



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER M-206**

## **Appeal M-9100443**

### **Welland County Roman Catholic Separate School Board**



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# ORDER

## BACKGROUND:

The Welland County Roman Catholic Separate School Board (the "Board") received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to certain records held by the Board. The requester indicated that the records contained information about an individual, now deceased, who had been an employee of the Board (the deceased). The request enumerated six categories of records described as follows:

- 1) Copies of records regarding certain allegations concerning the deceased.
- 2) Copies of Board Minutes where the deceased or certain other matters were discussed.
- 3) Copies of documents concerning certain charges or potential charges.
- 4) Copies of certain Board policies and protocols.
- 5) Copies of documents from the deceased's employment file (corporate, Human Resources).
- 6) Copies of records regarding a particular investigation being conducted by the Board into allegations made against the deceased.

Attached to the request was a copy of the last will and testament of the deceased appointing his wife as the sole executrix of his will. The requester indicated that he was authorized to request the information on behalf of the executrix. The requester provided the Board with an authorization to that effect signed by the executrix.

The Board granted access in full to the records described in categories 4 and 5. The Board denied access to the records in categories 1 and 2 pursuant to sections 6(1)(b), 12 and 38(b) of the Act. The Board's response with respect to the category 6 records implied that no records existed as there was no "current investigation being conducted by the Board".

The decision stated further that certain records did not relate to the administration of the estate, and that therefore section 54(a) of the Act did not provide the requester with a right of access to these documents. The Board also advised the requester that, pursuant to section 18 of the Act, the request for the category 3 records had been transferred to another institution which had custody of any possible responsive records.

The requester appealed several aspects of the Board's decision. He questioned the application of the exemptions cited by the Board to deny access to the records. He indicated that he was of the opinion that additional records responsive to the items requested in categories 3, 4 and 6 exist. He stated that he was appealing the Board's decision regarding the non-application of section 54(a) of the Act. As well, the appellant questioned whether the individual who rendered the access decision had the authority to do so.

During mediation of the appeal, the Board disclosed more records to the appellant. Included in these were

the records for which the Board had claimed the application of the exemption in section 12 of the Act. Accordingly, that is no longer an issue in this appeal.

As mediation was only partially successful, notice that an inquiry was being conducted to review the decision of the Board, was sent to the Board and the appellant. Representations were received from both parties.

In its representations, the Board indicated that it had located another record that was responsive to the request, and that it was relying on the exemption in section 14 of the Act to deny access to this document. A supplementary Notice of Inquiry was then sent to the parties, asking for representations regarding this record. Representations on this issue were received from the Board only

On August 6, 1993, while the previous representations were being considered, Commissioner Tom Wright issued Order M-170 which interpreted several statutory provisions of the Act in a way which differed from the interpretation in previous orders. Since a new approach to the operation of the Act was being adopted and because the same statutory provisions are at issue in the present appeal, it was determined that copies of Order M-170 should be provided to the parties. The parties were then given the opportunity to state whether the contents of Order M-170 would cause them to change or supplement the representations which they had previously made. Additional representations were received from the Board only.

### **THE RECORDS:**

The records at issue in this appeal may be described as follows:

- 1) An excerpt from the minutes of a Board meeting of October 21, 1991.
- 2) A memo dated October 11, 1991, and an attached statement dated October 20, 1991.
- 3) A report dated October, 1991 regarding an alleged incident.
- 4) A memo dated October 30, 1991.
- 5) A report to the Director of Education dated October 29, 1991, and an attached memo re: background information.
- 6) An employee's file notes and memos.
- 7) A page of notes taken by a counsellor.

Access to Record 1 was denied to the appellant pursuant to section 6(1)(b) of the Act. The Board denied access to the balance of the records stating that section 54(a) of the Act did not apply and claiming the exemption provided by section 38(b), with reference to parts of section 14.

## **PRELIMINARY MATTER:**

The appellant has asked the Commissioner's office to review the authority of the Board's decision-maker to make access decisions under the Act.

The Board has provided a copy of the delegation of authority to this office. I have reviewed this delegation and am satisfied that it is valid and proper. Accordingly, I find that the individual who made the access decision had the authority to do so.

