

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4354

Appeal MA22-00301

Dufferin-Peel Catholic District School Board

March 27, 2023

Summary: The Dufferin-Peel Catholic District School Board (the board) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to security footage depicting an interaction between a teacher and his school's principal. The board located a responsive record and relying on the exclusion at section 52(3)3 of the *Act* (labour relations or employment records) denied access to it, in full. In this order, the adjudicator finds that the video security footage is not excluded from the *Act* under section 52(3)3 and orders the board to issue a new access decision without relying on the exclusion.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990, c M.56, section 52(3)3.

Orders Considered: Orders MO-2556, MO-2694, MO-3018, MO-3227, MO-3238, MO-3504, MO- MO-4119, MO-4149 and P-1252.

Cases Considered: *Ontario (Ministry of Correctional Services) v. Goodis*, (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.).

OVERVIEW:

[1] This appeal relates to a request made by a teacher for security footage that shows an interaction between him and his school's principal. The interaction resulted in a complaint by the principal and a subsequent workplace investigation.

[2] Specifically, the Dufferin-Peel Catholic District School Board (the board) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*) for access to security footage at specified locations in a specified school on a specified date and time. The request stated the following:

I am seeking security footage of myself from [named school] within the Dufferin-Peel Catholic District School Board. The school's address is [specified address]. The footage is of me in the front foyer of the school. The date and time of the footage is Wednesday [specified date], from 2:15 pm to 2:30 pm. (The video is of me by the [specified location] and in front of the [specified location].)

[3] The board located the footage in question and relying on the exclusion at section 52(3) of the *Act* (labour relations or employment records) denied access to it, in full.

[4] The requester (now the appellant) appealed the decision to the Information and Privacy Commission of Ontario (the IPC).

[5] At mediation the board confirmed its position that the record is excluded from the scope of the *Act* under section 52(3)3.

[6] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeals process where an adjudicator may decide to conduct an inquiry under the *Act*.

[7] I decided to conduct an inquiry and sought representations from the board on the facts and issues set out in a Notice of Inquiry. The board provided responding representations. I then sought and received representations from the appellant.

[8] In this order, I find that the video security footage is not excluded from the *Act* under section 52(3)3 and order the board to issue a new access decision.

RECORDS:

[9] At issue in this appeal is video security footage.

DISCUSSION:

Does section 52(3)3 exclude the video security footage from the Act?

[10] 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.¹

[11] The board relies on section 52(3)3 which 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.

[12] 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*.

[13] 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.²

[14] 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.³

[15] 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 action in which the institution could be held vicariously liable for its employees' actions.⁴

[16] For the collection, preparation, maintenance or use of a record to be "in relation to" one of the three subjects mentioned in this section, there must be "some connection" between them.⁵

[17] The "some connection" standard must, however, involve a connection relevant to the scheme and purpose of the *Act*, understood in their proper context. For example, given that accountability for public expenditures is a core focus of freedom of information legislation, accounting documents that detail an institution's expenditures on legal and other services in collective bargaining negotiations do not have "some connection" to labour relations.⁶

¹ Order PO-2639.

² *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.

³ *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.). The CanLII citation is "2008 CanLII 2603 (ON SCDC)."

⁴ *Ministry of Correctional Services*, cited above.

⁵ Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

⁶ Order MO-3664, *Brockville (City) v. Information and Privacy Commissioner, Ontario*, 2020 ONSC 4413 (Div Ct.).

[18] 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.⁷

[19] 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.⁸ 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.⁹

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

[20] 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
3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

The board’s representations

[21] The board confirms that the responsive record is a video recording captured by a board surveillance camera located in the school where the appellant teaches; the video security footage captures an interaction between the appellant and the school principal on the date set out in the appellant’s request.

[22] The board submits that the video documenting this interaction is the subject matter of a complaint by the principal and a subsequent workplace investigation into the appellant’s alleged threatening and unprofessional conduct.

[23] It submits that the purpose of the investigation was to look into allegations of employee misconduct and determine whether any corrective or disciplinary action related to the appellant’s employment was warranted. It adds that the investigation resulted in a finding of misconduct and a consequent suspension.

[24] The board submits that the video footage was collected, maintained and used by

⁷ *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.

⁸ Order PO-2157.

⁹ *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above.

the board employee relations department as part of a workplace investigation file into allegations of employee misconduct. It says that the video footage was used in relation to various meetings, consultations, discussions, and communications related to the investigation into allegations of employee misconduct. It submits that this includes an investigative meeting that was attended by the appellant and his union representative, where the appellant was shown the record and provided an opportunity to provide information relating to the incident. The board submits that the video was directly a part of the investigation and used by the board as part of its assessment, review and determination of findings in relation to the investigation.

[25] The board submits that in Order MO-2694, the IPC found "some connection" to a labour relations or employment-related matter, where the records at issue could serve multiple purposes. The board submits that the video at issue in the appeal before me has a direct connection to a labour and employment matter and should thus be excluded on that basis.

[26] The board also relies on Order MO-3227, which dealt with a request for a copy of the school board's internal audit report. In that order the adjudicator found that as a primary focus of the report involved an investigation into potential misconduct of a board employee in the course of their employment, section 52(3) applied.

[27] The board also references Order MO-3504, where the adjudicator found that section 52(3)3 applied to a number of records, including a photograph, since they were being used to assist in the determination of whether disciplinary action should be taken against an employee.

[28] The board adds that in Order MO-3018, an appeal that arose out of a request for access to records relating to the surveillance of a union official by the employer, videos relating to a workplace Ethics Hot-Line complaint were found to be excluded from the *Act* by virtue of section 52(3)3.

