Information and Privacy Commissioner,
Ontario, Canada

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

RECONSIDERATION ORDER MO-4463-R

Appeal MA22-00301

Order MO-4354

Dufferin-Peel Catholic District School Board

November 23, 2023

Summary: The Dufferin-Peel Catholic District School Board (the board) submitted a request for reconsideration of Order MO-4354, claiming a jurisdictional defect. In this reconsideration order, the adjudicator finds that the board has not established any of the grounds for reconsideration in section 18.01 of the IPC's *Code of Procedure*, including a jurisdictional defect in section 18.01(b), denies the reconsideration request and orders the board to comply with Order MO-4354.

Statutes Considered: IPC *Code of Procedure*, section 18.01(b).

Orders Considered: Orders M-957, M-1107, MO-2131, MO-2556, MO-2589, MO-3238, MO-4119, MO-4149, MO-4354, P-1252, PO-2538-R, PO-2703 and PO-3062-R.

Cases Considered: *Chandler v. Alberta Assn. of Architects*, 1989 CanLII 41 (SCC); *Ontario* (*Solicitor General*) *v. Ontario* (*Assistant Information and Privacy Commissioner*), 2001 CanLII 8582 (ON CA), leave to appeal refused [2001] S.C.C.A. No. 509; *Ontario* (*Ministry of Community and Social Services*) *v. Doe*, 2014 ONSC 239, appeal dismissed *Ontario* (*Ministry of Community and Social Services*) *v. John Doe* 2015 ONCA 107; *Ontario* (*Attorney General*) *v. Toronto Star* 2010 ONSC 991; *Ontario* (*Attorney General*) *v. Information and Privacy Commissioner*, 2009 CanLII 9740 (ON SCDC); *Ontario* (*Correctional Services*) *v. Goodis*, 2008 CanLII 2603 (ON SCDC).

OVERVIEW:

[1] This reconsideration decision addresses the request of the Dufferin-Peel Catholic District School Board (the board) that the Information and Privacy Commissioner of Ontario (the IPC) reconsider Order MO-4354. The appellant made a request to the board 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 board located responsive video security footage. The board issued a decision denying access to the footage in question on the basis that it was excluded from the application of the *Act* under the exclusion in section 52(3)3 (employment or labour relations).

[2] Order MO-4354 found that the video security footage is not excluded from the *Act* under section 52(3)3 and ordered the board to issue a new access decision.

[3] The board requested a reconsideration of Order MO-4354 on the ground that there is a jurisdictional defect under section 18.01(b) of the IPC's *Code of Procedure* (the *Code*).[1] The board's reconsideration request included submissions to the IPC on the grounds for reconsideration as well as the grounds for a stay. I then sought representations from the appellant on the grounds for a stay only, which were shared with the board for reply. The board provided responding representations on the stay. I granted an interim stay pending my decision on whether a full stay is appropriate.

[4] I have decided to issue a decision on the board's reconsideration request. In light of my determinations in this order, it is not necessary for me to determine whether a full stay should be granted.

[5] For the reasons that follow, I find that the board has not established that there is a jurisdictional defect in Order MO-4354 as contemplated by section 18.01(b) of the *Code*. I deny the reconsideration request, lift the interim stay of Order MO-4354 and order the board to comply with Order MO-4354.

DISCUSSION:

[6] The sole issue in this decision is whether there are grounds under section 18.01(b) of the *Code* to reconsider Order MO-4354.

[7] The IPC's reconsideration criteria and procedure are set out in section 18 of the *Code*. Section 18.01 sets out the grounds for reconsideration. Given the board's reconsideration request, only section 18.01(b) of the *Code* is relevant. It reads:

[1] The board has not claimed any of the other grounds for reconsideration under section 18.01 of the *Code*.

