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

Reconsideration Order MO-1592-R

Appeal MA-990335-1

Order MO-1344

York Region District School Board

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NATURE OF THE APPEAL:

This order sets out my decision on the reconsideration of Order MO-1344 issued October 4, 2000.

The appellant, a bargaining agent, submitted a request to the York Region District School Board (the Board) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to "the minutes or records of the meeting of the Trustees at which they voted to 'lock out' the members of the Elementary Teachers Federation of Ontario York Region". The appellant also wanted to receive "the individual record of how each Trustee voted."

The Board identified one responsive record, denied access to it pursuant to section 6(1)(b) of the *Act* (*in camera* meeting) in conjunction with section 207(2) of the *Education Act*. The appellant appealed this decision, and during the mediation stage of the appeal process section 52(3) of the *Act* was raised. This section removes certain employment and labour relations records from the scope of the *Act*.

In Order MO-1344, I found that section 52(3) did not apply to the record. I then addressed the issue of the possible application of section 6 to the record, and ultimately ordered the Board to disclose certain portions of the record.

The Board later applied to the Divisional Court for judicial review of the order.

The application for judicial review of Order MO-1344 was placed on hold pending the outcome of the judicial review of three other orders of the Information and Privacy Commissioner (IPC) that raised similar issues.

On August 8, 2001, the Court of Appeal for Ontario issued a ruling quashing the three orders under review on the basis that the IPC's interpretation of section 65(6) [the provincial equivalent to section 53(3) at issue in this appeal] was incorrect [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355]. The IPC brought a motion for leave to appeal the Court of Appeal's decision to the Supreme Court of Canada. On June 13, 2002, the Supreme Court denied this motion ([2001] S.C.C.A. No. 509). As a result, the judgment of the Court of Appeal now stands.

On October 17, 2002, I wrote to the Board and the appellant and advised that I had formed the preliminary view that I should reconsider MO-1344 in light of the Court of Appeal decision. I sought representations from both parties on (1) whether there are grounds for reconsideration; and (2) if so, what the appropriate remedy should be. Both parties submitted representations.

SHOULD THE ORDER BE RECONSIDERED?

Introduction

The IPC's reconsideration procedures are set out in section 18 of the *Code of Procedure*. In particular, sections 18.01 and 18.03 of the *Code* state:

> 18.01 The IPC may reconsider an order or other decision where it is established that there is:

(a) a fundamental defect in the adjudication process;

(b) some other jurisdictional defect in the decision; or

(c) a clerical error, accidental error or omission or other similar error in the decision.

18.03 The IPC may reconsider a decision at the request of a person who has an interest in the appeal or on the IPC's own initiative.

My interpretation and application of section 52(3) in Order MO-1344

Section 52(3)2 of the *Act* reads:

> 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:
>
> > 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.

For a record to qualify under section 52(3)2, the Board must establish that:

1. the records were collected, prepared, maintained or used by the Board or on its behalf; **and**

2. this collection, preparation, maintenance or usage was in relation to negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the Board; **and**

3. these negotiations or anticipated negotiations took place or will take place between the Board and a person, bargaining agent or party to a proceeding or anticipated proceeding.

(See Orders M-861 and PO-1648)

In Order MO-1344, I found that the Board had established the first part of the three-part test for section 52(3)2. With respect to the second part of the test, I reviewed Order P-1618 and proceeded to apply a "time-sensitive" approach in the circumstances of the appeal. I then found that the second part of the test was not met for the following reasons:

> In my view, the approach outlined in Order P-1618 and other similar orders can and should be applied in considering the specific requirements of section 52(3)2.

> In order for section 52(3)2 to apply, the Board must establish that the "negotiations or anticipated negotiations" which are the subject of the record are current or in the reasonably proximate past so as to have some continuing potential impact on any ongoing labour relations issues which may be directly related to the record.

The Court of Appeal's decision in *Ontario (Solicitor-General)*

In *Ontario (Solicitor General)*, above, the Court of Appeal stated the following with respect to the "time-sensitive" element under the provincial equivalent of section 52(3):

> In my view, the time sensitive element of subsection 6 [section 65(6) of the provincial *Act*] is contained in its preamble. The Act "does not apply" to particular records if the criteria set out in any of subclauses 1 to 3 are present when the relevant action described in the preamble takes place, *i.e.* when the records are collected, prepared, maintained or used. Once effectively excluded from the operation of the Act, the records remain excluded. The subsection makes no provision for the Act to become applicable at some later point in time in the event the criteria set out in any of subclauses 1 to 3 cease to apply.
>
> …
>
> In my view, therefore, [Assistant Commissioner Mitchinson] was wrong to limit the scope of the exclusions in the way that he did.

Is there a jurisdictional defect in Order MO-1344 in light of the Court of Appeal's decision?

