Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-2673-I

Appeal MA10-237

Toronto District School Board

November 23, 2011

Summary: The appellant submitted a 14-part request to the Toronto District School Board for access to information relating to matters involving the board and a trade union. The appellant appealed the board's decision to exclude two records from the scope of the *Act* under section 52(3)(labour relations and employment records). The board also withheld some information from these records, claiming that the information was not responsive to the request. During the inquiry stage, the appellant requested an index of records and sought to expand the scope of appeal. The exclusion at section 52(3)3 was found to apply to one of the records and the board was ordered to conduct a further search for records responsive to the original scope of appeal. The withheld portions of the remaining record was found to contain responsive information and was ordered disclosed. Appeal upheld in part.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, ss. 17, 52(3)3, 52(4)1.

Orders and Investigation Reports Considered: MO-2191-I, MO-2200, MO-2282-I, PO-2157]

OVERVIEW:

[1] The appellant submitted a 14-part request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Toronto District School Board (the Board or TDSB). The board issued a decision providing the appellant with partial

access to records responsive to parts 2, 5, 7, 10 of the request. The board advises that no responsive records exist for parts 8 and 14 of the request and claim that the remaining parts of the request are excluded from the scope the *Act* under section 52(3) (labour relations and employment records).

[2] The requester (now the appellant) appealed the board's decision to deny access to records responsive to parts 9 and 13 of the request.

[3] Mediation did not resolve the appeal and it was transferred to the adjudication stage of the appeals process, in which an adjudicator conducts an inquiry under the *Act*. During the inquiry of this appeal, a notice of inquiry setting out the facts and issues was sent to the parties, who then submitted representations in support of their positions.

[4] The board subsequently issued a revised decision letter to the appellant granting access to a severed copy of one of the records citing the exception to the exclusionary provision at section 52(3) in section 52(4)1 of the *Act*. The board continues to maintain that some portions of this record are not responsive to the request and submitted representations in support of this position. The board also submitted representations that the remaining record is also excluded under the scope of the *Act* under section 52(3)3.

[5] The non-confidential portions of the board's representations were shared with the appellant, who provided representations in response. The appellant's representations raised two preliminary issues which will be addressed in this order (Issues A and B). The parties' representations were shared in accordance with section 7 of the IPC's Code of Procedure and Practice Direction 7.

RECORDS:

[6] The board identified the following two records responsive to parts 9 and 13 of the request:

Description of Record	Released?	Number of pages
Minutes of Settlement between the institution and union, dated May 2010	Partial disclosure	1 page
Internal email correspondence, dated April 16, 2010	Withheld	1 page

ISSUES:

A. Can the appellant expand the scope of appeal to include parts of the request not appealed when the appeal was filed?
B. Is the board required to provide the appellant with an index of records?
C. Is the withheld information responsive to the request?
D. Was the board's search for responsive records reasonable?
E. Is the email record excluded from the scope of the *Act* under section 52(3)3?

PRELIMINARY ISSUES:

A. Can the appellant expand the scope of appeal to now include parts of the request not appealed when the appeal was filed?

[7] The appellant's representations received during the inquiry process was the first instance this office was made aware that the appellant wishes to also appeal the board's decision with respect to parts 1, 3, 4, 6, 11 and 12 of the request.

[8] The parties agree that the appellant provided the board sufficient detail to identify records responsive to the request. The appellant submitted a 14 part request and received a decision letter responding to all fourteen parts of her request. In response, the appellant filed an appeal that sought a review of the board's decision relating to parts 9 and 13 of the request only.

[9] Upon receipt of the appeal, this office opened an appeal file to address the issues identified in the appeal letter, sent a request for documentation to the board and received two records. Though the minutes of settlement was identified as an email in the mediator's report, it was correctly identified more accurately as a "one-page document" or "minutes of settlement" in the notice of inquiry sent to the appellant, the board's revised decision letter and its representations.

[10] Upon my receipt of the appellant's representations, I wrote to her and advised that the only records contained in my file were an email and the minutes of settlement. I directed the appellant to file a new request to seek access to records responsive to parts 1, 3, 4, 6, 11 and 12 of her original request, if she wished to do so.

[11] In response, the appellant requests that I reconsider my advice and argues that filing "a second request would only delay the appeal". The appellant also argues that "[t]here is essentially no material prejudice to the TDSB to have to defend their position at this time with respect to those matters of the original request". The appellant submits that the "present appeal is ongoing and no decision has yet been made, interim or otherwise".