> 18.01 The IPC may reconsider an order or other decision where it is established that there is:
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> (b) some other jurisdictional defect in the decision; or
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> 18.02 The IPC will not reconsider a decision simply on the basis that new evidence is provided, whether or not that evidence was available at the time of the decision.

[8] Ordinarily, under the common-law principle of *functus officio*, once a decision-maker has determined a matter, he or she does not have jurisdiction to consider it further.[2] I am *functus* unless the party requesting the reconsideration - in this case, the appellant - establishes one of the grounds in section 18.01 of the *Code*. The provisions in section 18.01 summarize the common law position acknowledging that a decision-maker has the ability to re-open a matter to reconsider it in certain circumstances.[3]

The boards reconsideration request

[9] The board takes the position that the IPC committed a jurisdictional defect in its interpretation of section 52(3)3.

[10] The board submits that the IPC erred in interpreting section 52(3)3 as only applying to records if their initial purpose at the time of collection is related to a labour relations or employment matter. Referencing paragraph 36 of Order MO-4354, the board submits that I erroneously took a restrictive approach to interpreting the scope of section 52(3)3 which is not borne out by the language of the section nor consistent with prior court decisions.

[11] The board submits:

> … the IPC finds that s.52(3) does not apply because the record was not "created" for a labour relations or employment purpose. The Institution first notes that the concept of creation is not expressly found in section 52(3).
>
> Having said this, the Institution presumes that the word the IPC intended to use was "collection" which is found in section 52(3), and which best describes the initial recording of data as amongst the four types of activities found in the introductory language to the section.
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> However, by limiting its focus to "collection" the Institution submits the IPC has read out of the *Act* the other actions which lead to exclusion of

[2] *Functus officio* is a common law principle which means that, once a decision-maker has determined a matter, they have no jurisdiction to consider it further.
[3] Order PO-2879-R.

> records. The Institution notes that records also become excluded under s.52(3) when they are "used" or "maintained" for a labour relations or employment related purpose. It goes without saying that the "use" or "maintenance" of a record will often follow its initial collection. This supports the Institution's position that records can become excluded from the *Act* by virtue of the purpose of their subsequent use or ongoing maintenance if such use or maintenance is connected to a labour relations or employment purpose such as in the instant case.
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> The IPC's decision says nothing about these other actions and their application to the records.

[12] The board submits that the IPC committed two errors depending on how one reads the decision:

a. read out portions of the section 52(3) test involving use and/or maintenance in order to come to its erroneous interpretation of the section that seems to exclusively focus on the purpose at time of "creation", a term that does not even exist in the section.

b. read in a qualifier to the statute that the "use" of the record attracting the exclusion must be limited to the "initial use" despite the fact that this qualifier is absent from the text of the section.

[13] The board takes the position that Order MO-4354 is inconsistent with *Ontario* (*Solicitor General*) *v. Ontario* (*Assistant Information and Privacy Commissioner*)[4] asserting that in its decision the Court of Appeal does not suggest that all of the actions (or even more than one of them) found in the preamble to section 52(3) must be connected to one or more of the criteria set out in paragraphs 1 to 3, nor that the labour relations or employment purpose must be present at the time of creation.

[14] The board also argues that Order MO-4354 is inconsistent with *Ontario* (*Attorney General*) *v. Toronto Star*,[5] which addressed the IPC's approach to the application of the section 65(5.2) exclusion in the *Freedom of Information and Protection of Privacy Act* (*FIPPA*)[6] (the provincial equivalent to section 52(2.1) of *MFIPPA*).

[15] The board submits that in the order under review by the court in that decision (Order PO-2703), the adjudicator had applied a narrow approach to interpreting section 65(5.2) that imposed a condition that records must be "created" for the purpose of the Crown/prosecution brief in order for that exclusion to apply. The board submits that in the following passage the Divisional court rejected the IPC's "static" approach to interpreting the exclusion when it wrote at paragraph 56 of its decision:

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[4] 2001 CanLII 8582 (ON CA), leave to appeal refused [2001] S.C.C.A. No. 509.
[5] 2010 ONSC 991.
[6] RSO 1990, c F.31.