## **ISSUES/DISCUSSION:**

The remaining issues arising in this appeal are as follows:

- A: Whether the information contained in the records qualifies as "personal information" as defined in section 2(1) of the Act.**
- B: Whether section 54(a) of the Act applies to the records in the circumstances of this appeal.**
- C: If the answer to Issue A is yes, whether the mandatory exemption provided by section 14 of the Act applies to Records 2-7.**
- D: Whether the discretionary exemption provided by section 6(1)(b) of the Act applies to Record 1.**
- E: Whether the Board's search for responsive records was reasonable in the circumstances.**

## **SUBMISSIONS/CONCLUSIONS:**

**ISSUE A: Whether the information contained in the records qualifies as "personal information" as defined in section 2(1) of the Act.**

Section 2(1) of the Act states, in part:

"personal information" means recorded information about an identifiable individual, ...

The records describe incidents involving various individuals, and relate to circumstances stemming from these incidents. In my view, the records contain recorded information about the deceased and other identifiable individuals and therefore qualify as personal information as defined in section 2(1) of the Act. As the death occurred within the past 30 years, section 2(2) of the Act does not apply.

The records do not contain any personal information of the appellant.

**ISSUE B: Whether section 54(a) of the Act applies to the records in the circumstances of this appeal.**

Under Issue A, I have found that the records contain the personal information of the deceased as well as other identifiable individuals. Section 36 of the Act gives an individual a general right of access to his or her own personal information. In addition, section 54(a) provides that:

Any right or power conferred on an individual by this Act may be exercised,

if the individual is deceased, by the individual's personal representative if exercise of the right or power relates to the administration of the individual's estate;

The appellant has taken the position that he is representing the estate of the deceased, and that, pursuant to section 54(a) of the Act, he is therefore entitled to access to any of the records that the deceased would have been entitled to under the Act.

The appellant would be able to exercise the deceased's right to request and be granted access to the deceased's personal information, if he is able to demonstrate that he is the deceased's "personal representative" and that his request for access to the information "relates to the administration of the deceased's estate".

The term "personal representative" in section 54(a) of the Act means an executor, an administrator, or an administrator with will annexed (Order P-294). In this case, it is clear that the appellant is the agent of the deceased's personal representative, the executrix, under section 54(a) of the Act. The issue raised by the parties is whether the request constitutes the exercise of a right or power "relating to the administration of the deceased's estate".

The Board has submitted that section 54(a) qualifies the right to records to which a personal representative is entitled to those "relating to the administration of the estate". The Board contrasts the wording of this section with the wording of sections 54(b) and (c) of the Act, under which, it maintains, individuals acting on behalf of other categories of requesters have unrestricted rights to act on behalf of those requesters.

The Board has also submitted that the information which has been released to the appellant, including the personal file of the deceased, was information which related to the estate of the deceased. This included information concerning such things as entitlement to death benefits, life insurance and vacation pay. The Board has refused to disclose the remaining records at issue on the basis that the records do not relate to the administration of the individual's estate. The Board also states that:

... None of the other documents referred to in the request deal with the administration of the

individual's estate but rather alleged criminal conduct which cannot proceed to prosecution due to the death of the accused. There has been no allegation of civil action ...

The appellant submits that the requested records do relate to the administration of the estate. In that regard, the appellant has taken the position that the personal representative of the estate is entitled to review the records requested in order to determine whether there exists any evidence to support various possible legal causes of action. The appellant also describes scenarios where the information might be required in possible court actions.

It is clear from the wording of section 54(a) that for a personal representative of a deceased to exercise a right or power of the deceased, the exercise of that right or power must "relate to the administration of the individual's estate." It is therefore evident that the rights of a personal representative under section 54(a) are narrower than the rights of the deceased person. That is, the deceased retains his or her right to privacy except insofar as the administration of his or her estate is concerned.

Personal privacy rights of deceased individuals are recognized in both the purpose of the Act as set out in section 1(b), and section 2(2) where, as I have noted, "personal information" is defined to specifically include that of individuals who have been dead for less than thirty years.

