Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER M-280

Appeal M-9300064

Toronto Board of Education

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ORDER

BACKGROUND:

The Toronto Board of Education (the Board) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for a copy of a report prepared by its Equity Advisor - Women. The report was prepared for the Board's Associate Director of Education - Human Resources and relates to concerns raised by the requester after a job competition in which she had been an unsuccessful candidate.

The Board identified the responsive record as a title page, an index, the 18-page report and 3 appendices. The Board disclosed the title page, the index, Section I, "Introduction", Section II, "Background" (except for 4 lines) and Part 1 of Section III, "The Selection Process". The Board also disclosed Appendices 1 and 3 and most of Appendix 2. The Board denied access to the remainder of the report pursuant to sections 7(1), 12, 14(1) and 14(3) of the Act. Access was denied to portions of Appendix 2 under section 14 only. The requester appealed the Board's decision.

During mediation, the Board determined that the covering letter to the report was also responsive to the request. The Board denied access to portions of the letter pursuant to sections 7(1) and 12 of the Act.

Mediation was not successful and notice that an inquiry was being conducted was sent to the appellant, the Board and the two other candidates involved in the job competition (the affected persons). Representations were received from the appellant, the Board and the successful candidate (affected person #1). Affected person #1 consented to the release of his personal information. The other candidate (affected person #2) did not provide representations.

While these representations were being considered, I issued Order M-170 which interpreted section 14 of the Act in a way which differed from the interpretation developed in previous orders. Since a new approach to the operation of the Act was being adopted and because section 14 is at issue in the present appeal, it was determined that copies of Order M-170 should be provided to all the parties. The parties were then afforded 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 and in its representations, the Board raised the application of section 14(3)(g).

PRELIMINARY ISSUE:

During the course of the appeal, the appellant stated that she believed she should be entitled to receive a copy of the report under the Board's Sexual Harassment policy. I do not agree. I have reviewed the policy and even assuming that it applies to the appellant's circumstances, I note that the policy clearly states that the Act will apply to information collected pursuant to the policy.

As well, the chronology of events leading to the preparation of the report and the content of the report itself, draw me to the conclusion that it is not the report of a fact-finding investigator under the Sexual Harassment policy. The appellant's original harassment complaint has been dealt with and an apology issued. In my

view, the report which is at issue in this appeal addresses employment equity concerns in the context of a job competition.

ISSUES:

A. Whether the record contains personal information as defined in section 2(1) of the Act.

B. Whether the record qualifies for exemption under section 7 of the Act.

C. Whether the record qualifies for exemption under section 12 of the Act.

D. Whether the discretionary exemption provided by section 38(a) of the Act applies to the personal information contained in the record.

E. Whether the discretionary exemption provided by section 38(b) of the Act applies to the personal information contained in the record.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the record contains personal information as defined in section 2(1) of the Act.

Personal information is defined in section 2(1) as "recorded information about an identifiable individual". Having reviewed the record, I find that the covering letter, the remaining sections of the report and Appendix 2 all contain the personal information of the appellant. Some parts of the report and Appendix 2 contain the personal information of both the appellant and the affected persons.

ISSUE B: Whether the record qualifies for exemption under section 7 of the Act.

Section 7(1) of the Act states:

> A head may refuse to disclose a record if the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

Section 7 purports to protect the free flow of advice and recommendations within the deliberative process of government decision-making and policy-making.

It has been established in a number of previous orders that "advice" for the purposes of section 7(1) must contain more than mere information. Generally speaking, "advice" pertains to the submission of a suggested course of action, which will ultimately be accepted or rejected by its recipient in the deliberative process (Orders M-40, M-69, M-194, M-210). "Recommendations" should be viewed in the same vein (Orders M-69, M-194, M-210).

The Board claims that all the undisclosed information falls within the scope of section 7(1) because:

> ... the Equity Advisor provides more than mere information. She is engaged in providing the Associate Director of Education - Human Resources with advice or an opinion, which is comprised of an analysis and conclusion, all of which then forms the basis for the recommendations as to the courses of action to be adopted by the Board.

The Board notes that the report and covering letter were marked "Private and Confidential" and states that:

> ... [I]f confidentiality is not maintained in respect of such advice and recommendations, then there is a risk of a "chilling effect" which will impede the decision-making process.

The Board also refers to Order P-233, in which it was held that a record may be exempt under section 13(1) of the Freedom of Information and Protection of Privacy Act (the provincial Act) the equivalent of section 7(1) of the Act, if its disclosure would allow accurate inferences to be drawn about the actual advice or recommendations. The Board submits that disclosure of much of the analysis of the Equity Advisor - Women would reveal her advice or recommendations.

