Information and Privacy Commissioner,
Ontario, Canada

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

# ORDER MO-4667

Appeal MA21-00650

Toronto District School Board

June 17, 2025

**Summary:** A community organization made a request to the Toronto District School Board (the board) under the *Municipal Freedom of Information and Protection of Privacy Act* for records relating to the board's investigation into emails sent by a board employee.

The board denied the appellant access to the responsive records claiming that the records are excluded from the scope of the *Act* because they relate to labour relations or employment-related matters (section 52(3)3). In the alternative, the board claimed that the records qualify for exemption under certain sections under the *Act*.

In this order, the adjudicator upholds the board's claim that the records are about labour relations or employment related matters and are excluded from the scope of the *Act*. As a result, she upholds the board's decision to exclude the records under section 52(3)3 and the appeal is dismissed.

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

**Orders Considered:** Orders P-927, PO-2556, MO-2694, MO-3384, MO-4119, MO-4354, and Order MO-4447

## OVERVIEW:

[1] In 2021, the Integrity Commissioner of the Toronto District School Board (the board or TDSB) issued a final report in relation to two complaints regarding allegations

about a trustee's conduct.[1] The complaints alleged that the trustee's posting on Twitter contravened the board's code of conduct. It was alleged that her social media post mischaracterized the actions of a board employee as having distributed antisemitic materials in an email mail-out. The Integrity Commissioner (IC) retained an Independent Investigator to assist her investigation into the matter. The IC issued a final report. The IC's report did not identify the employee who sent the mailout by name but included excerpts of the mailouts in the appendices of the report. The IC's report also did not discuss or investigate any issues relating to the board employee's conduct.[2] The board completed its own investigation into the conduct of its employee.

[2] This order resolves an appeal relating to a request submitted by a community organization under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*) to the board for records relating to the board's own investigation into the conduct of the employee who sent the mail-out.[3]

[3] The board issued a decision denying the appellant access to the responsive records in full claiming that disclosure would constitute an unjustified invasion of personal privacy under the mandatory personal privacy exemption at section 14(1).

[4] The appellant appealed the board's decision to the Information and Privacy Commissioner of Ontario (the IPC). The board responded by issuing a revised access decision to the appellant claiming that the records were excluded from the scope of the *Act* (section 52(3)3) while maintaining that the records were exempt under section 14(1), in the alternative.

[5] During mediation, the appellant confirmed that it continued to seek access to the records and the board further revised its decision to include the possible application of the discretionary solicitor-client privilege exemption in section 12 to some of the records if the exclusion was found not to apply. The board also indicated in its revised decision that it continued to take the position that the personal privacy exemption at section 14(1) also applies if the exclusion does not. Given the timing of the board's raising of section 12, the issue of late-raising a discretionary exemption was added to the appeal.

[6] As mediation did not resolve the appeal, the file was transferred to the adjudication stage of the appeals process where an adjudicator may conduct an inquiry. During the inquiry, written representations from the board, the employee and the appellant were received.[4] The board was given an opportunity to submit reply representations, which it

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[1] A signed copy of the report is found as part of an agenda item posted on the board's website.
[2] For more information regarding the background of the IC's investigation, see paragraphs 16 to 20 of Order MO-4447.
[3] The request sought access to "any and all records relating to the TDSB investigation into emails sent by TDSB employee [employee named] on May 16 and 19, 2021."
[4] The parties' representations were shared in accordance with the IPC's *Code of Procedure.* The appellant in its representations, requested that two letters it sent to the mediator be considered as part of its representations. These letters were not shared with the board or employee but I have reviewed them.

did.

[7] In this order, I uphold the board's decision that the records are excluded from the scope of the *Act* under section 52(3)3 and dismiss the appeal. Given my decision, it was not necessary that I make any finding regarding the application of any of the board's exemption claims.

## RECORDS:

[8] In its request[5] the appellant sought access to:

> Any and all records relating to the TDSB investigation into emails sent by TDSB employee [name of employee] on [two specified dates.]

