads:

A head may refuse to disclose to the individual to whom the information relates personal information,

> (a) if section 6, 7, 8, 8.1, 8.2, 9, 9.1, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information;
>
> (b) if the disclosure would constitute an unjustified invasion of another individual's personal privacy;
>
> (c) that is evaluative or opinion material compiled solely for the purpose of determining suitability, eligibility or qualifications for the awarding of contracts and other benefits by an institution if the disclosure would reveal the identity of a source who furnished information to the institution in circumstances where it may reasonably have been assumed that the identity of the source would be held in confidence; (c.1) if the information is supplied explicitly or implicitly in confidence and is evaluative or opinion material compiled solely for the purpose of determining suitability for an honour or award to recognize outstanding achievement or distinguished service;
>
> (d) that is medical information if the disclosure could reasonably be expected to prejudice the mental or physical health of the individual; or
>
> (e) that is a research or statistical record.

absent a necessary and limited exemption which has a specific reference to section 36[9] personal rights, section 52(3) cannot shield institutions from disclosing personal information to the affected individual.

[34] He states that section 52(3) is unnecessarily broad and purports to apply to every aspect of the relationship between employer and employee as compared to section 38(a) that applies to limited, specific and apparently necessary exemptions.

[35] The appellant states that the *Act's* granting of rights to access one's personal information followed by a broad section 52(3) exclusion is an absurdity which must be resolved in favour of access. He points out that the exceptions to the right of access must be always be narrowly construed, the legislature does not intend to produce absurd consequences and that section 52(3) defeats the purpose of the *Act*.

[36] The appellant submits that if section 52(3)3 applies, then in respect of employment-related matters the institution could ignore several statutory duties found in the privacy protection part of the *Act*, such as the collection and use of personal information (sections 28, 29, 35) and the duty to obtain consent for use of personal information (section 31).

[37] He submits that if the legislature intended to limit the section 36 rights granted to individuals, it could have done so in clear, specific terms, such as it did elsewhere throughout the *Act*. He provides several examples that he says indicate that the legislature could have included more specific language limiting rights.

[38] The appellant submits that in the case of *Brockville*,[10] the effect of section 52(3) was restricted to the extent necessary to preserve individual rights in accord with the purpose of the legislation. He states that although *Brockville* was concerned with a public access matter, its approach to interpretation of section 52(3) is of general application.

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[9] Section 36 reads:

> (1) Every individual has a right of access to,
>
> (a) any personal information about the individual contained in a personal information bank in the custody or under the control of an institution; and
>
> (b) any other personal information about the individual in the custody or under the control of an institution with respect to which the individual is able to provide sufficiently specific information to render it reasonably retrievable by the institution.
>
> (2) Every individual who is given access under subsection (1) to personal information is entitled to,
>
> (a) request correction of the personal information if the individual believes there is an error or omission;
>
> (b) require that a statement of disagreement be attached to the information reflecting any correction that was requested but not made; and
>
> (c) require that any person or body to whom the personal information has been disclosed within the year before the time a correction is requested or a statement of disagreement is required be notified of the correction or statement of disagreement.

[10] Cited above.

[39] The appellant submits that, therefore, the intention of the amendment that brought section 52(3) into the *Act* was to deal with the public right of access, not personal rights covered by Part II of the *Act*.[11]

[40] The appellant also relies on the case of *Kawartha Pine Ridge District School Board v. Elementary Teachers' Federation of Ontario*,[12] a case concerned with the right of a teacher to access their own personal information. (I note that this decision is a labour arbitration decision, not a decision under the *Act*).

[41] In reply, the board reiterates that the records consist of emails and notes collected, prepared, maintain and used by it to investigate a complaint into the conduct of the appellant. It states that they were collected, maintained and used in relation to meetings, consultations, discussions and communication with the appellant, Human Resources, and the union during the investigation.

[42] It states that an employer's investigation about allegations regarding an employee's behaviour and/or actions is an employment-related matter. It further states that it has a legal obligation under the collective agreement, employment and other legislation to investigate complaints from employee(s) about another employee, as is the case here, and to deal appropriately with the matter, taking any necessary disciplinary action.

[43] I will first consider the appellant's argument that the board is unable to raise the application of the section 52(3)3 exclusion because the appellant's request is one for his personal information.

[44] If I find that section 52(3)3 can apply in the context of requests for one's own personal information, then I will then consider, with reference to the parties' evidence, whether the records at issue are excluded by reason of this provision.

Findings about the application of section 52(3)3 to records that contain personal information

[45] The appellant argues that section 52(3) cannot apply to requests for one's personal information made under section 36 of the *Act*, which is found in Part II of the *Act*. Part II of the *Act* and the section 36 right to access one's personal information is distinct from the general right of access at section 4 of the *Act*.