> The Adjudicator erred because he limited the application of s. 65(5.2) to records that were part of the Crown Brief or prosecution materials. The Crown Brief and prosecution materials are not static. Documents that are not yet part of the Crown Brief may become part of the Crown Brief later and prosecution materials may relate or become integral to the prosecution over the course of the proceedings.

[16] The board submits that the Divisional Court's approach to the exclusion is consistent with the previous decisions of the IPC in Orders M-1107, MO-2589 and P-1252 which the board submits stand for the principle that the purposes for which records may be used are not static in nature and that records not initially collected in relation to labour relations or employment related purposes may be used in relation to such purposes at a subsequent date. The board states that this approach was rejected in error in Order MO-4354.

[17] The board adds that Orders MO-2131, MO-2556 and MO-4119 which are relied upon at footnote 10 of Order MO-4354, adopt and repeat the same error in approach that began with Order M-957.

[18] Finally, the board submits that I also misconstrued the decision of the Court in *Ministry of Correctional Services v. Goodis*[7] (*Goodis*) when I wrote at paragraph 34 of Order MO-4354:

> 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*[8] as follows:
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> > … 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

[7] 2008 CanLII 2603 (ON SCDC)
[8] Also see Orders MO-3238, MO-4119 and MO-4149.

> 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.

[19] The board asserts that *Goodis* does not stand for this principle. The board submits that:

> First, a cursory review of the facts and positions laid out in the Divisional court case reveals that records in dispute were (a) correspondence from opposing counsel, related to production and discovery issues in a civil action citing vicarious liability of the police force and (b) records related to a public complaint about the alleged misconduct (an assault) by an officer (see para 7). The Ministry took the position that all of the records in appeal were excluded from *FIPPA* by virtue of s.65(6) since they were related to the civil litigation against the police force. The force was named as being vicariously liable for the actions of its officer (see para 13).
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> The court rejected the Ministry's position. However, it did so not because the public complaint records were collected prior to the existence of the civil litigation but rather, because the litigation itself was not related "to labour relations or to the employment of a person by the Institution" as required by the language of s.65(6) para 1.
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> The court makes it clear that it finds that s.65(6) does not apply to the concept of vicarious liability stating, in part, at para 22:
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> > In my view, the language used in s. 65(6) does not reach so far as the Ministry argues. Subclause 1 of s. 65(6) deals with records collected, prepared, maintained or used by the institution in proceedings or anticipated proceedings "relating to labour relations or to the employment of a person by the institution". The proceedings to which the paragraph appears to refer are proceedings related to employment or labour relations per se - that is, to litigation relating to terms and conditions of employment, such as disciplinary action against an employee or grievance proceedings. In other words, it excludes records relating to matters in which the institution has an interest as an employer. It does not exclude records where the Ministry is sued by a third party in relation to actions taken by government employees.

> The IPC's erroneous interpretation of the Divisional Court's findings suggesting the decision supports the proposition that the exclusion does not apply to records created prior to the existence of the criteria set out in section 65(6) para 1 is non-sensical when it is recalled that the Court also rejects the application of the section to plaintiff's counsel's correspondence (as referenced in para 7) despite the fact that it was produced at the very time the litigation was ongoing (and not prior to it).

[20] The board submits that the court considered that that 65(6)1 (the provincial equivalent of section 52(3)1) applies to matters as between the employee and employer (such as disciplinary matters that are at issue in the appeal that resulted in Order MO-4354) and not vicarious liability.

[21] That board argues that I erroneously relied upon Orders MO-3238, MO-4119 and MO-4149, which simply adopt the error from Order MO-2556 and repeat an interpretation of the Divisional Court's decision which it cannot bear.