[9] The board located 1462 pages of responsive records. Most of the records consist of chains of emails exchanged between several individuals, including the employee and staff in the board's Human Rights Office (HRO) and Employee Services department. As a result, each time an email is responded to, the initial email forms part of the email chain. In some cases, documents are also attached to the emails and the attachments are also duplicated as part of the email chain. I also confirm that the records include other correspondence, including the HRO's review and assessment, in draft or final form.

[10] In its representations, the appellant says that records which would respond to its request would include emails a named trustee exchanged with the HRO. The issue of whether or not the board conducted a reasonable search for responsive records was not an outstanding issue identified in the mediator's report. Accordingly, the appellant's claim that the trustee's emails should have been identified as responsive to its request will not be addressed in this order.[6]

## PRELIMINARY ISSUE:

### Should the board be ordered to provide further particulars about the records?

[11] During mediation, the appellant requested additional information about the records the board identified as responsive to its request. In response, the board said that the records consist of "[e]mail communications, letters, a report and associated draft records."

[12] In its representations, the appellant takes the position that the description of the

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[5] The request is dated August 11, 2021 and was accompanied by a letter of the same date addressed to the board. The letter refers to this request as its "second Freedom of Information Access Request" and notes that another request under the *Act* was mailed on July 21, 2021.

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

records the board provided at mediation was insufficient and prevented it from making "proper submissions on whether [the exclusion] applies." The appellant asserts that I should require the board to provide particulars about each record by providing "an applicable title or brief description at the very least."

[13] In support of its position, the appellant cites two IPC orders[7] and says:

> … the applicable case law provides that an inquiry into the production of records under *MFIPPA*, particularly when the s.52(3) exclusion is asserted, is "record-specific and fact-specific," and a "record-by-record approach" is to be utilized.

[14] The board addressed this issue in its reply representations and says that using broad categories to describe the records is appropriate in the context of this appeal given that the records are "repetitive or of a similar nature." The board also says that the case law cited by the appellant does not speak to the issue of what level of details records are to be described to a party seeking access. Finally, the board says that its representations which were provided to the appellant contains sufficient information about the context surrounding the collection, use, preparation and/or maintenance of the records, which determines whether the exclusion at section 52(3)3 applies.

[15] I note that one of the orders cited by the appellant sets out the IPC's approach in reviewing records for the purposes of determining whether an exclusion or exemption applies. In Order MO-3384[8], the adjudicator states:

> This office has consistently taken the position that the exclusions at section 52(3) of the *Act* (and the equivalent section in the *Act*'s provincial counterpart[9]) are record specific and fact-specific. This means that in order to qualify for an exclusion, a record is examined as a whole. This whole-record method of analysis has also been described as the "record-by-record" approach when applied by this office in considering the application of exemptions to records.

## ***Analysis and finding***

[16] The appellant takes the position that the IPC's record-by-record approach to analyze records creates an obligation on the part of the board to identify or describe each record found responsive to its request. I disagree and I find that the IPC's record-by-record approach does not create an obligation on the part of the institution to describe each record individually. The record-by-record approach set out above in Order MO-3384 and related decisions speaks to how the IPC will examine records when it reviews an

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[7] Orders MO-3947 and MO-3384.
[8] See also Orders MO-4622, MO-3927, M-352, MO-3798-I, MO-3927, MO-3947, MO-4071, PO-3642, PO-3893-I and PO-4564.
[9] *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31, section 65(6).

institution's decision as to whether an exclusion or specific exemption applies.

[17] The appellant also argues that the way the board described the records in this appeal prevented it from making "proper submissions on whether the exclusion applies." In my view, the board's decision to describe the records in broad categories was appropriate in the circumstances of this appeal taking into account the content of the non-confidential portions of the board's representations. In addition, having reviewed the records, which comprise of mostly emails, I note the records contain many duplicate copies. I am satisfied that the broad category descriptions of records along with the board's representations provide the appellant with sufficient information to respond to the board's submission that the records are subject to the exclusion under section 52(3)3.