[29] Finally, relying on Order P-1252, the board submits that IPC jurisprudence has determined that there need not be an initial connection between the record and the labour relations purpose provided that, at some stage, it becomes connected to such a purpose.

The appellant's representations

[30] The appellant's representations and attachments focus on his version of the events that transpired on the day in question and subsequently. He asserts that he was harassed and sets out his concerns regarding the conduct of the board and its employees regarding the events of that day and thereafter. He asserts that his allegations were not properly investigated and the video was neither properly viewed nor used in accordance with the board's Video Surveillance Systems in Schools Policy, a copy of which he included as an attachment to his representations.

[31] He submits because the board has withheld access to the video in order to conceal their ongoing misconduct and impropriety, section 53(2)3 should not apply.

Analysis and finding

[32] In my view, section 52(3)3 does not apply to the video security footage.

[33] As I discuss in more detail below, previous IPC orders have drawn a distinction between records created in the normal course of an institution's operations, and records that were collected, prepared, maintained and used by others who subsequently investigate complaints.¹⁰

[34] In Order MO-2556, Adjudicator Frank DeVries reviewed in detail the jurisprudence relating to the distinction that has been made between records that document what he described as "the initial, day-to-day police investigation into circumstances involving the appellant" and records relating to "subsequent complaint investigations and/or other proceedings." Specifically, Adjudicator DeVries articulated the distinction that has been made in previous orders and the decision of the Divisional Court in *Ontario (Ministry of Correctional Services) v. Goodis*¹¹ as follows:

... As the records at issue in this appeal relate to the initial, day-to-day police investigation into circumstances involving the appellant, which occurred within the jurisdiction of the Police, they do not fall within the exclusionary provision in section 52(3). Although it may well be that subsequent complaints about the actions of the investigating officer resulted in further investigations and/or the creation of additional files (of which I have very little evidence), the original records that relate to the original investigations into the appellant's actions are not removed from the scope of the *Act* simply because they were reviewed or considered as part of a review of the officer's conduct under other legislation. Any such review does not alter the character of the original records, which were prepared for the purposes of the investigations conducted by the officer (see also Order MO-2504). Accordingly, I find that the original incident sheet and general occurrence report that form the records at issue in this appeal are not excluded from the operation of the *Act* simply because of their possible inclusion or review in subsequent complaint investigations and/or other proceedings.

[35] In my view, although the context is different, this rationale is equally applicable to the case before me. This is a request for a record that documents the events of that day as captured contemporaneously by a security camera in the school. Although it may exist in other places, the request is for ongoing security video collected on a specified date. The board has made no argument to suggest that security camera's initial

¹⁰ See, for example, Orders M-927, MO-2131, MO-2556 and MO-4119.

¹¹ Cited above. Also see Orders MO-3238, MO-4119 and MO-4149.

collection of the video was for the purposes of the discipline investigation. In other words, the security video footage would have existed whether or not the investigation occurred.

[36] As a result, I find that the video security footage is not excluded from the scope of the *Act* under section 52(3)3. As mentioned, the request was for the video security footage taken on a specific date at a specific time, that was captured in the board's day to day operations, not for records related to the subsequent complaint into the appellant's conduct, which occurred after the video was recorded. Therefore, I find that the record was not created for a labour relations or employment-related purpose.

[37] Accordingly, I find that the record was not collected, prepared, maintained or used in relation to meetings, consultations, discussions or communications about *labour relations or employment related matters in which the institution has an interest*, under section 52(3)3 of the *Act*. The words "labour relations or employment related matters in which the institution has an interest" are found in the third part of the three-part test for section 52(3)3. As all three parts of the test must be met for the exclusion to apply, and the third part does not apply, the record does not qualify for exclusion.

[38] In drawing this conclusion, I find that the orders relied upon by the board are distinguishable on their facts or do not reflect the evolution of the IPC's approach to the issue. The request at issue in Order MO-2694 was for certain interview materials collected by an investigator retained by the Toronto District School Board to examine complaints made under its human rights policy about the actions of certain of its employees. The request at issue in Order MO-3227 was for a copy of an internal audit report, not a record of the nature before me. The request at issue in Order MO-3504 was made in the context of a request for an entire investigation file and the record at issue in Order MO-3018 was for the results of a specific surveillance initiative, rather than video footage that would have existed in any event. Finally, the records at issue in Order P-1252 were all sourced from an employee's centralized employment file and pertained to the employee's retirement or study leave, being created for that purpose. That being said, to the extent that the adjudicator's findings in Order P-1252, issued in 1996, may be considered to be in conflict with my conclusion in this appeal I respectfully decline to follow it. As reflected in Orders MO-2556, MO-3238, MO-4119 and MO-4149, IPC jurisprudence has evolved since Order P-1252 was issued and in my view the IPC's current approach better reflects the accountability purposes of the *Act*.¹²

[39] In summary, I find that the exclusionary provision in section 52(3)3 does not apply to the video security footage. Accordingly, I find that the video security footage falls within the scope of the *Act*.

[40] I will therefore order the board to issue another access decision to the appellant,

¹² See in this regard the discussion in *Ontario (Ministry of Community and Social Services) v. Doe*, 2014 ONSC 239, upheld in *Ontario (Community and Social Services) v. John Doe*, 2015 ONCA 107.

in accordance with the terms of the *Act*.

ORDER:

1. I do not uphold the decision of the board.
2. I order the board to issue a new decision to the appellant, without relying on the section 52(3) exclusion. For the purposes of the timelines the board must adhere to, the date of this order is to be treated as the date of the request.
3. I order the board to provide this office with a copy of the new decision letter that it issues to the appellant.

Original signed by: _____
Steven Faughnan
Adjudicator

_____ March 27, 2023