



Information and Privacy
Commissioner/Ontario

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

ORDER M-18

Appeal M-920075

Lambton County Board of Education

O R D E R

BACKGROUND:

On February 18, 1992, the Lambton County Board of Education (the "institution") received a request under the Municipal Freedom of Information and Protection of Privacy Act (the "Act") for access to the actual salaries or salary ranges for the institution's director, executive assistant and superintendents. Salary ranges for the positions of the executive assistant and the superintendent of business existed and were disclosed to the requester.

Access was denied to the actual salaries of the institution's Director of Education, Superintendent of Human Resources, Superintendent of Academic Affairs and the three Superintendents of Schools for the north, south and central school regions (the "affected parties") pursuant to section 14 of the Act. The institution stated that as "the Lambton County Board of Education's director and superintendents do not have salary ranges, your request for their exact salaries is denied".

On March 2, 1992, the requester appealed the institution's decision, claiming that "this information is necessary so that our readers know how public funds are being spent in the midst of these difficult economic times - much less with contract negotiations underway for a new teachers' contract on September, 1992". The appeals officer confirmed with the appellant that the sole issue under appeal was access to the exact salaries of the affected parties.

The matter proceeded to inquiry. Written representations were received from the institution, the appellant and the affected parties. I have considered all representations in reaching my decision.

There is no dispute among the parties that the information requested, the actual salaries of the affected parties, qualifies as "personal information" as defined in section 2(1) of the Act. Having reviewed the information, I agree that it is personal information.

ISSUES:

The issues arising in this appeal are as follows:

- A. Whether the mandatory exemption provided by section 14 of the Act applies.
- B. If the answer to Issue A is yes, whether there is a compelling public interest under section 16 in the disclosure of the personal information which clearly outweighs the purpose of the section 14

exemption.

SUBMISSIONS:

ISSUE A: Whether the mandatory exemption provided by section 14 of the Act applies.

Section 14(1) of the Act prohibits the disclosure of personal information except in certain circumstances. One such circumstance is described in section 14(1)(f) of the Act, which states:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

if the disclosure does not constitute an unjustified invasion of personal privacy.

Sections 14(2) and (3) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of another individual's personal privacy. Section 14(3) lists the types of information, the disclosure of which, is presumed to constitute an unjustified invasion of personal privacy.

Both the institution and the affected parties specifically relied on the application of section 14(3)(f) to raise the presumption that disclosure of the personal information at issue would constitute an unjustified invasion of personal privacy. Section 14(3)(f) states:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness; [emphasis added]

It is my view that, in the circumstances of this appeal, disclosure of the salary for a specific position for which there is one incumbent would describe an individual's income as set out in section 14(3)(f) and would, therefore, constitute a presumed unjustified invasion of personal

privacy.

Section 14(4) of the Act outlines a number of circumstances which, if they exist, could operate to rebut a presumption under section 14(3). Section 14(4) (a) states:

Despite subsection (3), a disclosure does not constitute an unjustified invasion of personal privacy if it,

discloses the classification, salary range and benefits, or employment responsibilities of an individual who is or was an officer or employee of an institution;

In this appeal, section 14(4) (a) does not serve to rebut the presumption contained in section 14(3) (f) as the information requested is the actual salary of each affected party, not the range of salary.

As section 14 is similar in wording to section 21 of the provincial Freedom of Information and Protection of Privacy Act (the provincial Act), orders issued under section 21 of the provincial Act give guidance in the interpretation and application of section 14 of the municipal Act. In Order 20, dated October 7, 1988, former Commissioner Sidney B. Linden considered the rebuttal of a presumed unjustified invasion of personal privacy under section 21 of the provincial Act. He stated that, "... a combination of the circumstances set out in section 21(2) might be so compelling as to outweigh a presumption under subsection 21(3). However, in my view, such a case would be extremely unusual".

Section 14(2) of the municipal Act (similar to section 21(2) of the provincial Act) states, in part, as follows:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

(a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;

...

(c) access to the personal information will promote informed choice in the purchase of goods and services;

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...

The appellant submits that disclosure of the actual salaries of the affected parties would not result in an unjustified invasion of their personal privacy. He states that school board salaries are funded by municipal ratepayers who have a "right to know where their dollars are going". Further, the appellant states that this right to know "transcends normal claims of privacy invasion". He states that "the ratepayers must know the requested information so that they can determine if their tax dollars are being spent wisely and if changes are needed to avoid unnecessary tax hikes and cuts to the education budget ... [and] if board salaries are in line with the board salaries in other counties". The appellant argues for the ratepayers' right and need to know in order to make informed choices. Thus, while not specifically making reference to section 14(2)(c) of the Act, the appellant is, in essence, raising it as a consideration.

The institution acknowledges that "the operation of publicly funded organizations should be open to scrutiny", and claims that its decision to deny access to personal information:

... does not result in denying to the ratepayer accountability regarding the Board's use of public funds, nor is the Institution precluding public scrutiny of its activities where the release of the information is not an unjustified invasion of personal privacy.

The institution submits that public scrutiny of its activities and the ratepayers' right to informed choice is ensured by public Board meetings and the democratic election of its trustees. The institution points out that the Education Act also protects from disclosure to the public "intimate, personal or financial information in respect of ... an employee or prospective employee of the board", as meetings of the Board may be closed to the public when such issues are discussed.

