

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4258

Appeal MA20-00380

Peel District School Board

September 29, 2022

Summary: This order deals with an access request to the Peel District School Board (the board) for specific pages of records located by the board in response to a previous access request. The board granted partial access to responsive records and withheld information pursuant to the labour relations or employment-related matters exclusion in section 52(3) of the *Act* and the discretionary exemption in section 7(1) (advice or recommendations). During mediation, the board issued two supplementary decisions, which disclosed additional records to the appellant and claimed additional exemptions. In this order, the adjudicator finds that the records are excluded from the *Act* by section 52(3)3 of the *Act* and dismisses the appeal.

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

Orders and Investigation Reports Considered: Orders M-967, M-996, MO-2694, MO-3227 and PO-3893-I.

OVERVIEW:

[1] By way of background, the appellant was employed as a teacher by the Peel District School Board (the board) and was on medical leave from his position. When the board determined that there was not a position which met his required medical accommodations, he filed a grievance. He was represented by his union during this grievance and a subsequent investigation into his conduct while employed as a teacher for the board.

[2] The appellant filed a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) with the board for specific numbered pages of records that were located in response to another access request he previously filed, but that the board did not grant access to. The records relate generally to the investigation and grievance.

[3] The board located the 48 identified pages and issued an access decision to the appellant granting him partial access to six pages. The board claimed the application of the labour relations exclusion in section 52(3) to deny him access to the information withheld in the six pages and the entirety of the 42 pages. The board also claimed, in the alternative, the application of the discretionary exemption in section 7(1) (advice or recommendations) to withhold some of the records.

[4] The appellant appealed the board's decision to the Office of the Information and Privacy Commissioner of Ontario (IPC).

[5] During mediation, the board conducted a second search for records and located an additional 28 pages of responsive records. The board issued a supplementary access decision, disclosing ten of the pages in full and withholding the remainder under section 52(3) and, in the alternative, section 7(1) for several of the records. The board later issued a further supplementary access decision in which it raised the personal privacy exemption in section 38(b) to deny access to some of the records.

[6] The board also advised the appellant it withheld portions of record G-25 on the basis that it was not responsive to his request. The appellant confirmed he does not pursue access to the information identified as not responsive. Accordingly, this information is not at issue.

[7] Mediation could not resolve the appeal and the appeal was transferred to the adjudication stage of the appeals process, where an adjudicator may conduct an inquiry.

[8] An adjudicator was assigned to this appeal and she decided to conduct an inquiry. She invited the board to make representations in response to a Notice of Inquiry, which summarizes the facts and issues under appeal. Noting that the records withheld under section 7(1) also appeared to contain the appellant's personal information, she decided to consider the possible application of section 38(a) and 7(1) for the information claimed exempt under section 7(1). The board submitted representations.

[9] The appellant was then invited to make representations in response to the Notice of Inquiry and the board's non-confidential portions of its representations. The appellant submitted representations. The representations of the parties were shared in accordance with the IPC's *Code of Procedure and Practice Direction 7*.

[10] This appeal was then transferred to me to continue with the adjudication of the

appeal.¹ In this order, I find that the records are excluded from the *Act* under section 52(3)3 and I dismiss the appeal.

RECORDS:

[11] The records and exemptions are described by the board as follows:

Page number	Description	Board's Decision	Exemption/exclusion claimed
G-21, G-25	Correspondence related to grievance complaint	Partial access	Section 52(3) Section 38(a)/7
G-22, G-23	Correspondence related to grievance complaint	Withheld in full	Section 52(3)
G-24	Internal correspondence related to the appellant	Withheld in full	Section 52(3) Section 38(a)/7 Section 38(b)
G-27, G-28, G-29, 133	Correspondence related to grievance complaint	Partial access	Section 52(3)
20, 20(a)-(l) ²	Email and attachments	Withheld in full	Section 52(3) Section 38(a)/7 Section 38(b)
21-40, 71-72	Correspondence related to investigation	Withheld in full	Section 52(3) Section 38(a)/7
99, 108-114	Correspondence related to investigation	Withheld in full	Section 52(3)
115-116	Correspondence related to investigation	Withheld in full	Section 52(3) Section 38(a)/7
124-126, 137	Correspondence related to investigation into employment-related matter	Withheld in full	Section 52(3)
138	Follow up to page 137	Withheld in full	Section 52(3)
139	Correspondence related to investigation into employment-related matter	Withheld in full	Section 52(3) Section 38(a)/7

¹ I have reviewed all the file materials and representations and have determined that I do not require further information before making my decision.

² As advised by the board, these records were mistakenly labeled as G-20(a)-G-20(l) on the upper right corner of the records.