Having carefully reviewed the record and the representations, I agree with the Board that the "Recommendations" section contained in Part VI of the report contains advice or recommendations and, therefore, qualifies for exemption under section 7(1). In my opinion, disclosure of certain portions of the covering letter, part 2 of Section III, and Sections IV and V of the report would also reveal the advice or recommendations of the Equity Advisor - Women and therefore, qualify for exemption under section 7(1).

In my view, the remaining information is not advice or recommendations. I am also satisfied that the disclosure of this information would not reveal the advice or recommendations of the Equity Advisor - Women. Accordingly, it does not qualify for exemption under section 7(1).

I have reviewed the provisions of section 7(2) and none of the exceptions apply.

I will now determine whether the parts of the report and covering letter which I have found do not qualify for exemption under section 7(1), qualify for exemption under section 12.

ISSUE C: Whether the record qualifies for exemption under section 12 of the Act.

Section 12 provides as follows:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

Section 12 consists of two branches, which provide an institution with the discretion to refuse to disclose:

1. a record that is subject to the common law solicitor-client privilege (Branch 1); and

2. a record which was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the Board must provide evidence that the record satisfies either of the following tests:

1. (a) there is a written or oral communication and

   (b) the communication must be of a confidential nature and

   (c) the communication must be between a client (or his agent) and a legal advisor and

   (d) the communication must be directly related to seeking, formulating or giving legal advice

OR

2. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.

   (Orders 49, M-2 and M-19)

A record can be exempt under Branch 2 of section 12 regardless of whether the common law criteria relating to Branch 1 are satisfied. Two criteria must be satisfied in order for a record to qualify for exemption under Branch 2:

1. the record must have been prepared by or for counsel employed or retained by an institution; and

2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

(Orders 210, M-2, M-19 and M-69)

It is not clear to me from the representations of the Board which parts of the Branch 1 and 2 tests it is addressing. However, I have reviewed the sections of the legal text and the case law to which the Board refers and I conclude that the Board is focusing on the application of the so-called litigation privilege set out in part 2 of Branch 1 and in Branch 2 of the section 12 exemption.

The Board's submissions concerning each branch are essentially the same. The Board asserts that litigation was within the contemplation of the Director of Education - Human Resources at the time the report was prepared and that this prospect of litigation later materialized when the appellant filed a complaint against the Board with the Ontario Human Rights Commission. The Board also states that the report was prepared by the Equity Advisor - Women with the intention that it be referred to the Board's solicitor.

The Board submits that solicitor-client privilege protects not only communications directly between a client and legal advisor but also "derivative communications", i.e., communications or materials internally generated by the client. The Board acknowledges that such internally generated communications are privileged only if made for the dominant purpose of reasonably contemplated litigation.

The Board refers to the text Solicitor-Client Privilege in Canadian Law, Butterworths Canada Ltd., Markham, Ontario, 1993, Ronald D. Manes and Michael P. Silver, in which the meaning of "derivative communications" is discussed. According to this text, the dominant purpose for the production of a "derivative communication" can exist in the mind of the person producing the document or the person ordering its production. The test for dominant purpose outlined in this text consists of three elements:

1. the document must have been produced with contemplated litigation in mind;

2. the document must have been produced for the dominant purpose of receiving legal advice or as an aid to the conduct of litigation - in other words for the dominant purpose of contemplated litigation; and

3. the prospect of litigation must be reasonable.

In my view, the notion of derivative communications and the dominant purpose test are reflected in the interpretation of section 12 of the Act and section 19 of the provincial Act contained in previous orders. The key issue to be determined is whether the dominant purpose for preparation of the record was contemplated litigation. A component of this determination is whether the prospect of litigation is reasonable.

In Order 52, former Commissioner Sidney B. Linden established the following requirements for a record to qualify as being prepared "in contemplation of litigation" in the context of section 19 of the provincial Act:

> (a) the dominant purpose for the preparation of the document must be contemplation of litigation; and
>
> (b) there must be a reasonable prospect of such litigation at the time of the preparation of the record -litigation must be more than just a vague or theoretical possibility.

This interpretation has been followed in numerous subsequent orders.

I have carefully considered the Board's representations, the content of the record and the circumstances under which the record was prepared. It is my conclusion that the dominant purpose for the preparation of the records was not in contemplation of litigation.

It is clear that the report was prepared in the context of the author's duties as employment equity advisor to the Board. I am also of the view that the dominant purpose for preparing the report was in response to a complaint filed by the appellant concerning a job competition, not in contemplation of litigation. As stated by the Board in its representations relating to the application of section 7(1) to the report:

> All of this, [referring to sections of the Report] of course, was submitted to the Associate Director for his consideration of how the Board should respond to the Appellant's concerns. [emphasis added]

Finally, in her covering letter which accompanied the report, the author indicates that her report analyzes the fairness and consistency of the selection process, the effectiveness of harassment policies and the ability of the organization to meet employment equity goals and timetables.