[18] Having regard to the above, I find that, given the circumstances of this appeal, the manner the board described the records is appropriate and the appellant had sufficient information to respond to the board's claim that section 52(3)3 applies.

## DISCUSSION:

[19] In the remainder of this order, I will consider whether the section 52(3)3 exclusion for records relating to labour relations or employment-related matters applies to the records at issue in the appeal.

[20] Section 52(3) of the *Act* excludes certain records held by an institution that relate to labour relations or employment-related 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.[10]

[21] The purpose of this exclusion is to protect some confidential aspects of labour relations and employment-related matters.[11]

[22] As noted above, 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.

[23] If section 52(3) applies to the records, and none of the exceptions found in section

[10] Order PO-2639.
[11] *Ontario (Ministry of Community and Social Services) v. John Doe*, 2015 ONCA 107 (CanLII).

52(4) applies, the records are excluded from the scope of the *Act*.

[24] 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.[12]

[25] 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.[13]

[26] 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.[14]

For section 52(3)3 to apply to the records, the board 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.

**Part 1: collected, prepared, maintained or used; and**
**Part 2: meetings, consultations, discussions or communications**

[27] 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.[15]

[28] 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.[16]

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[12] *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.
[13] *Ontario (Ministry of Correctional Services) v. Goodis* (2008) [Goodis], 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.); 2008 CanLII 2603 (ON SCDC).
[14] *Ministry of Correctional Services*, cited above.
[15] Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).
[16] Order MO-3664, *Brockville (City) v. Information and Privacy Commissioner, Ontario*, 2020 ONSC 4413 (Div Ct.).

[29] The board says that the records were collected and prepared on its behalf by its Employment Services department and HRO in order to conduct an investigation into an employee. The board provided an affidavit with its representations from its Superintendent of Education that attached a copy of the board's Human Rights Policy that applied at the time of the board's investigation. The non-confidential portions of the affidavit, which was provided to the appellant, confirms that the board's Employee Services department initiated an investigation into the employee and the HRO was "enlisted to conduct a review of the contents of the mailouts."

[30] The board says that the records are analogous to the type of records at issue in Order MO-2694 in which the board conducted an investigation into whether one of its employees adhered to board policy. The board also says that the records were:

> … either directly part of the investigation and sent or received by TDSB officials responsible for the investigation. Or, the responsive records were used by TDSB officials (the HRO or Employee Services) as part of their assessment, review and determination of findings in relation to the investigation.

[31] The appellant's representations do not dispute the board's evidence that parts 1 and 2 of the test have been met. The appellant's representations focus on challenging the board's assertion that the records relate to a labour relations or employment-related matters.

[32] Having regard to the parties' representations and the records themselves, I accept the board's representations demonstrate that it collected and maintained the records in relation to meetings, consultations and discussions. Accordingly, I find that parts 1 and 2 of the test in section 52(3)3 have been met.

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

[33] 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.[17]

[34] 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.[18]

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[17] *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.
[18] Order PO-2157.

[35] 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.[19]

[36] The records 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. 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).[20]

[37] The appellant takes the position that not all records responsive to its request would relate to labour relations or employment-related matters. The appellant asserts that the board's position seeks to "broaden the section 52(3) exclusion well beyond its legitimate boundaries, in an attempt to avoid having to produce any records in respect of its own conduct."

[38] The board's main argument is that the records relate to questions of human resource issues, namely whether the employee's conduct violated board policies. The board says that the records relate to "a private employment-related matter" and that its Employee Services department initiated an investigation of the employee while the HRO "was enlisted to conduct a review/assessment of the contents of mailouts and determine whether [the employee' violated any aspect of TDSB's Human Rights Policy." The board says that the purpose of the HRO's review/assessment was to supplement its investigation and states:

> The labour relations or employment-related nature of the investigation does not change whether the investigation finds there was non-compliance with applicable employment policy(ies) or not.
>
> The nature of the investigation was with respect to an individual employee's conduct ... This is evident on the text of the request as well.
>
> Moreover, records associated with investigations to determine whether employees have acted in compliance with employer rules and/or policies are routinely held to be excluded from the *Act* under section 52(3).