140-141	Correspondence related to investigation into employment-related matter	Withheld in full	Section 52(3)
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[12] The board explains that the records beginning with the letter 'G' all pertain to the appellant's grievance file, namely, G-21, G-22, G-23, G-24, G-25, G-27, G-28, G-29 and 133 (the grievance records). The remaining records, namely, 20, 20(a)-(l), 21-40, 71-72, 99, 108-116, 124-126 and 137-141, were pulled from other locations, including but not limited to the board's investigation file pertaining to the appellant (the investigation records). It also explains that, in its representations, the records have been assessed in two groups: those pertaining to the grievance file and those pertaining to the investigation file (collectively, the records).

DISCUSSION:

[13] Because the board claims that the records are excluded from the *Act* under section 52(3), I must first consider that issue before the exemptions, that the board relied on in the alternative. As explained below, I find that the records are excluded from the *Act* by section 52(3)3.

[14] Section 52(3) of the *Act* excludes certain records held by an institution that relate to labour relations or employment matters. If the exclusion applies, the record is not subject to the access scheme in the *Act*, although the institution may choose to disclose it outside of the *Act's* access scheme.³

[15] The purpose of this exclusion is to protect some confidential aspects of labour relations and employment-related matters.⁴ 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*. If section 52(3) applied at the time the record was collected, prepared, maintained or used, it does not stop applying at a later date.⁵

[16] The type of records excluded from the *Act* by section 52(3) are those relating to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue.⁶

[17] Section 52(3) does not exclude all records concerning the actions or inactions of an employee of the institution simply because their conduct could give rise to a civil

³ Order PO-2639.

⁴ *Ontario (Ministry of Community and Social Services) v. John Doe*, 2015 ONCA 107 (CanLII).

⁵ *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. 509 (*Solicitor General*).

⁶ *Ontario (Ministry of Correctional Services) v. Goodis*, 2008 CanLII 2603 (ON SCDC) (*Ministry of Correctional Services*).

action in which the institution could be held vicariously liable for its employees' actions.⁷

Section 52(3)3: labour relations or employment-related matters in which the institution has an interest

[18] The board takes the position that the records are excluded from the *Act* under the labour relations and employment-related matters exclusion at section 52(3)3.

[19] 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:

...

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

[20] For the collection, preparation, maintenance or use of a record to be "in relation to", there must be "some connection" between them.⁸

[21] The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to similar relationships. The meaning of "labour relations" is not restricted to employer-employee relationships.⁹

[22] 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.¹⁰

[23] 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 use was in relation to meetings, consultations, discussions or communications; and

⁷ *Ministry of Correctional Services*, cited above.

⁸ Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

⁹ *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.) (*Minister of Health and Long-Term Care*); see also Order PO-2157.

¹⁰ Order PO-2157.

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

[24] While the appellant does not specifically address this issue in his representations, he points out that the board may disclose any records that are excluded from the *Act*.¹¹

[25] The board is claiming this exclusion for portions of records G-21, G-25, G-27, G-28, G-29 and 133. The IPC has consistently taken the position that the exclusions at section 52 are record- and fact-specific. In order to qualify for an exclusion, a record is examined as a whole. The whole-record method of analysis is also described as the "record-by-record" approach.¹²

[26] In Order PO-3893-I, Adjudicator Fadel adopted this approach and found that the application of an exclusion must be considered in the context of the whole record for records where an institution claimed the exclusion applied in part. As a result, he considered the application of the exclusion to the whole record in order to determine the appellant's access rights, and, while using the record-by-record approach, he found that the record was excluded from the provincial *Freedom of Information and Protection of Privacy Act (FIPPA)* under section 65(6), the provincial equivalent of section 52(3). Adjudicator Fadel further found that the institution's decision to disclose some of the record was not improper as section 65(6) is an exclusion, not a mandatory exemption, holding that an institution may choose to disclose information outside of the *FIPPA*.

[27] I agree with and adopt this approach that the application of the section 52(3)3 exclusion must be considered in the context of the whole record, even though the board has only applied the section 52(3)3 exclusion to portions of records G-21, G-25, G-27, G-28, G-29 and 133.

Part 1: collected, prepared, maintained or used

[28] To satisfy part 1 of the section 52(3)3 test, the board must establish that the records were collected, prepared, maintained or used by an institution or on its behalf.

[29] The board submits that the grievance records were collected, prepared, maintained and used by the board's employees as part of the appellant's disability claim, accommodation request and grievance. It also submits that the investigation records were collected, prepared, maintained and used by the board's employees as

¹¹ The appellant also refers to sections 31 and 32 of the *Act* and indicates that he consents to the disclosure of certain information related to himself. However, these sections do not relate to the access to information provisions of the *Act* and are therefore not applicable to his access request. Moreover, my finding below that the records are excluded from the *Act* also means that these provisions do not apply to the records.