In my opinion, the Board has failed to establish that the remaining portions of the record qualify for exemption under Branch 1 or Branch 2 of the section 12 exemption.

Under Issue E, I will consider the application of the Act to the parts of the record containing the personal information of the affected persons.

ISSUE D: Whether the discretionary exemption provided by section 38(a) of the Act applies to the personal information contained in the record.

Section 38(a) states:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > (a) if section 6, 7, 8, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information; [emphasis added]

I have found under Issue A that the contents of the report and covering letter qualify as personal information about the appellant. Under Issue B, I found that the "Recommendations" section and other parts of the report and the covering letter qualify for exemption under section 7(1). Section 38(a) is a discretionary exemption. The Board has provided me with representations regarding its exercise of discretion in refusing to disclose this information to the appellant. I find nothing improper in this exercise of discretion and would not alter it on appeal.

ISSUE E: Whether the discretionary exemption provided by section 38(b) of the Act applies to the personal information contained in the record.

Under Issue A, I found that some of the personal information at issue relates to both the appellant and the affected persons, the other two candidates in the job competition.

Section 36(1) of the Act gives individuals a general right of access to personal information about themselves, which is in the custody or under the control of an institution. However, this right of access is not absolute. Section 38 provides a number of exceptions to this general right of access including section 38(b) which reads as follows:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > if the disclosure would constitute an unjustified invasion of another individual's personal privacy;

Section 38(b) introduces a balancing principle. The Board must look at the information and weigh the requester's right of access to his or her own personal information against another individual's right to the protection of his/her personal privacy. If the Board determines that the release of the information would constitute an unjustified invasion of the other individual's personal privacy, then section 38(b) gives the Board the discretion to deny the requester access to the personal information.

In my view, where the personal information relates to the requester, the onus should not be on the requester to prove that disclosure of the personal information **would not** constitute an unjustified invasion of the personal privacy of another individual. Since the requester has a right of access to her own personal information, the only situation under section 38(b) in which she can be denied access to the information is if it can be demonstrated that disclosure of the information **would** constitute an unjustified invasion of another individual's privacy.

The successful candidate (affected person #1) has consented to the release of his personal information. Therefore, disclosure of this information cannot be considered to be an unjustified invasion of his personal privacy and it should be disclosed to the appellant. The only personal information remaining at issue is that of the other unsuccessful candidate (affected person #2). This information appears in one sentence on page 5 of the report and relates to his ranking in the job competition.

Sections 14(2), (3) and (4) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of an 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.

In its representations, the Board submits that the presumptions under sections 14(3)(d) and (g) apply to the information at issue. These sections read:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> (d) relates to employment or educational history;
>
> (g) consists of personal recommendations or evaluations, character references or personnel evaluations;

In Order 196, I found that the actual ranking of a candidate in a job competition satisfied the requirements of section 21(3)(g), the provincial counterpart of section 14(3)(g) of the Act. I am of the view that the presumption contained in section 14(3)(g) applies to the information relating to affected person #2.

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 section 16 of the Act, the public interest override, applies (Order M-170).

I have considered section 14(4) of the Act and find that the personal information at issue does not fall within the ambit of this provision. In addition, the appellant has not argued that section 16 of the Act applies.

Accordingly, I am of the view that disclosure of the interview ranking would constitute an unjustified invasion of the personal privacy of affected person #2. Section 38(b) is a discretionary exemption and I am satisfied that there is nothing improper with the Board's exercise of discretion to refuse to grant access to this information.

In summary, I have found that the information relating to affected person #2 qualifies for exemption under section 38(b) and that portions of the report and the covering letter qualify for exemption under section 38(a) by virtue of section 7(1). I am providing the Board with a highlighted copy of the covering letter and the report which will indicate those portions of the covering letter and the report to which these sections apply.

ORDER:

1. I order the Board to disclose to the appellant the portions of the covering letter and the report which are **not** highlighted in the copy of the record which is being forwarded to the Board with this order. I also order the Board to disclose the portions of Appendix 2 for which the section 14 exemption was claimed.

2. I order the Board to disclose the information referred to in Provision 1 within 15 days following the date of this order.

3. In order to verify compliance with the provisions of this order, I order the Board to provide me with a copy of the record which is disclosed to the appellant pursuant to Provision 1, **only** upon my request.

Original signed by: March 3, 1994
Tom Wright
Commissioner