[46] Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 38 provides some exemptions from this right.

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[11] Part II of *MFIPPA* is the part of *MFIPPA* that concerns "Protection of Individual Privacy".
[12] *Kawartha Pine Ridge District School Board* v. *Elementary Teachers' Federation of Ontario* (*Kawartha*), 2008 CanLII 27810 (ON LA).

[47] Having reviewed the records, I confirm they contain the personal information of the appellant. The records at issue are all about the appellant and his behaviour at work. In this case, the records contain information generated in the course of an investigation of improper workplace conduct, which has been found to be personal information.[13]

[48] Therefore, I agree with the appellant that the records contain his personal information. Even if information relates to an individual in a professional, official or business capacity, as is the case here, it may still be "personal information" if it reveals something of a personal nature about the individual.[14] Such is the case here.

[49] The appellant raises the following arguments to support his assertion that section 52(3) cannot apply to requests made for one's personal information:

(1) Section 52(3) conflicts with the purpose of section 1(b) the *Act*.

(2) Section 52(3) conflicts with Part II of the *Act*.

[50] The appellant appears to be arguing that *Brockville* is authority for the proposition that the purpose of the labour relations and employment records exclusion is to limit only public access to an institution's labour relations and employment records, and should not apply to limit an individual's right to access their own personal information.

[51] In *Brockville*, the Divisional Court noted that the IPC found that the purpose of the labour relations exclusion is to protect the interests of institutions by removing the public right of access to institutions' labour and employment records. This does not, however, in my view support a conclusion that the labour relations and employment records exclusion does not apply to the other rights and obligations in Part II of the *Act*, including an individual's right to access their own personal information under section 36(1).

[52] *Brockville* addressed the purpose of the labour relations and employment records exclusion in relation to removing public access to general records because public access was the issue in that case. Nothing in the decision limits the purpose of the labour relations and employment records exclusion to prevent only public access to labour relations or employment records. The labour relations and employment records exclusion is also generally concerned with protecting the confidentiality of certain labour relations and employment records. As the Courts have noted, when the government first introduced the labour relations and employment records exclusion, it stated that the purpose of the exclusion was "to ensure the confidentiality of labour relations

[13] See Order PO-2525.
[14] Orders P-1409, R-980015, PO-2225 and MO-2344.

information."[15]

[53] Further, in *Reynolds v. Binstock*[16] the Divisional Court expressly considered whether the labour relations and employment exclusion applied to preclude the IPC from investigating Ms. Reynold's privacy complaint. Ms. Reynolds made a number of arguments against the application of the labour relations and employment records exclusion, including that it was not intended to apply to personal information, such as her personal information that was at issue in the privacy complaint. The Court disagreed, stating:

> …had the Legislature intended the exclusion to apply only to records subject to access requests, as the applicant suggests, it would have been a simple matter to say so.

[54] The Court also considered the purpose of the labour relations and employment records exclusion and found that:

> It seems probable that the intention of the amendment was to protect the interests of institutions by removing public rights of access to certain records relating to their relations with their own workforce. It has the effect of curtailing the employees' privacy rights by excluding those same records from the Act's privacy protections. In so doing, section 52(3) must necessarily adversely affect public sector employees, for they are the persons who work for the institutions and who would have the most interest in the class of documents in question, either to have access to them or to have them protected from access by others. The latter interest is actually enhanced by the amendment, but other privacy interests are removed. [Emphasis added.]

[55] In my view, *Reynolds* supports an interpretation that if the labour relations and employment records exclusion test is met, then the records will be excluded from the application of all of the *Act*, not just the general right of access provision (i.e. Part I).

[56] Finally, in the IPC's jurisprudence, the labour relations and employment records exclusion has been considered in numerous cases over the years where the request was made for the requester's own personal information related to their employment.[17] While none of these orders addressed an argument that the labour relations and employment records exclusion is in conflict with section 1(b) or Part II of the *Act*, in Order PO-3686, the appellant challenged the constitutionality of this exclusion, including on the basis that it is contrary to the purpose of *FIPPA*[18] to provide access to information (section

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[15] See for example, *Ontario (Ministry of Correctional Services) v. Goodis*, 2008 CanLII 2603 (ON SCDC).
[16] 2006 CanLII 36624 (ON SCDC).
[17] See for, example, the following orders: P-1514 (1998), MO-2027 (2006), Interim Order PO-2924-I (2010), MO-2880 (2013), PO-3686 (2017), PO-4204 (2021), and MO-4163 (2022).
[18] *Freedom of Information and Protection of Privacy Act*, the provincial equivalent of the *Act*.