Decision and Analysis

[12] The appellant appears to take the position that until an interim or final decision is made, she has a right to add issues to the appeal regardless of the circumstances or timing. The appellant argues that her request to expand the scope of appeal is similar to the board's decision to revise its decision. However, I note that while the appellant seeks to add issues, the board's revised decision resulted in an additional record being released to her.

[13] In addition, the appellant argues that the board would not suffer material prejudice if the scope of appeal is expanded to now include the board's decision regarding parts 1, 3, 4, 6, 11 and 12 of the request. However, the scope of appeal was clearly identified by the appellant as being limited to parts 9 and 13 of the request in her appeal letter and the same was confirmed during mediation. As a result, the notice of inquiry sent to the board only sought its representations in response to the issues identified in the appeal letter and mediator's report. Accordingly, the board's representations provided to this office do not address the issues the appellant seeks to add to the appeal. In addition, when this office opened the appeal, the only records requested were those responsive to the scope of appeal identified by the appellant. As a result, the only records identified as being at issue are copies of the email and minutes of settlement.

[14] Though the appellant cites delay as one of the primary reasons why her request to add new issues to this appeal should be granted, her evidence does not explain how the delay would significantly prejudice her position, given that the board has a statutory obligation to issue a decision within 30 days of the receipt of her request.

[15] Further, in my view, the appellant's evidence that the minutes of settlement were incorrectly identified in the mediator's report and could also be identified as responsive to another part of the request does not give rise to a right to expand the scope of this appeal to include portions of the board's decision she previously decided not to pursue.

[16] Having regard to the above, I find that the scope of this appeal is restricted to the board's decision that responds to parts 9 and 13 of the request. If the appellant wishes to seek access to those records she previously decided not to pursue, she may file a new request under the *Act* which would require the board to issue a new decision which could give rise to right of appeal to this office.

B. Is the board required to provide the appellant with an index of records?

[17] The board did not provide an index of records with its initial or revised decision letters to the appellant.

[18] In her representations, the appellant argues that the board should have provided her with an index of records describing the responsive records. The appellant submits that IPC Practices, Number 1 entitled "Drafting a Letter Refusing Access to a Record" requires the board to provide an index of records with every decision letter.

[19] In support of her position, the appellant also refers to Interim Order MO-2191-I. The appellant argues that Order MO-2191-I stands for the proposition that "[a] decision letter that does not adequately identify the responsive records is not an adequate decision letter for the purposes of the *Act*".

[20] The appellant also raises a number of issues relating to her concern that she is not able "to determine what records have been located, what records have been denied, whether the [board] has responded to the request in its entirety and whether any records which might be responsive exist". The appellant also argues that "there may be significant overlap in the records".

[21] Upon my receipt of the appellant's representations, I sent a letter to the appellant's representative, which states:

> Neither the *Act* not IPC Practices, Number 1 entitled "Drafting a Letter Refusing Access to a Record" requires institutions to provide an Index of Records, particularly in a situation where the Board has identified only two responsive records.
>
> In the circumstances of this appeal, the records identified consist of only two pages and are adequately described in the Notice of Inquiry, the Board's revised decision letter and representations. In my view, an Index of Records would not assist the processing of this appeal or provide a better understanding of the records. Accordingly, I will not be requesting that the Board produce an Index of Records for these two records.

[22] In response, the appellant's representative states:

> … the IPC in [its] "Practices Number 1" has long maintained that a ***"proper"*** decision letter shall contain an "index of records." The document goes on to state ***that "an index of all involved records must be provided in the decision letter"*** (emphasis added). These are not my words, not the Appellant's, but the words as put out by the Commissioner. With respect, your conclusion in your letter that there is not requirement for an Index of Records runs counter to what is clearly stated by the IPC. Whether one (1) or two (2) records are in issue, or one hundred (100) or two hundred (200), or one thousand (1000) or two thousand (2000), is simply not the point. The actual number is irrelevant. In this situation, an Index of Records would cover all records identified by

> the request whether or not they are produced by the TDSB and at this point we simply do not know how many records they have identified as responsive to the original request. My client, the Appellant, is entitled to said Index which should cover all records that respond to the original request, whether or not the appeal is going forward with respect to all parts of the original request. The basic information that will be provided by the Index of Records is simply a) something my client is entitled to have, b) something you should have available to you as you deal with the issues presented by the Appeal (no matter its scope), and c) should have been provided at first instance. I have in my earlier submissions offered to you the precedent of Interim Order MO-2191-I that supports my client's position in this regard.