[22] It is not necessary for me to consider or set out the appellant's stay representations or the board's response to those stay representations for me to address the board's request for reconsideration.

Analysis and findings

[23] The reconsideration process in section 18 of the IPC's *Code of Procedure* is not intended to provide parties who disagree with a decision a forum to re-argue their case. In my view that is what the board is attempting to do here.

[24] In Order PO-2538-R, Senior Adjudicator John Higgins reviewed the case law regarding an administrative tribunal's power of reconsideration, including the Supreme Court of Canada's decision in *Chandler v. Alberta Association of Architects*.[9] Regarding the reconsideration request before him, he concluded that:

> [T]he parties requesting reconsideration … argue that my interpretation of the facts, and the resulting legal conclusions, are incorrect…. In my view, these arguments do not fit within any of the criteria enunciated in section 18.01 of the *Code of Procedure*, which are based on the common law set out in *Chandler* and other leading cases such as [*Grier v Metro Toronto Trucks Ltd.*].[10]
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> On the contrary, I conclude that these grounds for reconsideration amount to no more than a disagreement with my decision, and an attempt to re-litigate these issues to obtain a decision more agreeable to

[9] 1989 CanLII 41 (SCC).
[10] 1996 CanLII 11795 (ON SC), 28 OR (3d) 67 (Div. Ct.).

> the LCBO and the affected party. …As Justice Sopinka comments in *Chandler*, "there is a sound policy basis for recognizing the finality of proceedings before administrative tribunals." I have concluded that this rationale applies here.

[25] Subsequent IPC orders have adopted this approach.[11] In Order PO-3062-R, for example, Adjudicator Daphne Loukidelis was asked to reconsider her finding that the discretionary exemption in section 18 of the *FIPPA* did not apply to information in records at issue in that appeal. In determining that the institution's request for reconsideration did not fit within any of the grounds for reconsideration set out in section 18.01 of the *Code*, Adjudicator Loukidelis wrote that:

> It ought to be stated up front that the reconsideration process established by this office is not intended to provide a forum for re-arguing or substantiating arguments made (or not) during the inquiry into the appeal…

[26] I accept and adopt this reasoning here.

[27] In Order MO-4354, I considered the board's arguments and submissions and determined that 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. I found that because of the nature of the video security footage and how it came to be created it 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*.

[28] Previous court decisions have stated that section 52(3) must be read in context and in light of its legislative history and the purposes of the *Act* and should not be interpreted in a manner that has the effect of shielding government officials from public accountability.[12]

[29] With respect to the purposes of the *Act*, section 1 states:

> The purposes of this Act are,
>
> (a) to provide a right of access to information under the control of institutions in accordance with the principles that,

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[11] See, for example, Orders MO-4004-R, PO-3062-R and PO-3558-R.

[12] See, for example *Brockville* (*City*) *v. Information and Privacy Commissioner, Ontario*, 2020 ONSC 4413 (Div Ct.); *Ontario* (*Ministry of Community and Social Services*) *v. Doe*, 2014 ONSC 239, appeal dismissed *Ontario* (*Ministry of Community and Social Services*) *v. John Doe*, 2015 ONCA 107.

> (i) information should be available to the public,
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> (ii) necessary exemptions from the right of access should be limited and specific, and
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> (iii) decisions on the disclosure of government information should be reviewed independently of government; and
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> (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

[30] Section 52(3)3 reads:

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

[31] In *Ontario (Ministry of Community and Social Services) v. Doe* (*John Doe*),[13] the Divisional Court upheld an IPC decision that found, in part, that records containing the full names of employees of the Family Responsibility Office (FRO) in the file of an individual who was subject to enforcement action by FRO were not excluded by operation of section 65(6) of *FIPPA*, the equivalent of section 52(3). In reaching its decision, the Court considered the legislative history of section 65(6) and the purposes of *FIPPA* and stated:

> . . . [A] purposive reading of the *Act* dictates that if the records in question arise in the context of a provincial institution's operational mandate, such as pursuing enforcement measures against individuals, rather than in the context of the institution discharging its mandate *qua* employer, the s. 65(6)3 exclusion does not apply. *Excluding records that are created by government institutions in the course of discharging public responsibilities does not necessarily advance the legislature's objective of ensuring the confidentiality of labour relations information. However, it could have the effect of shielding government officials from public accountability, an effect that is contrary to the purpose of the Act.* The government's legitimate confidentiality interests in records created for the

[13] 2014 ONSC 239, appeal dismissed *Ontario* (*Ministry of Community and Social Services*) *v. John Doe*, 2015 ONCA 107.

> purposes of discharging a government institution's specific mandate may be protected under exemptions in the *Act*, but not under s. 65(6).[14]
>
> [emphasis added]

[32] Furthermore, in *John Doe*, the Divisional Court found that the dictionary definition of the word "about" in section 65(6)3 of *FIPPA* requires that the record do more than have some connection to, or some relationship with, a labour relations or employment related matter. It stated that "about" means "on the subject of" or "concerning": see *Concise Oxford English Dictionary*, 11th ed., 2004, *s.v.* "about". This means that to qualify for the section 65(6)3 exclusion, the subject matter of the record must be a labour relations or employment-related matter.[15] It further stated:

> Adopting the Ministry's broad interpretation of "about" would mean that a routine operational record or portion of a record connected with the core mandate of a government institution could be excluded from the scope of the *Act* because such a record could potentially be connected to an employment-related concern, is touched upon in a collective agreement, or could become the subject of a grievance. This interpretation would subvert the principle of openness and public accountability that the *Act* is designed to foster.[16]

[33] The video security footage considered in Order MO-4354 is similar to the record considered in Order MO-4149, which was a video recording taken on a Kingston Transit bus on a specified date. In Order MO-4149, after referring to a number of IPC orders,[17] the adjudicator found that the video recording was not excluded under section 52(3)3 of the *Act*, stating:

> While I acknowledge that the orders referred to above deal with police records, the principles enunciated in them are equally applicable to the facts in this appeal. I find that the video at issue in this appeal was created as part of Kingston Transit's day-to-day operations. As previously stated, in its own policy regarding video surveillance, the city's position is that this technology is used to enhance the protection and safety of employees and the general public; to reduce, deter and investigate incidents of vandalism or criminal activity; and to protect property and assets. In my view, as was the case in Order MO-4119, the fact that the video was subsequently used by Kingston Transit to investigate the complaint the appellant made regarding the transit operator does not change its initial character. Accordingly, I find that the video does not

[14] At paragraph 39.
[15] At paragraph 29.
[16] At paragraph 30.
[17] Including Order MO-4119.

> relate to labour relations or employment related matters in which the city has an interest under section 52(3)3 of the *Act*.[18]

[34] In Order MO-4149, the City of Kingston provided a copy of its Video Surveillance Policy (the policy), which stated that it applies to the collection, use, disclosure and disposal of recorded information collected through video surveillance. This technology, the policy stated, is used to enhance the protection and safety of employees and the general public; to reduce, deter and investigate incidents of vandalism or criminal activity; and to protect property and assets.

[35] As set out in Order MO-4354, the video security footage is a record created by the board in the normal course of its day-to-day activities. A copy of the video security footage was then "collected" by the board after it was created and subsequently "maintained or used" by it in relation to discipline proceedings involving the appellant. As explained in Order MO-4354 this does not mean that the original records are excluded from the *Act* by section 52(3)3 from the moment of their collection. In other words, they are routine operational records that are created and become part of the record holdings at the school irrespective of their possible inclusion or review in subsequent investigations and/or other proceedings.

