



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

# **ORDER MO-2307**

## **Appeal MA07-19**

### **Windsor-Essex Catholic District School Board**



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## **NATURE OF THE APPEAL:**

The Windsor-Essex Catholic District School Board (the Board) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) relating to the amount of fees billed by a named law firm for legal advice provided to an identified individual (the affected person), and whether the payment of this account was approved by the Board's Trustees. The Board subsequently contacted the requester asking her to clarify her request. In response to this, the requester clarified her request as follows:

I am seeking a summary of the legal bills paid out in September, October, November and December 2006. I would like to know who got paid from that account and how much. For example, the Board's lawyer is [name], so how much did his firm get paid in each month and what service did he provide. I also want to know if any other people were paid for services from that budget. For example, [named law firm] is an independent lawyer. Did he receive any compensation from the school board? I'd like to know how much and for what service did he provide.

The Board responded to the clarified request, granting the requester access to a copy of a cheque and cheque stub payable to a named law firm. The Board advised that they did not have any summaries of legal bills for October, November and December 2006, as no such bills had yet been paid. The requester had obtained a copy of the September 2006 summary of legal bills from the Board's own website.

The requester, now the appellant, appealed the decision of the Board, on the basis that the Board had not responded to her request for information as to what legal services were performed in exchange for this payment.

During the course of mediation, the Board advised the appellant that, pursuant to section 14(5) of the *Act*, it could not confirm or deny the existence of further records. In addition, the Board advised that, if further records did exist, the disclosure of these records could affect the interests of a third party. As a result, the Board gave notice to an individual whose personal information may be contained in the records (the affected person) pursuant to section 21 of the *Act*.

Following this notification, the Board issued a decision to the appellant reiterating its reliance upon section 14(5) of the *Act*. In the alternative, the Board maintained that if records did exist, they would be excluded from the application of the *Act* pursuant to the exclusionary provision in section 52(3)3 (labour relations and employment records) of the *Act*. The Board went on to state that, in the further alternative, if records exist, access to them would be denied pursuant to sections 14(1) (invasion of privacy) and 6(1)(b) (closed meeting) of the *Act*.

Following discussions with the mediator, the Board indicated that it was no longer relying upon section 14(5) of the *Act*. However, the Board continued to rely upon section 52(3)3, and in the alternative, sections 14(1) and 6(1)(b) of the *Act*.

During mediation, the appellant raised the issue of a public interest in the disclosure of the records. As a result, section 16 of the *Act* was added as an issue in this appeal.

As the parties were unable to resolve the issues through the process of mediation, the file was transferred to me to conduct an inquiry. I sent a Notice of Inquiry, setting out the facts and issues in this appeal, to the Board and the affected person, initially. I received representations from both. In its representations, the Board agreed to disclose Record 3 to the appellant, the cheque request form. Therefore this record is no longer at issue in this appeal.

I then decided to seek representations first from the appellant on the issue as to whether the records are excluded from the *Act*. I sent a copy of the Board's representations concerning the exclusionary provision in section 52(3)3 of the *Act*, along with an enclosure to their representations (the Regular Board Meeting Minutes) to the appellant, together with a Notice of Inquiry, seeking her representations. Portions of the Board's representations on this issue were withheld due to my concerns about their confidentiality. I also withheld the representations of the affected person, due to my concerns about their confidentiality. The appellant did not provide representations in response to the Notice of Inquiry, instead relying on earlier submissions she had made prior to receiving the Notice of Inquiry.

## **RECORDS:**

There are 4 pages of records at issue, as follows:

<b><u>Record #</u></b>	<b><u>Description of Record</u></b>
------------------------	-------------------------------------

- |    |   |
|----|---|
| 1. | Statement of Account from a named law firm. |
| 2. | Record 1 with notation.                     |
| 4. | Severed version of Record 1.                |
| 5. | One page of minutes from in camera meeting. |

## **DISCUSSION:**

### **BACKGROUND**

In the non-confidential portions of its representations, the Board provided the following background information:

At the time the [records were created the] affected party...was on the Executive Council of the Board. An investigation/review was undertaken. The investigation/review, involved several meetings, consultations, discussions and communications among staff and trustees concerning these employment-related matters.