Decision and Analysis

[23] IPC Practices, No. 1 can be found on this office's website, indexed under heading "Best Practices and Professional Guidelines". Its introduction states that an "appeal can be a time-consuming process for an institution" and "drafting a correct decision letter at the outset not only saves the institution time at the start of the appeal process, but speeds up the process for all parties involved". Finally, institutions are encouraged to follow two key steps to met their legislative requirements. One of the key steps identified is entitled "Drafting Procedure" and the appellant is correct in stating that the phrase "an index must be provided in the decision letter" appear in this section. However, the entire passage reads:

> A sample decision letter refusing access to records is attached (page 3), along with a decision letter checklist (page 2). Following is a description of the components of a proper decision letter:
>
> (a) Provide an index of records. Because a request may involve several records, an index of all involved records must be provided in the decision letter. The IPC has found that providing a list of records satisfies some appellants who decide not to proceed further with an appeal. Such individuals initiate their requests for the sole purpose of finding out whether a specific record is or is not contained in the information they wish to access.

[24] The appellant insists that IPC Practices, No.1 creates a legal requirement on the part of institutions to provide an index of records with their decision letters. This office can and has authored best practices and practice directions to help institutions meet their legislative requirements. These include IPC Practices and various practice directions some of which refer to the creation of an index. I also note that Orders MO-2200 and MO-2282-I state that "there are no specific requirements under the *Act* which require an institution to prepare an Index of Records".

[25] The appellant refers to Interim Order MO-2191-I in support of her position that a "decision letter that does not adequately identify the responsive records is not an adequate decision letter for the purposes of the *Act*". In that order, Adjudicator Daphne Loukidelis ordered the Ottawa Police Services Board to issue a new decision letter with an index of records after finding that "none of the written communications of the Police have constituted an adequate decision letter for the purposes of the *Act*".

[26] In my view, the circumstances of the present appeal are much different than those in Order MO-2191-I, where the adjudicator found that the decision letters and representations of the police failed to identify records and in some cases, failed to cite an exemption or exclusion under the *Act* to withhold access in that appeal. In addition, the adjudicator found that the inadequate decision letters, combined with a lack of clarity in the police's responses, made achieving any meaningful progress toward resolution of the appeal difficult. Consequently, the adjudicator ordered the police to re-issue a decision letter and provide an index of records to "facilitate a meaningful review of the substantive issues" before her.

[27] Given my finding that the scope of this appeal should only address those issues set out in the appellant's appeal letter, the only issues before me are whether the board conducted a reasonable search for records responsive to parts 9 and 13, whether the withheld email and severed portions of the minutes of settlement contain non-responsive information and whether the responsive portions of the email is excluded from the scope of the *Act* under section 52(3)3.

[28] Though the board's initial decision letter does not contain all of the components of a "proper decision letter" identified in IPC Practices No.1, I am satisfied that a index of records is not required in the circumstances of this appeal to adjudicate the substantive issues before me or to resolve any issues relating to overlapping records. In my view, the information the board provided the appellant in its initial decision letter, *combined* with the additional information provided in its revised decision letter and representations adequately identifies the issues and the two records at issue in this appeal. Accordingly, the appellant's request for an order requiring the board to produce an index of records is denied.

SUBSTANTIVE ISSUES:

C. Is the withheld information responsive to the request?

[29] Parts 9 and 13 of the request states:

- A copy of any decision of the [board] informing a contractor that it has been banned from [board] sites (part 9); and

- Any document or correspondence (including email) which indicates the intention or the decision of the [board] to bar any contractor including, but not limited to, [nine named companies and/or individuals listed] (part 13)

[30] The board submits that it severed the portions of the records which do not identify the decision. The board's position is that "these portions – since they do not convey the responsive decision – are not responsive to the request".

[31] The appellant's representations were prepared by counsel who states:

> It is submitted, on behalf of the [appellant], that the request by her did in fact provide to the TDSB sufficient details to identity the record which are responsive to the request. The TDBS in its decision letters has indicated that it has identified responsive records to the request. It has not indicated that it found any ambiguity in the request. It is submitted that the TDSB has "read down" the request and responded accordingly when in fact it is to "read up" or liberally interpret [the] request "to best serve the purpose and spirit of the *Act*".

[32] Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;
>
> . . .
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[33] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour [Orders P-134 and P-880].

[34] To be considered responsive to the request, records must "reasonably relate" to the request [Orders P-880 and PO-2661].