[36] The board essentially submits that because section 52(3)3 applies to records that are "collected," this means that it implicitly applies to records which may have been created for a completely non-employment purpose, but which were "collected" by, and are now being "used" by the board for the purpose listed in section 52(3)3. As stated in Order MO-4354 this approach has been rejected in many IPC orders which better reflect the accountability purposes of the *Act*, including Orders MO-4119 and MO-4149.

[37] In Order MO-4354, I found that the original record, which was created in connection with the board's mandate regarding surveillance, is not excluded from the *Act* by section 52(3)3, because it was not collected, prepared, maintained or used by the ministry in relation to the employment of a person by the board. The fact that the board may have collected and used copies of some of these records in relation to the discipline of the appellant is not sufficient for the section 52(3)3 exclusion to apply to the original record.

[38] The board argues that my decision is inconsistent with *(Attorney General) v. Toronto Star*. Nothing in the *Toronto Star* case forbids a consideration of the competing statutory purposes in interpreting the proper reach of s. 52(3)3. The "some connection" standard still must involve a connection that is relevant to the statutory scheme and objects understood in their proper context.[19]

[39] The board says *Goodis* was misinterpreted. In *Goodis*, the Divisional Court stated that there is a distinction between employees' actions and employment-related matters.

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[18] At paragraph 29.

[19] *Brockville* (*City*) *v. Information and Privacy Commissioner, Ontario*, 2020 ONSC 4413 at paragraph 39.

In particular, it found that that not all records documenting the actions or conduct of employees are "employment related matters" for the purpose of section 65(6)3 (the provincial equivalent of section 52(3)3), even if they are found in a civil litigation or complaint file, and that such a determination turns on examining the particular record at issue.[20] The finding in Order MO-4354 is based on the video security footage. It is, in the circumstances, one of those records that happens to document the actions or conduct of employees but not what are "employment related matters" under section 52(3)3. Again, the video security footage would have existed whether or not the discipline investigation of the appellant occurred.

[40] Finally, the board said that Order MO-4354 is inconsistent with *Ontario* (*Solicitor General*) *v. Ontario* (*Assistant Information and Privacy Commissioner*) but the reasons it gives for its position do not align with the wording of the section at issue. The preamble in section 52(3) sets out the framework for the application of parts 1 to 3. Furthermore, the Divisional Court in *Ontario* (*Ministry of Community and Social Services*) *v. Doe*[21], discussed above, stated that the term "about" in section 65(6)3 (the provincial equivalent of section 52(3)3) means "on the subject of" or "concerning," which means that to be excluded from the *Act*, the subject matter of the record must be a labour relations or employment-related matter.[22] It further stated that "about" should not be interpreted in a broad manner that would mean that a routine operational record or portion of a record connected with the core mandate of a government institution could be excluded from the scope of the *Act* because such a record could potentially be connected to an employment-related concern, is touched upon in a collective agreement, or could become the subject of a grievance. Such an interpretation would subvert the principle of openness and public accountability that the *Act* is designed to foster.[23] In my view, the type of routine operational records that are at issue in this appeal are not intended to be caught by the section 52(3)3 exclusion.

[41] I find that the board's request is an attempt to re-argue the appeal. I find that the board has not established a jurisdictional defect in Order MO-4354 under section 18.01(b) of the *Code*, or any other ground for reconsideration set out in section 18.01. I therefore deny the board's reconsideration request.

ORDER:

1. I deny the board's reconsideration request.

2. I lift the interim stay of Order MO-4354 and I order the board to comply with Order MO-4354 by December 27, 2023.

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[20] *Goodis* at paragraphs 23 and 29.
[21] *Ontario* (*Ministry of Community and Social Services*) *v. Doe*, 2014 ONSC 239, appeal dismissed *Ontario* (*Ministry of Community and Social Services*) *v. John Doe*, 2015 ONCA 107.
[22] *Supra* at paragraph 29.
[23] *Supra* at paragraph 30.

Original Signed by: November 23, 2023

Steven Faughnan
Adjudicator