In order to give effect to these rights, I believe that the phrase "relates to the administration of the individual's estate" in section 54(a) should be interpreted narrowly to include records relating to financial matters to which the personal representative requires access in order to wind up the estate. The records at issue in this appeal contain precisely the type of sensitive personal information about the deceased which the other sections of the Act to which I have referred were designed to protect. This personal information does not relate to the administration of the deceased's estate.

Therefore, the appellant is not entitled to access this information under section 54(a) of the Act. Accordingly, the appellant's request for information, as it relates to the deceased's personal information, is subject to the mandatory provisions of section 14 of the Act.

**ISSUE C: If the answer to Issue A is yes, whether the mandatory exemption provided by section 14 of the Act applies to Records 2-7.**

Once it has been determined that a record contains personal information, section 14(1) of the Act prohibits the disclosure of this information, except in certain circumstances. Specifically, section 14(1)(f) of the Act reads as follows:

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), (3), and (4) of the Act provide guidance in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy. In Order M-170, Commissioner Wright addressed the interrelationship between sections 14(2), (3), and (4) of the Act in the following way:

... [W]here personal information falls within one of the presumptions found in section 14(3) of the Act, a combination of circumstances set out in section 14(2) of the Act which weigh in favour of disclosure, cannot collectively operate to rebut the presumption.

The only way in which a section 14(3) presumption can be overcome is if the personal information at issue falls under section 14(4) of the Act or where a compelling public interest exists in disclosure of the record in which the personal information is contained, which clearly outweighs the purpose of the section 14 exemption.

I adopt this approach for the purposes of this order.

### **Section 14(3)**

The Board submits that sections 14(3)(b) and (d) of the Act apply to Records 2-6 and that sections 14(3)(a), (d), and (g) apply to Record 7. These sections state:

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

- (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;
- (b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;
- (d) relates to employment or educational history;
- (g) consists of personal recommendations or evaluations, character references or personnel evaluations; or

In my view, with one exception, the presumptions in sections 14(3)(b) and (d) do not apply to Records 2-6. It is my opinion that the records generated by the Board were not compiled as part of an investigation into a possible violation of law. Rather, a Board employee reported certain allegations to the agency with the legislative authority to investigate the allegations.

The agency advised the Board employee to contact the Police who then conducted an investigation. The personal information contained in Records 2-6 was compiled by employees of the Board to record the necessary information for its reporting requirements and to address the employment issues which arose with respect to the deceased. The Board has no legal mandate to, nor did it, conduct any investigation itself. Moreover, the charges that were subsequently laid against the deceased, were laid by the Police as a result of their investigation. Accordingly, it is my view that the presumption contained in section 14(3)(b) does not apply to the majority of Records 2-6.

The one exception to this is a statement prepared for the Police by one Board employee. This statement is part of Record 2. The statement contains the personal information of numerous individuals which was compiled and is part of the Police investigation into the allegations. I am satisfied that the requirements for a presumed unjustified invasion of personal privacy under section 14(3)(b) have been established with respect to this portion of Record 2.

I have considered section 14(4) of the Act and find that none of the personal information at issue in this portion of Record 2 falls within the ambit of this provision. In addition, the appellant has not argued that the public interest override set out in section 16 of the Act applies to the facts of this case.

As far as the application of the presumption contained in section 14(3)(d) to Records 2-7 is concerned, I do not agree with the position of the Board that these records contain the employment history of any Board employees. There is no connection between the information contained in these records with the employees' positions, job responsibilities, career history, performance appraisals or other human-resource related characteristics that are normally associated with employment history (Orders P-256 and P-433). Rather, they are records which outline the Board employees' involvement with the situation involving the allegations.

Record 7 is a handwritten note taken by the counsellor/teacher who was conducting a psychological counselling session with a student. In my view, the requirements for a presumed unjustified invasion of personal privacy under section 14(3)(a) have been established.

Based on the reasoning I have set out above with respect to the Police statement portion of Record 2, I find that the presumption of an unjustified invasion of personal privacy has not been rebutted with respect to the personal information contained in Record 7. Therefore, Record 7 qualifies for exemption pursuant to section 14(3)(a) of the Act.

### **Section 14(2)**

Section 14(2) provides a list of circumstances to consider in determining whether a disclosure of personal information would constitute an unjustified invasion of personal privacy. The appellant and the Board have provided me with representations supporting their respective positions regarding the application of section 14(2).