[35] I have carefully reviewed the records and find that all of the information contained in the email and most of the information contained in the minutes of the settlement is responsive to the request. The only information which I find to be not responsive, is the information contained in the first two bullet points in the minutes of settlement.

[36] In my view, a liberal interpretation of the wording in parts 9 and 13 of the request would capture information which not only identifies the specific intention or decision of the board to ban or bar contractors from its sites, but also any conditional terms related to the decision or directions to staff to effect the decision. Given the purpose and the spirit of the *Act*, I find that information identifying the dates and times of meetings of the board to discuss issues which resulted in the decision in question is responsive. This is particularly the case if such information appears in the same record that captures the actual decision. Similarly, I find that information identifying the names and titles of individuals employed by the board and the union that appears along with the decision is responsive. Finally, I note that in one instance information that was withheld in the email as being not responsive to the request was released to the appellants in the minutes of settlement. This information addresses the direction to board staff to effect the decision.

[37] Having regard to the above, I find that all of the information contained in the minutes of settlement is responsive to the request, except for the first two bullet points. As the board has not claimed that any exemption or exclusion applies to this record, I will order the board to disclose the portions of the minutes of settlement I found to be responsive to the request. For the sake of clarity, I have enclosed a highlighted copy of this record with the board's copy of this order.

[38] With respect to the information in the email that I found to be responsive, I will now go on to determine whether it is excluded from the scope of the *Act* pursuant to section 53(3)3.

D. Was the board's search for responsive records reasonable?

[39] The appellant submitted representations in support of her position that records responsive to part 8 and 14 of the request exist. However, these portions of the request are not within the scope of this appeal.

[40] With respect to the parts of the request which are before me, the appellant submits that the board failed to conduct a reasonable search for records responsive to parts 9 and 13 of the request. Parts 9 and 13 of the request seek access to copies of

any decision informing a contractor that it has been banned from the board in addition to copies of any document which discusses the intention or decision to bar any contractor "including, but not limited" to nine companies or individuals identified by the appellant.

[41] The appellant argues parts 9 and 13 of the request was "global in nature" and not limited to those specified in the list contained in the request.

[42] The board's representations admit that it "confined itself to the list in question".

[43] Having regard to all of the evidence of the parties, I find that the board failed to conduct a search which included locating responsive records relating to contractors not identified in the request. The request clearly indicates that the list provided by the appellant was not exhaustive. Accordingly, records which informs a contractor, who was not identified on the list, that it has been banned from board sites would be responsive. Similarly, records which indicate the intention or decision of the board to bar a contractor not identified on the list would also be responsive.

[44] As I have found that the board did not conduct a reasonable search, I will order the board to conduct a further search for records responsive to parts 9 and 13 of the request.

E. Is the email excluded from the scope of the *Act* under section 52(3)3?

[45] 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.

[46] 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*.

[47] For the collection, preparation, maintenance or use of a record to be "in relation to" the subject mentioned in paragraph 3 of section 52(3), it must be reasonable to conclude that there is "some connection" between them. [Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).]

[48] 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; **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 institution has an interest.

[49] 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].

[50] The board submits that the email was prepared by a board staff member and sent to other staff. The board also submits that at "all material times" it was bound to a collective agreement with the union referred to in the record. Finally, the board advises that the subject matter of the email contains instructions which arose as the result of a grievance meeting between the board and the union regarding a grievance initiated by the union.

[51] The appellant's representations state:

> [T]he records requested herein relate to contractors who have been banned or not allowed on TDSB sites by the TDSB and as such *ss.52(3)(3)* simply cannot apply. Records relating to meetings, consultations, discussions or communications about banning *contractors*, with respect, are not records relating to the collective bargaining relationship between the TDSB and its employees, or the employment, human resource or staffing matters of a TDSB employee.

[52] The appellant also argues that the collective agreement between the board and union does not apply to contractors. In support of her position, the appellant refers to case law which finds that independent contractors are not employees. The appellant also refers to Order P-1545 which found that the provincial equivalent of section 52(3) has "no application outside the employment context".

[53] Finally, the appellant argues that the exception at section 52(4)1 brings the email within the scope of the *Act*.

Part 1: collected, prepared, maintained or used

[54] The record at issue is an email prepared by board staff and sent to other staff members. Accordingly, I am satisfied that board has established part one of the three requirements for the application of section 52(3)3.