1(b) was not specifically addressed). In that order, the adjudicator disagreed and concluded that because of its inclusion in the *Act,* the labour relations and employment records exclusion must be interpreted in light of the purposes of the *Act.*

[57] As with other exclusions in *MFIPPA*, the labour relations and employment records exclusion is a threshold issue for the application of *MFIPPA* and the exercise of the IPC's powers under *MFIPPA*. I find that if the records at issue meet the test for this exclusion, then they are excluded from entirety of *MFIPPA*, including the rights to access one's personal information in Part II.

[58] Finally, the appellant relies on the labour arbitrator's decision in *Kawartha* as authority for the proposition that section 52(3)3 does not take away the rights of access of an employee of a school board. In that case, the question was whether a labour arbitrator had jurisdiction to consider the application of this section of *MFIPPA* to a violation of an employee's privacy rights under a collective agreement.

[59] In *Kawartha*, the labour arbitrator determined that the employee's illness was not an employment-related matter in which the school board has an interest such that section 52(3)3 could be used to prevent disclosure of information to the employee under the terms of a collective agreement.

[60] However, in the appeal before me, unlike in the *Kawartha* case, the appellant's behaviour at work that is the subject matter of the records is an employment-related matter.

[61] Accordingly, I find that where section 52(3) applies, it excludes records from the *Act* in their entirety, including records requested under Part II of the *Act*.

[62] I will now summarize the parties' positions regarding the three-part test under section 52(3) to determine whether section 52(3)3 applies to exclude the records at issue in this appeal.

Part 1: Collected, prepared, maintained or used

[63] The board states that as part of the human resources investigation into the complaint, records were collected, prepared, maintained and used by it in relation to the complaint, investigation and the subsequent request for a neuropsychological assessment of the appellant.

[64] The appellant did not address parts 1 to 3 of the test under section 52(3)3 directly, but in his representations, he confirms that the records were prepared by the board and used by it in relation to the board's human resources investigation into his conduct.

Findings re: part 1

[65] As noted above, the records consist of emails, notes, and a grievance file. The grievance file also contains emails and notes, as well as correspondence.

[66] Based on my review of the records and the parties' representations, I find that the records were collected, prepared, maintained and used by the board in relation to the investigation of the complaint. Therefore, part 1 of the test under section 52(3)3 has been met.

Part 2: meetings, consultations, discussions or communications

[67] The board states that the records include meeting notes, discussions, consultations and communications related to the investigation and the board's request for a neuropsychological assessment of the appellant.

[68] The appellant does not dispute that the records were used for meetings, consultations, discussions and communications within the board and with him.

Findings re: part 2

[69] Based on my review of the records and the parties' representations, I find that the records were collected, prepared, maintained and used by the board in relation to meetings, consultations, discussions or communications with the appellant, human resources and the union about the complaint made against the appellant. Therefore, part 2 of the test under section 52(3)3 has been met.

[70] What I will consider next at part 3 is whether the meetings and other communications were about labour relations or employment-related matter in which the board has an interest.

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

[71] The board's position is that the records are about the board's, as the employer, investigation into the complaint. That is, allegations regarding the appellant's (its employee's) behaviour and/or actions. The board states that it has an obligation under its procedures, and other legislation, to investigate complaints about its employees, to deal appropriately with the matter, and to take any necessary disciplinary action.[19]

[72] The appellant, although disputing the application of section 52(3)3, does admit that the records concern his employment with the board. He indicates that:

[19] The board relies on Order MO-1635.

- The board's Human Resources Department suspended him and did request that he undertake a neuropsychological assessment.

- The appellant asked the board's Human Resources Department as to the procedure the board used in deciding to suspend him and for demanding the neuropsychological assessment, as well as the basis for the suspension.

- The appellant received correspondence and other communications from the board's Human Resources Department about the allegations against him.

[73] In the alternative, the appellant submits that when the board disclosed 140 pages of employment-related documents to him outside of the collective agreement mediation process, it effectively waived its reliance on the section 52(3)3 exclusion.

