

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2694

Appeal MA10-461

Toronto District School Board

February 15, 2012

Summary: The board received a request for certain interview materials collected by an investigator retained by the board to examine complaints made under its human rights policy about the actions of certain board employees. The board argued that these records were excluded from the operation of the *Act* by virtue of the exclusionary provision in section 52(3). Based on the representations of the parties and the contents of the records, the decision to deny access on the basis of the exclusionary provision in section 52(3) was upheld.

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

Cases Considered: *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

OVERVIEW:

[1] The Toronto District School Board (the board) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to "all documents created and gathered in the preparation of the board's Human Rights Office investigation, Interim and Final Report into the complaint of [a named student] against the administration and certain staff of [a named school]." In particular, the requester sought access to all copies of:

1. the investigation notes of the [named investigators] used in the preparation of their findings
2. all interview notes made in the course of interviewing the witnesses, all statements, emails, testimony made by the witnesses and given to the investigator(s).

[2] In its decision, the board determined that the responsive records are not subject to the *Act* as a result of the application of the exclusionary provision in section 52(3) of the *Act*. As a result, the board denied access to the requested records.

[3] The requester, now the appellant, appealed the decision. No issues were resolved at mediation and the file was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*. I provided the board with a Notice of Inquiry and received its representations, portions of which contained confidential information. Accordingly, a severed version of the board's representations, along with a Notice of Inquiry, was provided to the appellant, who also submitted representations. The appellant's submissions were then shared with the board, which provided additional representations by way of reply.

RECORDS:

[4] The records consist of e-mails, an investigation timeline and contacts list and typewritten copies of interview notes and investigatory interviews.

ISSUES:

[5] The sole issue for determination in this appeal is whether the exclusionary provision in section 52(3) of the *Act* applies to the information contained in the records.

DISCUSSION:

Are the records excluded from the *Act* by virtue of the operation of the exclusionary provision in section 52(3)?

[6] Section 52(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:

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.

[7] 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*.

[8] For the collection, preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in paragraph 1, 2 or 3 of this section, 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.).]

[9] 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].

[10] 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].

[11] 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), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.)].

[12] 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

[13] The board relies on the application of section 52(3)3 to the responsive records. For section 52(3)3 to apply, it 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.

[14] 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 and 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.)].

[15] 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 and P-1369]
- litigation in which the institution may be found vicariously liable for the actions of its employee [Orders PO-1722, PO-1905 and *Ontario (Ministry of Correctional Services) v. Goodis*, cited above].

[16] 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)*].

[17] The records collected, prepared maintained or used by the Ministry 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].

Analysis and findings

[18] The records at issue in this appeal relate to investigations into allegations against board employees under the board's Human Rights Policy. The first investigation related to an allegation that the actions of a number of board employees at the appellant's son's school violated the board's Human Rights Policy. The second investigation involved a complaint filed by another individual alleging that she suffered discriminating actions at the hands of a board employee as a result of her involvement in the earlier complaint.

[19] The board submits that its Human Rights Policy imposes broad obligations on its staff to take positive steps to eliminate and address situations where discrimination and harassment exist. The reason behind the policy is to ensure that the board, through its staff, complies with its legal obligations under the *Ontario Human Rights Code*, thereby avoiding potential legal liability for the board under the *Code* or otherwise. The board submits that employees who fail to meet any of the obligations described in its Human Rights Policy may be subject to discipline, discharge or some other form of non-disciplinary correction, including counselling.

[20] In cases where an investigation is undertaken, it proceeds according to the board's Human Rights Operational Procedure which permits the board's Human Rights office to retain an external investigator to conduct an investigation on its behalf. In the cases which gave rise to the creation of the records at issue in this appeal, an external investigator was appointed and interviews were conducted with various involved staff

persons, as well as others with some knowledge of the allegations. The Board submits that the respondents to the complaints were board employees who were represented by their respective bargaining agents

[21] With respect to the first two components of the test under section 52(3), there appears to be no dispute that the records were collected, prepared, maintained or used by or on behalf of the board and that the records are in relation to meetings, consultations, discussions or communications between the investigator and the board, in accordance with the process outlined in the board's Human Rights Operational Procedure. The board hired an investigator to look into the allegations on its behalf and, in doing so, the investigator had meetings, consultations and communications with board employees. The records at issue in this appeal were created as a result of these actions. Therefore, I conclude that the first two parts of the test under section 52(3) have been met.

[22] With respect to the third part of the test under section 52(3)3, in its initial submissions the board identifies the connection between the subject matter of the records and employment and/or labour relations issues affecting it and its employees. It argues that the records indicate that the human rights policy complaints that were the subject of the records arose as a result of actions by the board's employees and addressed what were perceived to be misconduct on the part of those staff. The board points out that "the human rights policy expressly sets out expectations for staff behaviour and potential employment sanctions for its breach". It also indicates that each of the employees are represented by a bargaining agent or voluntary association who have a collective bargaining relationship with it, and that "each employee attended the interview process [with the human rights policy investigator] with a respective trade union [representative]."

[23] The appellant takes the position that her request "does not seek the disclosure of information related to labour relations or to employment-related matters, and thus s. 52(3) of the *MFIPPA* does not exempt the information from disclosure." Instead she argues that the request seeks:

. . . documents related to the investigation and resolution of a human rights complaint made on behalf of a student against the administration and particular staff members of a school within the [board]. These documents relate to the role of the [board] as an overseer of the educational environment of students within the district, not as an employer, and the matters of interest are not connected to collective bargaining, human resources or staff relations.

[24] The appellant goes on to argue that, unlike the process that takes place following a complaint against a police officer under the *Police Services Act*, complaints under the board's Human Rights Operational Procedure are not aimed at correcting the

behaviour of the subject individuals, but rather seek to remedy the identified problem in other ways, including non-disciplinary and systemic actions. The appellant argues that the outcomes that flow from investigations under the board's Human Rights Policy are "related more to establishing whether the [board] should be responsible for taking action to address the existence of discrimination than to the relationship that exists between the [board] as employer of the specific employees named in the complaint."

[25] In its reply representations, the board submits that the decision in *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner* [cited above] "rejected any interpretation that qualified the term 'in relation to' as requiring a 'sufficient' or 'substantive' connection between the records and the grounds in s. 52(3)." Rather, the board argues that the court found "there must simply be some form of connection between the records and the grounds identified in the section."

[26] Based on my review of the records and the representations of the parties, I am satisfied that the collection, preparation, maintenance or use of the records under consideration in this appeal, the interview materials collected by the investigator, was "in relation to" employment-related matters in which the institution has an interest. The appellant may be correct in identifying that a human rights investigation into the actions of board employees may result in systemic or other changes to board policies. In this case, however, I find that the board has established a sufficiently strong connection between the contents of the records and an employment-related matter, specifically related to the management of its employees, to warrant the application of the exclusion in section 52(3).

[27] Accordingly, I find that the information in the records at issue is excluded from the scope of the *Act* and I dismiss the appeal.

ORDER:

I dismiss the appeal.

Original Signed By:

Donald Hale
Adjudicator

February 15, 2012