Part 2: meetings, consultations, discussions or communications

[55] I am also satisfied that the collection, preparation, maintenance or usage of the information contained in the email is directly related to meetings, consultations, discussions or communications arising from the grievance initiated by the union. Accordingly, I find that the board has established part two of the three requirements for the application of section 52(3)3.

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

[56] The issue I am to determine is whether the board's collection, preparation, maintenance or usage of the email was in relation to discussions about labour relations matters in which the board had an interest.

[57] The appellant submits that since the records contain information about the board's decision to bar contractors, the board is not entitled to rely on the exclusion at section 52(3)3 as the contractors in question are not in an employee relationship with the board. The appellant also asserts that the contractors are not subject to any collective agreement with the board. The appellant's evidence focuses on the subject-matter of the email and the relationship between the board and contractors. In my view, the subject-matter of the record, including the board's decision to bar contractors, is not determinative of the issue I am to determine. The exclusion at section 52(3) can apply to a broad category of information and can also apply to information that would be subject to the *Act* if the information was not used by the institution in a labour relations or employment-related matter [See Order PO-2157].

[58] Having regard to the evidence of the board and the record itself, I am satisfied that the board's use of the email had a substantial connection to and is about the grievance initiated by the union. The phrase "labour relations or employment-related matters" has been found to apply in the context of a grievance under a collective agreement [Orders M-832 and PO-1769]. In the circumstances, the email was prepared by the board after it met with the union to discuss the grievance. Though it appears that the appellant questions whether the grievance was properly before the parties or subject to the collective agreement, the fact remains that the board met with the union and discussed the grievance which resulted in the board's preparation of the email at issue. Accordingly, I am satisfied that the grievance constitutes a labour relations matter in which the board had an interest. Though the term "labour relations" generally

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].

[59] I have carefully reviewed the email, and find that its subject matter addresses the issues discussed at the grievance meeting. Accordingly, I find that there is substantially connection between the email and the grievance, and I find that the board has established part three of the three requirements for the application of section 52(3)3.

Exceptions to section 52(3)

[60] The appellant submits that the exception to the exclusionary provision at section 52(3) under section 52(4)1 applies to the email. This exception provides that the *Act* applies to "[a]n agreement between an institution and a trade union".

[61] I find that the exception at section 52(4)1 does not apply to the email on the basis that it does not constitute an agreement between the board and the union. In making my decision, I note that there is no evidence before me suggesting that the email was sent to the union and formed part of its agreement with the board. I also note that the email predates the signed agreement between the board and union.

[62] Accordingly, I find that section 52(3)3 applies to the email and as a result this record is excluded from the scope of the *Act*.

ORDER:

1. I order the board to disclose the portions of the minutes of settlement I found contains responsive information. For the sake of clarity, a highlighted copy of the record will be provided to the board.

2. I uphold the board's decision excluding the email from the scope of the *Act*.

3. I order the board to conduct a further search for records responsive to the appellant's request for copies of any decision of the board informing any contractor that it has been banned from the board's site (part 9 of the request). I also order the board to conduct a further search for any document or correspondence, including emails, which indicate the intention or decision of the board to bar any contractor (part 13 of the request).

4. I order the board to provide me with an affidavit from the individual(s) who conducted the search, confirming the nature and extent of the search conducted

for responsive records within 30 days of this interim order. At a minimum the affidavit should include information relating to the following:

(a) information about the employee(s) swearing the affidavit describing his or her qualifications and responsibilities;

(b) the date(s) the person conducted the search and the names and positions of any individuals who were consulted;

(c) information about the type of files searched, the search terms used, the nature and location of the search and the steps taken in conducting the search; and,

(d) the results of the search.

5. The affidavit referred to above should be sent to my attention, c/o Information and Privacy Commissioner/Ontario, 2 Bloor Street East, Suite 1400, Toronto, Ontario, M4W 1A8. The affidavit provided to me may be shared with the appellant, unless there is an overriding confidentiality concern. The procedure for the submitting and sharing of representations is set out in IPC Practice Direction 7.

6. If, as a result of the further search, the board identifies any additional records responsive to the request, I order the board to provide a decision letter to the appellant regarding access to these records in accordance with the provisions of the *Act*, considering the date of this order as the date of the request.

7. In order to verify compliance with order provision 1, I reserve the right to require a copy of the information disclosed by the board to be provided to me.

8. I remain seized of this appeal in order to deal with any outstanding issues arising from this appeal.

Original signed by: November 23, 2011
Jennifer James
Adjudicator