Findings re: part 3

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

- an employee's dismissal[20]

- a grievance under a collective agreement[21]

- disciplinary proceedings under the *Police Services Act*[22]

- a "voluntary exit program."[23]

[75] The phrase "labour relations or employment-related matters" has been found *not* to apply in the context of:

- an organizational or operational review[24]

- litigation in which the institution may be found vicariously liable for the actions of its employee.[25]

[76] 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.[26]

[77] The records collected, prepared, maintained or used by the institution are excluded only if the meetings, consultations, discussions or communications are about

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[20] Order MO-1654-I.
[21] Orders M-832 and PO-1769.
[22] Order MO-1433-F.
[23] Order M-1074.
[24] Orders M-941 and P-1369.
[25] Orders PO-1722, PO-1905 and *Ontario (Ministry of Correctional Services) v. Goodis*, cited above.
[26] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above.

labour relations or "employment-related" matters in which the institution has an interest. Employment-related matters are separate and distinct from matters related to employees' actions for which an institution may be vicariously liable.[27]

[78] The appellant is a teacher and is an employee of the board. The records are internal board emails, notes, and a grievance file. They all document discussions or correspondence about the investigation into the appellant's behaviour at work and what employment-related disciplinary actions to undertake about his behaviour.

[79] The appellant's position is that when the board disclosed 140 pages of employment-related documents to him outside of the collective agreement mediation process, it effectively waived its reliance on the section 52(3)3 exclusion. However, there is nothing in *MFIPPA* that prevents an institution from providing access to otherwise excluded information outside the scope of the *Act*.[28]

[80] The board did not disclose to the appellant the disciplinary documentation at issue in this appeal. These records are not located in the appellant's human resources - central file, but are records related to the discipline imposed on the appellant and, according to the board, are records that are never placed in an employee file. By disclosing other records to the appellant outside of the *Act*, the board did not waive its right to apply the section 52(3)3 exclusion to these records.

[81] I find that the meetings, consultations, discussions or communications reflected in the records, are about employment-related matters in which the board has an interest, specifically the board's, as the employer, investigation into allegations regarding the appellant's, a board employee, behaviour at work.

[82] As well, the appellant is governed by a collective agreement and the collective agreement is referred to in some of the records. The board has a legal obligation under the collective agreement to investigate and deal with complaints from employee(s) about another employee, as is the case here. The records also reflect the outcome of meetings, consultations, communications and discussions by the board with the union about appellant. These communications also concern labour relations matters in which the board has an interest.

[83] I find that part 3 of the test under section 52(3)3 has been met as the records contain information about meetings, consultations, discussions or communications about labour relations and employment-related matters concerning the appellant in which the board has an interest.

[84] The records are excluded from the application of the *Act*, unless I find that any of the exceptions in section 52(4) apply.

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[27] *Ministry of Correctional Services*, cited above.
[28] See for example Order PO-2613 where the IPC encouraged disclosure notwithstanding that the records were excluded from the scope of *FIPPA*.

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

[85] If the records fall within any of the exceptions in section 52(4), the *Act* applies to them.

[86] The appellant relies on the exceptions to section 52(3) in paragraphs 1 and 3 of section 52(4), which read:

> This Act applies to the following records:
>
> 1. An agreement between an institution and a trade union.
>
> 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.

[87] The appellant submits that these paragraphs apply as the board has entered into collective agreements with the union and employees which afford an individual access to their personal information irrespective of section 52(3).

[88] The appellant states that this collective agreement provides that a teacher is entitled, without limitation, to access their personnel records, as follows:

> A Teacher shall have access during normal business hours to that Teacher's personnel file upon prior written request and in the presence of a Manager of Human Resource Services, or designate. The Teacher may copy any material contained in the personnel file.

[89] The board did not provide representations on section 52(4).

Findings re section 52(4)

[90] As noted above, the appellant's position is that the exceptions in section 52(4)1 and 3 apply, as the provisions of the applicable collective agreement allow him access to his personal information.

[91] In Order MO-1470, the adjudicator found that sections 52(4)1 to 52(4)3[29] relate only to the actual agreements themselves rather than to records that might fall within the scope of the provisions of the agreements. She found that the exclusion in section 52(3)3 applied to the records at issue in that appeal.

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[29] Section 52(4)2 has not been raised by the appellant and does not apply here. Section 52(4)2 reads:

> This Act applies to the following records:
>
> 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.

[92] I agree with that conclusion, which accords with the plain meaning of the statute. For one of the exceptions in section 52(4)1, 2, and 3 of the *Act* to apply, the records must be an agreement, not records to which he is entitled to access pursuant to an agreement.

[93] The records at issue, which are emails, notes, and a grievance file, are not agreements, do not fall within these exceptions and are excluded from the application of the *Act* by reason of section 52(3)3.

[94] I note that the appellant has made other arguments about his rights under his collective agreement. These disputes are not within the jurisdiction of the IPC.

ORDER:

I uphold the board's decision that the records at issue are excluded from the application of the *Act* by reason of section 52(3)3. I dismiss the appeal.

Original signed by: May 23, 2023

Diane Smith
Adjudicator