It is the Board's understanding that [named law firm's] office prepared Records 1 and 2.

On October 24, 2006 an in-camera meeting, of the Committee of the Whole Board was held.

After the October 24, 2006 in-camera meeting, the Director of the Board, [name], made the notation on Record 2. The Board severed the description of services provided from Record 2 which resulted in the creation by the Board of Record 4. Record 4 was created to be attached to Record 3 being the cheque requisition form.

### **LABOUR RELATIONS AND EMPLOYMENT RECORDS**

The Board claims that section 52(3)3 excludes the records from the application of the *Act*. 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:

Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

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

The term "in relation to" in section 52(3) means "for the purpose of, as a result of, or substantially connected to" [Order P-1223].

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. [*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.]

The term "employment of a person" refers to the relationship between an employer and an employee. 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 [Order PO-2157].

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 [*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].

Section 52(3) may apply where the institution that received the request is not the same institution that originally “collected, prepared, maintained or used” the records, even where the original institution is an institution under the *Freedom of Information and Protection of Privacy Act* [Orders P-1560, PO-2106].

The exclusion in section 52(3) does not exclude all records concerning the actions or inactions of an employee simply because this conduct may give rise to a civil action in which the Crown may be held vicariously liable for torts caused by its employees [*Ontario (Ministry of Correctional Services) v. Goodis* [2008] O.J. No. 289 (Div. Ct.)].

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 [*Ministry of Correctional Services*, cited above].

### **Section 52(3)3: matters in which the institution has an interest**

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 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 institution has an interest.

#### ***Part 1: collected, prepared, maintained or used***

The Board submits that it collected, maintained and used Records 1, 2 and 4. The Board also prepared the severed version of Record 4 and prepared, maintained and used Record 5.

Neither the affected person in his representations, nor the appellant in her letter, address the issue of whether the records are excluded from the *Act* by reason of the application of section 52(3)3.

### **Analysis/Findings**

Based on my review of the Board's representations and the records, I agree with the Board's characterization of the records and find that part 1 of the test has been met.

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

The Board submits that:

Record 1 was used by the Chair of the Board during the in-camera meeting of the Committee of the Whole Board on October 24, 2006.

Record 2 and 4 are a version of Record 1..

Record 1 was used "in relation to" the meeting and discussions which took place on October 24, 2006. As a result of that meeting, Records 2, 4 and 5 were prepared. As well, Records 1, 2, 4 and 5 are "substantially connected to" the October 24, 2006, meeting and discussions about employment-related matters in which the institution had an interest. Therefore, Records 1, 2, 4 and 5 were collected, prepared, maintained and/or used "in relation to" the meeting and discussions which took place on October 24, 2006.

### **Analysis/Findings**

Based on the confidential and non-confidential representations of the Board and on my review of the records themselves, I find that the Board collected, maintained, prepared or used the records in relation to meetings, discussions or communications. In particular, Record 1, the named law firm's statement of account, was used by the Board at its October 24, 2006 in-camera meeting of the Committee of the Whole Board. As a result of this meeting, Record 2 was prepared, which consists of a copy of Record 1 with a notation on it made by the Board's Director. Record 4, which is a severed version of Record 2, was then prepared and attached to the cheque requisition form (Record 3) and used by the Board to arrange for payment of the legal account which comprises Record 1. Record 5 contains the minutes prepared following the meeting. Therefore, I conclude that the Board prepared, maintained and/or used all of the records at issue "in relation to" the October 24, 2006 Board meeting and that the Board has satisfied the second part of the three-part test.

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

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

- a job competition [Orders M-830, PO-2123]

- an employee's dismissal [Order MO-1654-I]
- a grievance under a collective agreement [Orders M-832, PO-1769]
- disciplinary proceedings under the *Police Services Act* [Order MO-1433-F]
- a "voluntary exit program" [Order M-1074]
- a review of "workload and working relationships" [Order PO-2057]
- the work of an advisory committee regarding the relationship between the government and physicians represented under the *Health Care Accessibility Act* [*Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*], [2003] O.J. No. 4123 (C.A.)]

