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

ORDER MO-1632

Appeal MA-020162-1

Le Conseil scolaire public de district du Centre-Sud-Ouest

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

This is an appeal from a decision of the Conseil scolaire public de district du Centre-Sud-Ouest (the Board), made under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The requester had sought access to copies of two French tests taken on September 11, 2001 and October 4, 2001. The requester clarified that he wanted to see the errors he made in the tests as well as the correct answers.

The Board located four records responsive to the request, and denied access to them in their entirety, relying on the discretionary exemption in section 11(h) of the *Act*. The requester appealed the Board's decision. During the course of mediation through this office, the Board raised the possible application of section 52(3) of the *Act*, and this was added as an issue in the appeal.

I sent a Notice of Inquiry to the Board, initially, inviting it to submit representations on the facts and issues raised by this appeal. The representations of the Board were shared with the appellant in their entirety. The appellant was also invited to and has submitted representations in response to those of the Board.

RECORDS:

There are four records at issue, consisting of the following:

1. French test taken on September 11, 2001 (pages 12 to 15)
2. French test taken on October 4, 2001 (pages 16 to 19)
3. Test of September 11, 2001 with correct answers (pages 20 to 23)
4. Test of October 4, 2001 with correct answers (pages 24 to 27)

CONCLUSION:

I find that section 52(3)3 of the *Act* excludes all of these records from the scope of the *Act*. Because of this finding, it is unnecessary to consider the application of sections 52(3)1, 52(3)2 or 11(h).

ANALYSIS:

APPLICATION OF THE *ACT*

Introduction

Section 52(3) is record-specific and fact-specific. If section 52(3) applies to the record, and none of the exceptions found in section 52(4) applies, then the record falls outside the scope of the *Act*.

Section 52(3)3

Section 52(3)3 of the *Act* states:

> Subject to subsection (4), this *Act* does not apply to records collected, maintained or used by or on behalf of an institution in relation to any of the following:
>
> > Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

In order to fall within the scope of paragraph 3 of section 52(3), 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 meetings, consultations, discussions or communications; **and**

3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the Board has an interest.

Requirements One and Two

In general, the Board states that according to its *Politique sur le recrutement et embauche* (Recruitment and Hiring Policy), all Board personnel (both teaching and non-teaching staff) are hired through a two-step competition. Step 1 involves passing a comprehensive language test. Step 2 consists of an interview.

Records 1 and 3 consist of the first language test taken by the appellant, and correct answers to that test. The appellant did not successfully complete this first test. Records 2 and 4 represent the second language test taken by the appellant, and its correct answers.

The Board submits that the records at issue were used by it in the recruitment of its staff in order to evaluate the competency of candidates in the French language. It submits that the records accordingly were collected, prepared, maintained and used by it.

Further, the Board submits that the collection, preparation, maintenance and usage are in relation to meetings, consultations, discussions or communications.

The appellant submits, with respect to section 52(3) in general, that a test administered for hiring purposes cannot be equated with the documents referred to in sections 52(3)1 to 3 of the *Act*. He states that the *Act* refers to records "relating to labour relations or to the employment of a person by the institution" (a reference to the wording in section 52(3)2). The tests that he wrote were

for the purpose of selecting supply-teaching or teaching candidates. Since a supply-teaching candidate, as the appellant was, cannot be deemed an employee when the Board has not offered him a position, and the relationship between the Board and the appellant was based solely on the recruitment of a supply-teaching candidate, the copies of the tests which he is seeking do not fulfil the criteria in section 52(3).

The appellant submits that he has no wish to gain any unfair advantage over other candidates through seeking access to these records, as he has no wish to take the test again. Rather, he wishes to evaluate the content of the tests, through the use of a neutral expert, to judge their validity.

In Order MO-1236, Adjudicator Laurel Cropley considered the application of section 52(3)3 of the *Act* to, among other things, test results created as part of an application by an individual for a position with a police force. Adjudicator Cropley found that the records document the recruitment process, and as such, were collected, prepared or used by the Police in relation to meetings, discussions or communications which took place in relation to an application for employment. On this basis, she was satisfied that the first two requirements of section 52(3)3 were met.

Similarly, in the appeal before me, I am satisfied that the tests and test results at issue were collected, prepared or used by the Board in relation to meetings, discussions or communications about the appellant's candidacy for employment as a supply teacher.

Requirement Three

The Board submits that it is self-evident that job recruitment is an employment-related matter in which the Board "has an interest." Relying on Order P-1242, the Board submits that its interests constitute a legal interest in that the employment recruitment process involves legal obligations (under the *Ontario Human Rights Code*) which the Board must meet.