I have considered the representations of the parties. In my view, in this appeal, there is no combination of the circumstances set out in section 14(2) which is sufficient to rebut the presumption contained in section 14(3). Accordingly, the presumption that disclosure of the exact salaries would constitute an unjustified invasion of personal privacy has not been rebutted by section 14(4)(a) or a combination of circumstances under section 14(2).

ISSUE B: If the answer to Issue A is yes, whether there is a
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compelling public interest under section 16 in the disclosure of the personal information which clearly outweighs the purpose of the section 14 exemption.

Section 16 of the Act states:

An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. [emphasis added]

In Order 20, Commissioner Linden, in discussing section 21(3) of the provincial Act (which is similar to section 14(3) of the Act) stated:

[Section 21(3)] specifically creates a presumption of unjustified invasion of personal privacy and in so doing delineates a list of types of personal information which were clearly intended by the legislature not to be disclosed to someone other than the person to whom they relate without an extremely strong and compelling reason.

The appellant states that "there is a compelling public interest in the requested information because it is this year of 'difficult economic times' in which education budget cuts might be made by the board due to fiscal restraint". He adds that it is this together with "an immediate need to know which overrides the purpose of the personal privacy protection exemption".

The institution submits that "the mere allegation that the right of the public to know how public funds are being expended does not provide any compelling reason for infringing an individual's right to personal privacy". The institution submits that even if such "a compelling interest" did exist, there is no evidence that such interest outweighs or is greater than an individual's right to protection of his/her privacy.

The intent of the legislature is clear on the balancing of rights - the right to access must be balanced by the right of an individual to the

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protection of his/her personal privacy. Neither right is without limits, which limits are also provided for in the Act.

I am mindful of the current economic environment which places an even greater value on the prudent use of public funds. I agree that the operations of public institutions should be open to public scrutiny. I also agree that the public has a right to know how public funds are being spent. However, these principles have limitations in the context of the Act itself. I am not convinced that a compelling public interest in the disclosure of the exact salaries exists, such as to outweigh the purpose of the exemption.

This is not to say that a public interest does not exist nor that the public has no right to know. In my view, the provisions of section 14 themselves recognize the intricate balance between the right to know and the right to privacy of personal information. Section 14(3)(f) provides for a presumed unjustified invasion of personal privacy for information such as the exact salary of an employee of an institution. However, I believe that section 14(4)(a) reflects the fact that even though disclosure of an exact salary is a presumed unjustified invasion of personal privacy, disclosure of a salary range is not.

In my view, section 14(4)(a) is a clear indication by the legislature that the disclosure of salary ranges is in the public interest. As well, I feel that section 14(4)(a) is a reflection of the views of the legislature as to where the appropriate balance between the right to know and the right to privacy should be struck in the case of the salaries of employees of taxpayer-funded entities.

To say it a bit differently, section 14(4)(a) itself incorporates the public interest as it permits members of the public to obtain information about the salaries of public employees to the extent of salary ranges. As to the requirement of section 16 that there be a compelling public interest which clearly outweighs the purpose of the exemption, in my view, the purpose of section 14 includes making the salary ranges of employees of the institution available to the public.

I believe that the appellant should be allowed access to some information relating to the salaries of the affected parties. In my view, to do otherwise would create an absurdity. It would mean that if an institution wanted to be less open in the area of salary information, it could achieve this by the simple expedient of not having salary ranges for its employees. In saying this, I am in no way suggesting that this is the situation in this appeal. Since exact salaries have the benefit of a presumed unjustified invasion of personal privacy, it is unlikely, in most circumstances, that any salary-related information would be available to the public. In my view, this is not the result which was intended by the legislature.

In this appeal, salary ranges do not exist. I feel that the public interest as reflected in the Act itself is such that, although the exact salaries should not be disclosed, salary ranges should be. Therefore, I order the head of the institution to establish salary ranges for the affected parties for the purpose of disclosure to the appellant and in response to his request. The ranges should be comparable to the ranges of salaries previously disclosed in response to the same request. When establishing the ranges for these positions, I ask the institution to keep in mind the purpose of section 14(4) (a) and the comments about salary ranges contained in Order M-5, issued December 11, 1992.

ORDER:

1. I order the institution to prepare a salary range for the positions occupied by the affected parties and to disclose them to the appellant.
2. I order that the institution not disclose the information referred to in provision 1 until forty-five (45) days following the date of this Order. This time delay is necessary to give any party to the appeal sufficient opportunity to apply for judicial review of my decision before the information is actually disclosed. Provided notice of an application for judicial review has not been served on the Information and Privacy Commissioner/Ontario and/or the institution within this forty-five (45) day period, I order that the information be disclosed within fifty (50) days of the date of this Order.
3. The institution is further ordered to advise me in writing within five (5) days of the date on which disclosure was made. This notice should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.
4. In order to verify compliance with this Order, I order the head to provide me with a copy of the information which is disclosed to the appellant pursuant to provision 1, upon request only.

POSTSCRIPT:

In this appeal, this office made no attempt to mediate. This was a deliberate decision on my part and, at no time, did the institution indicate an unwillingness to participate in mediation. In many appeals of this type, where the exact salary is at issue and no salary range exists, our office has been successful in working with institutions and appellants in resolving appeals on the basis of the institution creating a salary range. To assist both institutions and requesters in dealing with such requests on a daily basis, I thought it would be useful to issue an order which clearly sets out my views on this important matter.

Original signed by:
Tom Wright
Commissioner

May 22, 1992