Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER M-1107

Appeal M-9700303

Toronto District School Board

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NATURE OF THE APPEAL:

The Etobicoke Board of Education (now the Toronto District School Board) (the Board) received a request from an occasional supply teacher under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for a listing of:

(1) All secondary school teachers permanent hirings since May 1, 1997 until September 22, 1997, (the date of the request), including subject area(s), age of the teacher and years of teaching experience as well as the number of individuals interviewed for each position filled.

(2) All teachers placed on a Long Term Occasional position starting from August 15, 1997 until September 22, 1997, including position filled, subject area(s), expected duration of employment, age of the teacher and years of teaching experience.

(3) The number of teachers added to the supply teachers' list, from January 1, 1997 until September 22, 1997, the date they were added to the list, and their teaching area(s).

(4) The number of supply teachers currently on the supply list who were qualified in a. Geography; b. Business; c. Math; d. Guidance and e. Computer Studies.

The requester clarified that he did not require the actual names of any teachers.

The information was not available in the requested format, so the Board retrieved relevant data from its computer systems and prepared a four-page record containing the information responsive to the request.

Despite the fact that it had created this record, the Board denied access on the basis that it fell within the scope of section 52(3), and therefore outside the jurisdiction of the Act.

The requester (now the appellant) appealed the Board's decision.

A Notice of Inquiry was sent to the Board and the appellant. Representations were received from both parties.

DISCUSSION:

JURISDICTION

On November 10, 1995, the Labour Relations and Employment Statute Law Amendment Act, 1995 (Bill 7), came into force. This bill amended section 52 of the Act by adding sections 52(3) and (4). This legislation placed various categories of records concerning labour relations and employment-related matters outside the scope of the Act.

Section 52(3) is record specific and fact specific. If this section applies to a specific record, in the circumstances of a particular appeal, and none of the exceptions listed in section 52(4) are present, then the record is excluded from the scope of the Act and not subject to the Commissioner's jurisdiction.

These sections read as follows:

> (3) Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> 1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
>
> 2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.
>
> 3. Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.
>
> (4) This 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.

In its representations, the Board makes general comments on the relationship of these provisions to the Act as a whole, which I will address before turning to the narrower issue of whether section 52(3) applies to the particular record at issue in this appeal.

The Board submits that the application of section 52(3) should be assessed without consideration of the purpose clause contained in section 1 of the Act. Section 1 reads as follows:

> The purposes of this Act are.
>
> (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
>
> (i) information should be available to the public;
>
> (ii) necessary exemptions from the right of access should be limited and specific; and
>
> (iii) decisions on the disclosure of information should be reviewed independently of the institution controlling the information; and
>
> (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

In the Board's view,

> ... the section 1 purpose clause refers expressly and **solely** to the regulation of the relationship between two parties, the government and the public. It does not speak to the regulation of other relationships to which the government is a party.

The Board sees the relationship between the government and its employees as falling outside the scope of the purpose clause because: "[A]ccess to labour relations and employment-related records is exhaustively regulated by other legislation." The Board points specifically to provisions in the Labour Relations Act, the Human Rights Act, and the Workplace Safety and Insurance Act in support of this position.

The Board submits that:

> Given that a well-developed legislative scheme already exists and regulates access to records related to labour relations or employment, the Commissioner should not
>
> interpret section 52(3) restrictively for fear that certain documents will fall outside of the legislative scheme (of which the Act is a part) which regulates access to records.

The Board also submits that, because section 1 of the Act refers to "exemptions", and section 52(3) is an exclusionary provision not an exemption, that section 52(3) is not intended to be interpreted narrowly or

restrictively. In the Board's view, because section 52(3) is a jurisdiction-limiting provision, it should be read:

> ... broadly and purposively to ensure that records which the Legislature clearly has identified as outside the scope of the Act are not swept into an unduly overexpansive interpretation of the purpose and scope of the Act.

I disagree with the Board's position.