[39] The appellant says that the facts in Order MO-2694, cited by the board, are distinguishable from those in this case. The appellant says that the records in Order MO-2694 were created in response to complaints the board received from parents and students about its employees. The appellant says that in this case, the "HRO's involvement was triggered primarily by an inquiry made by the [employee].

[40] The appellant also says that the records it requested are broader than those requested in Order MO-2694 and include records created by the individual being

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[19] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above.
[20] *Ontario (Ministry of Correctional Services) v. Goodis*, cited above.

investigated as opposed to just records created by the investigators.

[41] The appellant says that in the present case the creation of records relating to the board's investigation into the mailouts went "through a number of distinct stages." The appellant says that its reading of the IC report:

> … reveals that the HRO's involvement was triggered primarily by an inquiry made by the [employee] then secondarily by an inquiry by [another individual], and only subsequently by the TDSB's belated realization that [the employee's] actions may have constituted a violation of its Human Rights Policy.

[42] The appellant says that "the HRO's involvement in this matter was not in the nature of an employee investigation." The appellant suggests that the Superintendent's affidavit confirms that a formal investigation did not commence until the Employee Services department got involved.

[43] The appellant asserts that the only record properly excluded under section 52(3)3 would be the board's communication to the employee with its decision to discipline or not. The appellant says that at a minimum any records created from the dates of when the mailouts were sent to when the board "became aware" of a potential violation and referred the matter to the Employee Services department is within the scope of the *Act*.

[44] The appellant also says that any records generated by the HRO are not properly excluded under section 52(3)3. The appellant says that the "HRO's investigation of this matter did not begin as a probe into whether the [board's policies] had been violated, and no evidence has been presented to suggest that it ever did."

[45] The appellant also makes the argument that section 52(3)3 should not be applied to any records concerning the actions or inaction of an employee simply because their conduct could give rise to a civil action in which the board could be vicariously liable.[21]

[46] The appellant says that the board should not be allowed to argue that the records relate to a private employment-related matter because details of the board's investigation was included in the IC's report. The appellant also says that the board and affected party posted information on the internet about this matter.

[47] Finally, the appellant says that even if section 52(3)3 is found to apply that the exception in section 52(4)3 provides that any agreement between the board and the employee is subject to the *Act*.

[48] In its reply representations, the board says that the appellant's argument that records generated before the board's decision to investigate is not subject to section

[21] The appellant cites the *Ministry of Correctional Services* decision, see supra note 12.

52(3), is inconsistent with IPC jurisprudence.[22] The board also questions the appellant's evidence questioning its position that the records relate to a private employment matter. The board says, in any event, the disclosure of records outside the *Act* does not prevent it from relying on section 52(3) to exclude records from the scope of the *Act*.

### ***Analysis and finding***

[49] The purpose of the exclusion in section 52(3) is to protect the confidential aspects of labour relations and employment-related matters. The IPC has consistently held that records comprising of an employer's investigation into the conduct of its employees is excluded from the scope of the *Act* unless one of the of the exceptions applies or the records relate to a matter in which the employer could be vicariously liable.

[50] I have reviewed the records and am satisfied that most of the records directly relate to the board's investigation into the conduct of one of its employees and that its investigation concerned a human resource question. These records comprise of email chains exchanged between several individuals, including the employee. The records also contain correspondence, including assessments and opinions from individuals employed or retained by the board.

[51] However, I agree with the appellant's assessment that it appears that the board and employee exchanged some communications before the board initiated a formal investigation. The appellant says that these communications cannot relate to a labour relations or employment-related matter as no formal investigation was underway at the time these records were created. In support of this position, the appellant distinguishes the facts between this case and those in Order MO-2694.