The appellant submits that sections 14(2)(a) and (d) of the Act are relevant circumstances to consider. The



Board has specifically made reference to section 14(2)(f) and inferentially refers to the application of section 14(2)(i). Those sections read 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;
- (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
- (f) the personal information is highly sensitive;
- (i) the disclosure may unfairly damage the reputation of any person referred to in the record

With regard to the application of section 14(2)(a) of the Act, Inquiry Officer Holly Big Canoe made the following statement in Order M-143:

In order to establish the relevance of section 14(2)(a), the appellant must provide evidence demonstrating that the activities of the Board have been publicly called into question, necessitating disclosure of the personal information of the affected persons in order to subject the activities of the Board to public scrutiny.

[Order M-84]

I agree with this approach and adopt it for the purpose of this appeal.

I have not been provided with any evidence demonstrating that the activities of the Board have been publicly called into question, nor that any party other than the appellant has expressed a concern about the activities of the Board. I am, therefore, not satisfied that section 14(2)(a) is a relevant factor to consider in determining whether the personal information should be disclosed.

Concerning the application of section 14(2)(d), the appellant states that the requested personal information is relevant because it affects the rights of the personal representative of the estate, and that the representative should have access to the same information to which the deceased would have been entitled.

I have dealt with the issue of the status of the personal representative under Issue B, and I am not satisfied that section 14(2)(d) applies in these circumstances.

I accept the submission of the Board that section 14(2)(f) applies in the circumstances of this case. In my

opinion, the information contained in the record is "highly sensitive" personal information of the deceased and other identifiable individuals.

The appellant maintains that the deceased and members of his family were made aware of the nature of the allegations against the deceased prior to his death. However, in my view, that does not diminish the sensitivity of the personal information at issue. In my view, disclosure of this information would cause excessive personal distress to the individuals named in the records (Order P-434).

In addition, I agree with the position of the Board that section 14(2)(i) is a relevant consideration in the circumstances of this appeal. Because of the death of the individual against whom the charges were laid, there will not be a criminal trial in this matter. Given this, the disclosure at this time of the personal information of those individuals who made the allegations would be "unfair".

In summary, I have found that the factors listed in sections 14(2)(f) and (i) weigh in favour of the protection of the personal privacy of the individuals whose personal information appears in the balance of Records 2-6. I have found no factors in section 14(2) of the Act which weigh in favour of disclosure.

The Board and the appellant have both made extensive representations on a number of additional circumstances surrounding this appeal.

The appellant has referred to certain additional matters which he believes are relevant and which he maintains should be considered in weighing the rights of access to the records. These circumstances include the fact that the requester is a relative of the deceased, the mental or physical well being of the requester, and a deceased individual's diminished interest in the protection of privacy.

In Order M-96, former Assistant Commissioner Tom Mitchinson considered the issue of the identity of a requester in the context of section 14(2)(d) of the Act. He stated:

In my view, a requester's status cannot be a relevant factor in determining whether disclosure of personal information will constitute an unjustified invasion of personal privacy. Disclosure of a record under Part I of the Act is, in effect, disclosure to the world and not just to the requester, and I find that the status of the Federation, or the relationship of a Federation to its members [the individuals whose personal information was being requested], is not a relevant consideration.

I agree with this approach and adopt it for the purpose of this appeal.

Accordingly, neither of first two additional factors referred to by the appellant which refer to the identity of the appellant are relevant factors to consider in the circumstances of this appeal.

In his submissions, the appellant has referred to Orders M-50 and M-51 to support his position that there exists a diminished interest in the protection of the privacy of a deceased individual. However, as

Commissioner Tom Wright stated in Orders M-50 and M-51:

The disclosure of personal information which might have constituted an unjustified invasion of personal privacy while a person was alive, may, **in certain circumstances**, not constitute an unjustified invasion of personal privacy if the person is deceased.

[emphasis added]

The Board notes that one must look at the **circumstances** of the death, not merely the **fact** of death, to see if the deceased's right to privacy is diminished as set out in these orders. Given the circumstances of this case, I agree with the Board that this is not a situation where the right to privacy has been diminished upon the death of an individual.