As indicated above, the appellant disputes that a test for the purpose of selecting supply-teaching candidates relates to "labour relations or to the employment of a person", as a supply-teaching candidate cannot be deemed an employee when the Board has not offered him a position.

It should be noted that section 52(3)3 refers to "employment-related matters" rather than "the employment of a person", which appears in section 52(3)2; however, I understand that the appellant intends his arguments about the meaning of "the employment of a person" to apply equally to section 52(3)3.

I do not accept the appellant's argument. Previous orders of this office, with which I agree, have held that job competitions or recruitment processes are employment-related matters (see Orders M-1127, MO-1193 and MO-1236). I find no meaningful distinction between the circumstances of those cases, and the circumstances of this appeal. The requirement that the matter be employment-related does not depend on the existence of an employment relationship between a candidate for employment and the institution at the time the records are created. The purpose of

a job competition or recruitment process is to select candidates for employment, and this is sufficient to characterize the meetings, discussions or communications in those processes as "employment-related." Likewise, on the facts of this appeal, the purpose of the meetings, discussions or communications about the appellant's candidacy for a supply-teaching position is to assess his eligibility for employment as a supply teacher. Whether or not the appellant is accepted as a supply-teaching candidate, the purpose of the process is fundamentally employment-related.

The only remaining issue is whether this is an employment-related matter in which the Board "has an interest." Previous orders have held that an interest is more than mere curiosity or concern. They found that an "interest" for the purposes of section 52(3)3 must be a legal interest in the sense that the matter in which the Board has an interest must have the capacity to affect the legal rights or obligations of the Board (Orders P-1242 and M-1147). In *Ontario (Solicitor General) v. Ontario (Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.) (leave to appeal to the Supreme Court of Canada dismissed, June 13, 2002), the Ontario Court of Appeal rejected this office's use of "legal interest" in applying section 65(2)3 of the provincial *Act* (the equivalent of section 52(3)3):

> In arriving at the conclusion that the words "in which the institution has an interest" in s. 65(6) 3 must be referring to "a legal interest" in the sense of having the capacity to affect an institution's "legal rights or obligations", the Assistant Privacy Commissioner stated that various authorities support the proposition that an interest must refer to more than mere curiosity or concern. I have no difficulty with the latter proposition. It does not however lead to the inevitable conclusion that "interest" means "legal interest" as defined by the Assistant Privacy Commissioner.
>
> As already noted, section 65 of the *Act* contains a miscellaneous list of records to which the *Act* does not apply. Subsection 6 deals exclusively with labour relations and employment related matters. Subsection 7 provides certain exceptions to the exclusions set out in subsection 6. Examined in the general context of subsection 6, the words "in which the institution has an interest" appear on their face to relate simply to matters involving the institution's own workforce. Sub clause 1 deals with records relating to "proceedings or anticipated proceedings relating to labour relations or to the employment of a person **by the institution**" [emphasis added]. Sub clause 2 deals with records relating to "negotiations or anticipated negotiations relating to labour relations or to the employment of a person **by the institution**" [emphasis added]. Sub clause 3 deals with records relating to a miscellaneous category of events "about labour-relations or employment related matters in which the institution has an interest". Having regard to the purpose for which the section was enacted, and the wording of the subsection as a whole, the words "in which the institution has an interest" in sub clause 3 operate simply to restrict the categories of excluded records to those records relating to the institutions' own workforce where the focus has shifted from "employment of a person" to "employment-related matters". To import the word "legal" into the sub

> clause when it does not appear, introduces a concept there is no indication the legislature intended.

Applying a "correctness" standard of review to the interpretation of the provincial equivalent of section 52(3)3, the Court of Appeal thus determined that this office's interpretation of the words "in which the institution has an interest" to mean a "legal interest" was incorrect.

Applying the above, and based on the circumstances of this appeal, I find that the Board has the requisite degree of interest in the subject matter of the records to meet the third part of the section 52(3)3 test. The interest of the Board went well beyond the "mere curiosity or concern" referred to by the Court of Appeal in its decision in *Ontario (Solicitor General)*, as the records invoke the Board's interests as an employer in its own workforce, and in the process of recruiting employees into that workforce.

I am satisfied accordingly that the Board has established all three components of the test under section 52(3)3. Further, I find that none of the exceptions in section 52(3)4 are present in the circumstances. I conclude that section 52(3)3 applies to the records at issue in this appeal and they are excluded from the scope of the *Act*.

ORDER:

I uphold the Board's decision.

Original signed by: April 10, 2003
Sherry Liang
Adjudicator