The provisions of the other statutes cited by the Board deal with the release of labour relations or employment-related records in the specific context of proceedings before a tribunal. In my view, the right of access to records having to do with employment-related matters is much broader under the Act. Section 2, for example, defines "personal information" to include information relating to the "employment history" of an individual; and sections 10(1)(d), 11(f), 14(3)(d) and 38(c) of the Act, all provide the right of access to what could be described as labour relations or employment-related information. None of these sections was affected by the amendments to the Act included in Bill 7.

In my view, by passing Bill 7, the Legislature has not removed all records concerning labour relations or employment-related information from the scope of the Act. Rather, it has created three categories of records in paragraphs 1, 2 and 3 of section 52(3), and removed them from the Act's jurisdiction, subject to section 52(4). Many other types of records dealing with labour relations or employment-related records remain within the jurisdiction of the Act and, in my view, it is incumbent on me to assess the implications of these Bill 7 provisions within the overall purposes contained in section 1 of the Act.

While I acknowledge that section 52(3) is not an "exemption", nonetheless, in my view, this section must be understood within the Act's overall statutory scheme, including the important purposes and principles delineated in section 1.

Does section 52(3) apply in this appeal?

In order for a record to be removed from the access and privacy provisions of the Act, section 52(3) requires that an institution show that the record was in relation to one of the circumstances listed in this section and that none of the exceptions in section 52(4) applies.

The Board states that it is relying on sections 52(3)1 and 3 to deny access to the record.

In order for a record to fall within the scope of section 52(3)1, the Board must establish that:

1. the record was collected, prepared, maintained or used by the institution or on its behalf; **and**

2. this collection, preparation, maintenance or usage was in relation to proceedings or anticipated proceedings before a court, tribunal or other entity; **and**

3. these proceedings or anticipated proceedings relate to labour relations or to the employment of a person by the institution.

Requirement 1

The Board states that the record was collected and/or prepared by the Board and continues to be maintained by it. The appellant agrees.

I find that the first requirement has been established.

Requirement 2

The Board acknowledges that the record was prepared in response to the appellant's request, not in relation to any "proceedings or anticipated proceedings before a court, tribunal or other entity" as required by section 52(3)1. However, the Board goes on to state that, after the request was submitted, the appellant filed a grievance in accordance with the terms of the collective agreement between the Board and the union to which the appellant belongs. The Board submits that records which do not fall within the scope of section 52(3)1 at the date of their preparation may do so at a later date. According to the Board:

> The language of subsection 52(3) does not speak solely of records **prepared** in relation to proceedings but also of records **maintained** in relation to proceedings. The Board submits that while the records in (sic) appeal were not initially prepared in relation to [the appellant's] current legal proceeding, (since their preparation preceded the initiation of the proceeding) they are currently maintained by the Institution in relation to the proceeding as described above.

The appellant does not dispute that he filed a grievance after submitting his request under the Act, but argues that the Board "... should justify their denial based upon the date of request and the circumstances at that time."

I accept the Board's interpretation of the requirements for Requirement 2 of section 52(3)1.

There is no dispute between the parties that there are currently ongoing grievance proceedings involving the appellant and the Board. Applying the reasoning from Orders M-815 and P-1223, I find that these are proceedings before an "other entity", namely an arbitrator appointed under the terms of the collective agreement. I also accept the Board's evidence that the records are currently being maintained in relation to these proceedings.

Accordingly, I find that Requirement 2 has been met.

Requirement 3

"[L]abour relations" for the purposes of section 52(3)1 is properly defined as the collective relationship between an employer and its employees (Order P-1252).

The appellant filed his grievance in accordance with the collective agreement between the Board and his union.

Accordingly, I find that the grievance arbitration is a proceeding relating to labour relations, and the third requirement of section 52(3)1 has been satisfied.

All three requirements under section 52(3)1 have been established.

In his representations, the appellant states that section 52(4) of the Act is applicable, because the Board must deal with the union in reviewing his grievance. In order to meet the requirements of section 52(4), the record at issue must be an "agreement" or an "expense account". The records at issue in this appeal are neither, and I find that section 52(4) does not apply.

Therefore, I find that the records are excluded from the Act's jurisdiction.

ORDER:

I uphold the Board's decision.

Original signed by: June 2, 1998
Tom Mitchinson
Assistant Commissioner