I recognize that the circumstances surrounding these incidents have been very difficult and stressful for all of the individuals involved. I also sympathize with the position of the appellant and his family. Nonetheless, having considered all the facts and circumstances of this case, it is my view that disclosure of the personal information of both the deceased and the other individuals contained in Records 2-7 would constitute an unjustified invasion of their personal privacy and that the exception in section 14(1)(f) does not apply.

**ISSUE D: Whether the discretionary exemption provided by section 6(1)(b) of the Act applies to Record 1.**

The Board claims that section 6(1)(b) of the Act applies to exempt Record 1 from disclosure. That section reads as follows:

A head may refuse to disclose a record,

...

that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public.

In order for an institution to rely on section 6(1)(b), it must establish that:

1. a meeting of a council, board, commission or other body or a committee of one of them took place; **and**
2. that a statute authorizes the holding of this meeting in the absence of the public; **and**
3. that disclosure of the record at issue would reveal the actual substance of

the deliberations of this meeting.

[Orders M-64, M-98, M-102, and M-184]

In Order M-102, it was established that the first and second parts of the above test require the Board to establish that a meeting was held **and** that it was held in camera. The third part of the test was examined in Order M-98, where it was identified that, although the information contained in a record may have been the **subject** of the deliberations, this is not sufficient to meet the third part of the test. The record itself must contain information which would reveal the **substance** of the deliberations referred to in the section. "Deliberations", in the context of section 6(1)(b) refer to discussions which were conducted with a view towards making a decision (Order M-184).

Record 1 is an excerpt from the minutes of a Board meeting of October 21, 1991. The Board has provided me with a certified copy of the minutes of that meeting, which confirm that the meeting was held in camera.

The Board then relies on section 207(2)(b) of the Education Act (formerly section 183(2)(b)) as the basis for its statutory authority to hold meetings in camera in certain circumstances. This provision states:

A meeting of a Committee of a board, including a committee of the whole board, may be closed to the public when the subject-matter under consideration involves,

the disclosure of intimate, personal or financial information in respect of a member of the board or committee, an employee or prospective employee of the board or a pupil or his or her parent or guardian;

Based on the evidence provided to me, I am satisfied that the Board had the requisite authority under section 207(2)(b) of the Education Act to hold an in camera meeting in order to discuss certain personal matters involving the deceased, who was then an employee of the Board. Having carefully reviewed the record, I am also satisfied that disclosure of Record 1 would reveal the actual substance of the discussions conducted by the Board, hence its deliberations. On this basis, I find that the Board has established that the third part of the section 6(1)(b) test applies in this case.

Since all three components of the test have been satisfied, I find that Record 1 is properly exempt from disclosure under section 6(1)(b) of the Act.

I must now determine whether the mandatory exception contained in section 6(2)(b) of the Act applies to the facts of this case. This section reads as follows:

Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record if,

in the case of a record under clause (1)(b), the subject-matter of the

deliberations has been considered in a meeting open to the public;

I have not been provided with any evidence to indicate that the subject matter of Record 1 has been considered in a meeting open to the public, and I find that section 6(2)(b) does not apply.

Section 6(1)(b) is a discretionary exemption. I have reviewed the Board's representations regarding its exercise of discretion in favour of claiming the exemption and find nothing improper in the circumstances of this appeal.

I am therefore satisfied that Record 1 qualifies for exemption under section 6(1)(b) of the Act.

**ISSUE E: Whether the Board's search for responsive records was reasonable in the circumstances.**

In response to the Notice of Inquiry, the Board identified an additional record, Record 7, as responsive to the request. Access to this record is discussed under Issue C.

As part of its representations, the Board provided an affidavit sworn by its Freedom of Information Co-ordinator. The affidavit attests to the nature of the searches conducted in response to the original request. It also attests to the follow-up inquiries which were made in response to the Notice of Inquiry, and the reasons why one additional record was located.

Having reviewed the affidavit evidence provided, I am satisfied that the Board has taken all reasonable steps to locate any records that would respond to the appellant's request, and I find that the search conducted by the Board in this appeal was reasonable.

**ORDER:**

I uphold the decision of the Board.

Original signed by: \_\_\_\_\_  
Anita Fineberg  
Inquiry Officer

\_\_\_\_\_ October 26, 1993