The Board addresses the question of whether there is a jurisdictional defect in Order MO-1344 in its representations as follows:

> The Board submits that the decision of the Assistant Commissioner was based solely on the application of a time sensitive approach, which has since been rejected by the Court of Appeal. The Assistant Commissioner must now overturn his previous Order and find that the Act has no application to the record pursuant to section 52(3)2 of the *Act*, and deny the appeal …

The appellant disputes the findings made by the Court of Appeal, and argues that Order MO-1344 should not be reconsidered. The appellant's representations state:

> As to the issue of time as it relates to this case, the Court of Appeal's distinction is interesting but I would suggest [it] is flawed. It is flawed because by ruling "once effectively excluded from the operation of the Act, the records remain excluded" because of "when the relevant action described in the preamble takes place, i.e. when the records are collected, prepared, maintained or ***used***" [emphasis added] would allow for retroactivity of exclusion. A record, not

> previously exempt, by virtue of its use in negotiations would then be excluded. The intent of this preamble cannot have been meant for this purpose as it runs completely contrary to [the] purpose of the Act.
>
> The Court of Appeal stated "though the Act as a whole provides a context for understanding the words of a specific section, the purposes section of an act does not mandate introduction of language into a statutory provision that is otherwise clear." I submit to you that the meaning of the Court [of] Appeal ruling negates what would otherwise be clear and creates a rather large loophole that would allow for the exclusion of any document "used" as part of negotiations.

Applying a "correctness" standard of review to my interpretation of the provincial equivalent of section 52(3), the Court of Appeal determined that my interpretation of the "time sensitive" element of this provision was incorrect. The finding in Order MO-1344 that section 52(3)2 does not apply to the record is based solely on the application of this "time-sensitive" approach. Because the Court of Appeal explicitly rejected this approach, I conclude that this finding constitutes a jurisdictional defect in the order, and that Order MO-1344 should be reconsidered for this reason.

Accordingly, I will reconsider my decision.

Does the record fall within the scope of section 52(3)2?

In Order MO-1344, I found that the record was collected, prepared, maintained and used by the Board. I confirm that finding here, thereby establishing the first requirement of section 52(3)2.

As far as the second requirement is concerned, I made the following comments in Order MO-1344:

> The record at issue in this appeal deals with a negotiation strategy used by the Board at a time of active and ongoing negotiation - November 1998. The negotiation approach taken by the Board at the November 9, 1998 *in camera* meeting is public knowledge; the request itself refers to the actual decision taken at the meeting, and the negotiation strategy was in fact implemented over the course of the following two days. After implementation, the strategy was also the subject of considerable public debate. I have been provided with the Board's information release dated November 11, 1998, in which the Board identifies the decision it made in the November 9, 1998 meeting, and confirms the reasons underlying the decision. …

In his original representations in this appeal, the appellant stated:

> I do not dispute nor does [the Board] dispute … that the record in question is in relation to proceedings involving negotiations as described in [section] 52(3)2. What the Board has failed to do is address in their representation their "interest" as required by paragraph 3 of [section] 52(3).

Unlike section 52(3)3, which requires that an institution have an "interest" in the labour relations or employment-related matter reflected in a record, section 52(3)2 does not include this term.

It is evident in the circumstances that the appellant was involved in negotiations with the Board at the time the record at issue in this appeal was prepared and used by the Board, and that this preparation and usage of the record related to these negotiations. Applying the direction of the Court of Appeal, I find that this is sufficient to establish the second requirement of section 52(3)2.

I also find that the negotiations took place between the Board and the appellant, which was acting as the bargaining agent for teachers employed by the Board, thereby satisfying the third and final requirement of section 52(3)2.

Therefore, I find that all three requirements of section 52(3)2 have been established, and the record is excluded from the *Act*.

It is not necessary for me to address with section 52(3)3.

WHAT IS THE APPROPRIATE REMEDY?

After finding in Order MO-1344 that section 52(3) did not apply, I went on to consider the record under the section 6(1)(b) exemption claimed by the Board. I found that some parts of the record qualified for exemption, and others did not.

The operational provisions of Order MO-1344 read:

1. I order the Board to disclose the top portion of the record identifying the date of the meeting and those trustees attending and not attending the meeting, the three headings identifying the subjects dealt with at the meeting, and the motion and outcome for the second item. I have attached a highlighted version of the record with the copy of this order sent to the Freedom of Information Co-ordinator at the Board which identifies the portions that should be disclosed. Disclosure must take place by **October 20, 2000.**

2. I uphold the Board's decision to deny access to the remaining parts of the record.

3. In order to verify compliance with the terms of Provision 1 above, I reserve the right to require the Board to provide me with a copy of the record disclosed to the appellant.

By letter dated November 10, 2000, I stayed provisions 1 and 3 of Order MO-1344, pending the disposition of the Board's judicial review application. In the circumstances, the appropriate remedy is to permanently stay provisions 1 and 3 of Order MO-1344, on the basis that the *Act* does not apply to the relevant record due to the operation of section 52(3)2.

ORDER:

I hereby permanently stay provisions 1 and 3 of Order MO-1344.

Original Signed By: November 28, 2002
Tom Mitchinson
Assistant Commissioner