¹² See Order PO-3642, where Adjudicator Ryu held that "the question is whether the collection, preparation, maintenance or use of the record, as a whole, is sufficiently connected to an excluded purpose so as to remove the entire record from the scope of the [applicable access to information legislation]."

part of an investigation into the appellant's conduct.

[30] I have reviewed the records and I find that they consist of email communications, notes and interview questions with responses. I confirm that they originated with the board's employees, and were either emails sent by the board's employees, notes of recorded information prepared and maintained by its employees, or interview questions prepared and used by its employees, with responses to those interview questions collected by its employees. Accordingly, I find that the records were collected, prepared, maintained and used on the board's behalf by its employees and the first part of the test has been met.

Part 2: meetings, consultations, discussions or communications

[31] To satisfy part 2 of the section 52(3)3 test, the board must establish that its collection, preparation, maintenance or use of the records was in relation to meetings, consultations, discussions or communications.

[32] The board submits that all of the records were collected, prepared, maintained and used in relation to various meetings, consultations, discussions and communications, and that this is clear from the face of the records. It explains that these records are email communications between the board's employees, notes prepared by its employees, and interview questions with responses, dealing with the appellant's disability claim, accommodation request and grievance and an investigation into the appellant's conduct.

[33] After reviewing the records, I find that the board's collection, preparation, maintenance or use of the records was in relation to meetings, consultations, discussions and communications about the appellant's disability claim, accommodation request and grievance and an investigation into the appellant's conduct. Accordingly, part 2 of the three-part test has been met.

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

[34] To satisfy part 3 of the section 52(3)3 test, the board must establish that the meetings, consultations, discussions or communications that took place were about labour relations or employment-related matters in which it has an interest.

[35] 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.¹³

[36] The term "employment-related matters" refers to human resources or staff

¹³ *Minister of Health and Long-Term Care*, cited above; see also Order PO-2157.

relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship.¹⁴

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

- a job competition;¹⁵
- an employee's dismissal;¹⁶
- a grievance under a collective agreement;¹⁷
- disciplinary proceedings under the *Police Services Act*;¹⁸
- a "voluntary exit program";¹⁹
- a review of "workload and working relationships";²⁰ and
- the work of an advisory committee regarding the relationship between the government and physicians represented under the *Health Care Accessibility Act*.²¹

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

- an organizational or operational review;²² or
- litigation in which the institution may be found vicariously liable for the actions of its employee.²³

[39] The phrase "employment related matters 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.²⁴ In *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, the Ontario Court of Appeal stated that section 65(6)3, the provincial equivalent of section 52(3)3:

¹⁴ Order PO-2157.

¹⁵ Orders M-830 and PO-2123.

¹⁶ Order MO-1654-I.

¹⁷ Orders M-832 and PO-1769.

¹⁸ Order MO-1433-F.

¹⁹ Order M-1074.

²⁰ Order PO-2057.

²¹ *Minister of Health and Long-Term Care*, cited above.

²² Orders M-941 and P-1369.

²³ Orders PO-1722, PO-1905 and *Ministry of Correctional Services*, cited above.

²⁴ *Solicitor General*, cited above.

...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 [footnote omitted], and the wording of the subsection as a whole, the words, "in which the institution has an interest" in subclause 3 *operate simply to restrict the categories of excluded records to those relating to the institution's own workforce* where the focus has shifted from "employment of a person" to "*employment-related matters*". (emphasis added)

[40] The decision of the Divisional Court in *Ontario (Ministry of Correctional Services) v. Goodis* went on to confirm that section 65(6)3 must be interpreted narrowly in light of the purposes of the *Freedom of Information and Protection of Privacy Act*, the provincial equivalent of the *Act*, so as to exclude only those records that actually relate to employment matters in which the institution has an interest. The Divisional Court stated:

Moreover, the words of subclause 3 of s. 65(6) make it clear that the records collected, prepared, maintained or used by the Ministry in relation to meetings, consultations or communications are excluded only if those meetings, consultations, discussions or communications are about labour relations or "employment-related" matters in which the institution has an interest.²⁵ Matters related to the actions of employees, for which an institution may be responsible are not employment-related matters for the purpose of section 52(3).²⁶

[41] The board submits that the grievance records relate to email communications, notes and interview questions related to the appellant's disability claim, accommodation request and grievance while employed as a teacher for the board. The board points to the title at the top of each of these records, which says "Disability Management Claim Details". In an affidavit sworn by an employee of the board, she advises that these records were taken from the appellant's grievance file.

[42] The board also submits that the investigation records relate to email communications, notes and interview questions with responses related to an investigation into the appellant's conduct while employed as a teacher for the board. The affidavit of the board's employee states that the investigation records were taken from the board's investigation file and employee file.