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

- an organizational or operational review [Orders M-941, P-1369]
- litigation in which the institution may be found vicariously liable for the actions of its employee [Orders PO-1722, PO-1905]

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 [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*].

The records collected, prepared maintained or used ... 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. Employment-related matters are separate and distinct from matters related to employees' actions [*Ministry of Correctional Services*, cited above].

In its non-confidential representations, the Board submits that:

Records 1, 2, 4 and 5 not only involved issues concerning [employment] but the records also related to the employment-related issues

Thus, the *Act* does not apply to Records 1, 2, 4 or 5 because the Board either collected, prepared, maintained or used the records in relation to the in-camera meeting of the Committee of the Whole Board held on October 24, 2006, and the discussions which took place during that meeting about employment-related matters which involved the Board's own workforce. Therefore, the Board had an interest in those matters which was more than a "mere curiosity or concern".

## **Analysis/Findings**

Record 1 was used at the October 24, 2006 meeting referred to above. Record 5 contains the minutes from that meeting. Records 2 and 4, the modified versions of Record 1, were prepared and then used in discussions or communications subsequent to the October 24, 2006 meeting. All of these records concern employment-related matters in which the Board has an interest.

The records are related to matters in which the Board is acting as an employer and both the terms and conditions of employment of an employee and human resources questions form the subject matters of them. I find that these employment-related matters are separate and distinct from matters related to the Board's employees' actions. Upon my review of the contents of the records, along with the confidential and non-confidential portions of the representations of the Board, I find that the records simply do not concern the actions or inactions of an employee where the employee's conduct may give rise to a civil action in which the Crown may be held vicariously liable for torts caused by its employees [*Ministry of Correctional Services*, cited above].

Accordingly, I find that part 3 of the test under section 52(3)3 has been met concerning Records 1, 2, 4 and 5. Therefore, as all three parts of the test have been met, I find that section 52(3)3 applies to the records.

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

If the records fall within any of the exceptions in section 52(4), the *Act* applies to them. Section 52(4) states:

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.



The Board submits that:

Records 1, 2, 4 and 5 are neither an agreement nor 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. Records 1, 2 and 4 are versions of a legal account for legal advice

The purpose of the exception in section 52(4) is to capture expenses in the normal course of business incurred on a regular, if not daily basis. If the every day expenses such as meals; travel, accommodation, etc. were caught by section 52(3), then there would be a disservice to the interests of an institution's transparency and accountability. Expense accounts containing those kind of every day expenses are fundamentally different from a legal account for legal advice...in an employment-related matter in which an institution has an interest and section 52(4) is not intended to apply to legal accounts in those circumstances. Records 1, 2, 4 and 5 are not an "expense account" for the purposes of section 52(4).

### **Analysis/Findings**

Based on my review of the records, I agree with the Board that none of the exceptions listed in section 52(4) apply to the records at issue. Although the affected person submitted Record 1 to the Board for reimbursement, I find that neither this record, nor the remaining records at issue, is an expense account within the meaning of section 52(4). Record 1, and its modified versions, Records 2 and 4, is a statement of account for legal services rendered by a named law firm. The appellant received the information that is contained in the records concerning the total amount paid by the Board for this account. The severed information in all of the records at issue concerns the details of the services rendered by the law firm and the name of the affected person for whom these legal services were rendered.

Accordingly, I find that none of the information contained in the records at issue fall within any of the exceptions listed in section 52(4). As none of the exceptions in section 52(4) apply to the records and as section 52(3)3 applies, I find that the records are excluded from the *Act*.

### **ORDER:**

I uphold the Board's decision to exclude the records from the *Act* and dismiss the appeal.

Original signed by: \_\_\_\_\_

Diane Smith  
Adjudicator

\_\_\_\_\_ May 22, 2008