[52] Order MO-2694 was cited by the board to demonstrate that the IPC has on previous occasions found that records relating to an employer's investigation into the conduct of one of its employees is excluded under section 52(3). However, this does not mean that any record located in a file relating to an employer's investigation into a complaint of one of its employees automatically falls outside of the scope of the *Act*. The adjudicator in Order M-927, considered this situation and commented that applying the exclusion at section 52(3) in those circumstances would lead to a "manifestly absurd result," which was not intended by the Legislature.

[53] 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.[23] For example, Orders M-927 and PO-2556 identified the difference between police records relating to police work conducted by officers and copies of those same records that may end up on a file relating to an investigation of the police officer's conduct. It was recognized that, while the first category may be prepared by police employees, such records are not "in

[22] In support of this argument, the board cites Order P-1252.
[23] See for example MO-4354

essence" about employment or labour relations matters (which is what section 52(3) excludes from the scope of the *Act*).[24]

[54] In Orders MO-4119 and MO-4354, applying the approach in Order M-927 the adjudicators found that video surveillance footage created in the normal course of an institution's operations subsequently copied and included in a complaint file about an employee's conduct did not exclude the footage under section 52(3). In these orders, the adjudicators concluded that the footage would have existed whether or not the investigation into the employee's conduct occurred because it was created in the normal course of the institution's operations.[25]

[55] Based on my review of the records and the representations of the parties, I am satisfied that any records before me which predate the board's decision to launch a formal investigation were not created in the normal course of the board's operation. Based on the board's representations, the board's Employee Services department initiated a formal investigation into the employee's conduct within a few days of the employee contacting the HRO. In the days leading up to the board's decision to launch a formal investigation into its employee's conduct, its HRO responded to email communications sent by the employee. Without revealing the content of these communications, I confirm that these records were not created in the normal course of the board's operation. Unlike the surveillance video footage and police records discussed above, these records were created in response to the employee initiating contact with the HRO regarding allegations made about his conduct. In my view, these records would not exist for any other purpose but to address the subject-matter of the allegations made about the employee. In other words, the original copy of these records would be placed in the board's investigation file as the records were not created or maintained by the board for any other purpose. Furthermore, I am satisfied that the content of these records relate to a labour relations or employment-related matter in which the board has an interest. Accordingly, I am satisfied that the third part of the three-part test in section 52(3)3 has been met.

[56] The appellant also says that the board cannot rely on section 52(3)3 because it has been previously found that section 52(3)3 does not exclude all records concerning the actions or inactions of an employee simply because their conduct could give rise to a civil action in which the board could be held vicariously liable.[26] However, the board did not raise anticipated or actual legal proceedings as a ground to exclude the records. Accordingly, I find that this situation has no application to the board's claim that the

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[24] Order MO-4119, para 28.

[25] In MO-4354, footage of an interaction between a teacher and principal was captured on video surveillance cameras installed in the school. In MO-4119, footage of an individual being arrested was captured on video surveillance and provided to the police.

[26] Section 52(3)1 states "…, 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:
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.

records are excluded under section 52(3)3.

[57] The appellant also asserts that the employee and board have already revealed information about the outcome of the board's investigation. In my view, the disclosure of records or portions of records is not a relevant consideration in the determination of whether the section 52(3)3 exclusion applies. Again, what is relevant is the actual content of the records at issue and the fact that, in this case, the three-parts of the test in section 52(3)3 have been met.

[58] Finally, the appellant claims that the exceptions relating to certain types of agreements between an institution and employee at section 52(4) apply in the circumstances of this appeal.[27] However, having reviewed the records, I find that none of the exceptions to section 52(3) could apply in the circumstances of this appeal.

[59] Having regard to the above, I find that the records before me address a labour relations or employment-related matter between the board and its employee in which I am satisfied the board has an interest given the allegations made against the employee.

[60] Accordingly, I find that part 3 of the test in section 52(3)3 has been met. As all three parts of the test in section 52(3)3 have been met, I find that the exclusion at section 52(3)3 applies and uphold the board's decision to deny the appellant access to the records.

## ORDER:

I uphold the board's decision and dismiss the appeal.

Original Signed by: June 17, 2025

Jennifer James
Adjudicator

[27] Section 52(4) states, in part, 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.