[43] The board submits that all of the records have "some connection" to a labour and employment matter. It refers to Order MO-2694, where the IPC found that for a record to be exempt under section 52(3), it is sufficient that there be "some

²⁵ *Ministry of Correctional Services*, cited above, at para. 23.

²⁶ *Ministry of Correctional Services*, cited above.

connection” to a labour and employment matter. In that case, the records served several purposes, including a labour and employment related purpose and also involved an investigation with a potential finding of employee misconduct and disciplinary consequences. In that order, the records were excluded under section 52(3).

[44] It also submits that the IPC has upheld the section 52(3) exclusions for records pertaining to accommodation claims. In Order M-996, the IPC determined that “meetings, consultations, discussions or communications” that related to the institution’s endeavours to accommodate an employee with a disability” were all “employment-related matters.” The board submits that several of the records in this appeal similarly deal with the appellant’s disability and accommodation claims while employed by the board.

[45] The board further submits that records relating to an investigation into potential misconduct by an employee while in the course of employment has also been excluded by the IPC under section 52(3). In Order MO-3227, the adjudicator upheld the school board’s decision to deny access to the school board’s internal audit report and found that as the main focus of the report was the investigation into potential misconduct of a board employee in the course of their employment, it was excluded under section 52(3) as pertaining to labour relations or employment matters. In that appeal, the adjudicator also found that the school board had an “interest” in the matter as it involved the alleged misconduct of one of its employees while in the course of employment.

[46] The board submits that all of the records in this appeal relate to either, or all, of the following issues: general labour/employment matters, accommodation and/or disability matters involving the appellant while employed by the board, grievance view documents, and investigation file documents. Therefore, it submits that all of the records are excluded on the basis of section 52(3) of the *Act*.

Analysis and findings

[47] After reviewing the records, I find that the meetings, consultations, discussions and communications were about labour relations and employment-related matters in which the board has an interest. The records relate to the board’s own employee, the appellant, and involve labour relations and employment-related matters related to the appellant in which the board has an interest as the appellant’s employer.

[48] I accept that the records clearly relate to the board’s management of one of its employees, namely, a disability claim and an accommodation request made by the appellant, a grievance filed by the appellant and an investigation into the conduct of the appellant. I have considered the board’s reference to Orders M-996, MO-2694 and MO-3227. I confirm that the matters being discussed in the records relate to the employment of the appellant himself and that the communications are about employment-related matters in which the board has an interest as an employer.

[49] I have also considered Order M-967, where the IPC found that a grievance filed by a member of a union pursuant to a collective agreement with an institution relates to "labour relations" for the purposes of section 52(3)3. I confirm that the matters being discussed in the records also relate to a grievance filed by the appellant, accordingly, they relate to labour relations between the board and the appellant's union.

[50] As a result, I find that the records relate to meetings, consultations, discussions and communications about labour relations and employment-related matters, where the board is acting as an employer and addressing its relationship with the appellant, as an employee of the board, namely, a disability claim, an accommodation request, a grievance related to the appellant, as well as an investigation into the conduct of the appellant.

[51] Accordingly, as all three parts of the three-part test have been met, I find that the records are excluded from the *Act* pursuant to section 52(3)3 of the *Act*. I will now consider whether any of the exceptions in section 52(4) of the *Act* applies.

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

[52] If the records fall within any of the exceptions in section 52(4), the records are not excluded from the application of the *Act*. Section 52(4) states that the *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.

[53] The appellant submits that the exception in section 52(4)1 applies. With reference to Order MO-1914, he explains that since he requested an end to his grievance in an email to his union, he is therefore requesting records that relate to the agreement between the board and his union, which ended his grievance.

Analysis and findings

[54] Based on my review of the records, I do not accept that the records include an agreement between the board and a union. In fact, none of the records can be

characterized as agreements for the purposes of section 52(4). Accordingly, I find that the exception in section 52(4)1 of the *Act* does not apply to override the section 52(3)3 exclusion. I also find that none of the other exceptions in section 52(4) apply in the circumstances of this appeal, given the nature of the records.

[55] As I have found that all three parts of the section 52(3)3 test have been met and that none of the exceptions in section 52(4) apply, I find that the records are excluded from the *Act* pursuant to section 52(3)3 of the *Act*. Accordingly, I uphold the board's decision to apply the exclusion to the records and dismiss the appeal. In light of this, I do not need to consider the possible application of any of the exemptions claimed by the board in the alternative.

[56] While the appellant is correct that the board may disclose any records that are excluded from the *Act*, I cannot review the board's decision to not disclose such records.

ORDER:

I find that the records are excluded from the *Act* and I dismiss the appeal.

Original signed by: _____
Valerie Silva
Adjudicator

September 29, 2022 _____