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

ORDER M-673

Appeal M_9500402

Toronto Board of Education

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NATURE OF THE APPEAL:

This is an appeal under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The appellant is a former employee of the Toronto Board of Eduction (the Board). While employed with the Board, she filed a complaint of harassment based on gender against two other employees of the Board. The complaint was made under the Board's sexual harassment policy (the Policy) and was directed, in particular, against one of the other employees (the primary respondent). The second respondent was named because of his supervisory role over the primary respondent. A Fact-Finder was retained to investigate the complaint. She determined that the complaint was not substantiated, and the complainant and respondents were notified of this conclusion. In addition, the Fact-Finder provided a copy of her report to the Board's Director of Education.

The complainant now seeks access to records pertaining to her complaint and the subsequent investigation of it. The request sets out, in detail, 11 specific categories of information she is seeking.

The Board located records responsive to parts 1, 5, 6 and 8 of the request and denied access to them on the basis of the following exemptions in the Act:

- advice or recommendations - section 7(1)
- third party information - section 10(1)
- invasion of privacy - sections 14(1) and 38(b)
- discretion to refuse requester's own information - section 38(a).

The Board also referred to section 32 of the Act to support the view that disclosure would be an unjustified invasion of privacy. This section deals with disclosure of personal information in contexts other than access requests.

With respect to parts 7, 9 and 10 of the request, the Board indicated that no records exist. The Board also indicated that records which may be responsive to parts 2, 3, 4 and 11 of the request may exist, but they are not in its custody or under its control.

The complainant appealed this decision (throughout this order, I will refer to the complainant/appellant simply as the complainant). A Notice of Inquiry was sent to the complainant, the Board, the two respondents to the complaint, the Fact-Finder and several witnesses. Representations were received from the Board, the two respondents, the Fact-Finder and two of the witnesses. The Board has attached to its representations the sworn affidavit of its Freedom of Information and Privacy Co-ordinator. This affidavit addresses the issue of reasonableness of search.

In its representations, the Board indicates that it is prepared to disclose Records 1 (Record 2 is a duplicate of Record 1, so I will not consider it further in this order), 3 - 7, 9, and 11 - 19, which consist of correspondence to or from the complainant. All these records pertain to part 6 of the request. Accordingly, these records are not at issue in this appeal. The Board does not indicate,

however, that these records have actually been disclosed. In the absence of this information, I will order the Board to disclose them to the complainant.

The Board did not provide representations on sections 32 or 10(1) of the Act. Section 10(1) is a mandatory exemption. In reviewing the records, I am satisfied that it has no application in the circumstances of this appeal. Accordingly, I will not consider it further.

With respect to section 32 of the Act, a number of previous orders have dealt with this section in the context of an access request. These orders have found that section 32 has no application in this context. I agree with this conclusion. Accordingly, in the absence of representations, I will not consider this issue further.

As a result of the above, the records at issue consist of the following:

- letter from the Fact-Finder to the Director of Education, dated October 11, 1994 (Record 8)
- internal memorandum from the Director of Education to the primary respondent, dated September 29, 1994 (Record 10)
- final confidential report of the Fact-Finder to the Director of Education, dated March 9, 1995 (Record 20)
- curriculum vitae of the Fact-Finder (Record 21).

DISCUSSION:

CUSTODY OR CONTROL

The Board has indicated that records which might be responsive to parts 2, 3, 4 and 11 of the request are not within its custody or control. Parts 2, 3 and 4 of the request pertain to the names of individuals interviewed by the Fact-Finder, as well as her notes and any documents provided to her. Part 11 refers to records pertaining to the complainant, in the custody of a consulting firm retained by the Board to study one of the Board's operations, as well as any records in the possession of named employees of the Board (the Director and Associate Director of Education and the primary respondent) regarding their interviews with the consultants.

Section 4(1) of the Act states:

> Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless the record or part falls within one of the exemptions under sections 6 to 15.

In Order 120, former Commissioner Sidney B. Linden made the following comments regarding the issues of custody and control: "I feel it is important that [custody and control] be given broad and liberal interpretation in order to give effect to [the] purposes and principles [of the Act]." I agree. He went on to outline what he felt was the proper approach to determining whether specific records fell within the custody or control of an institution:

In my view, it is not possible to establish a precise definition of the words "custody" or "control" as they are used in the Act, and then simply apply those definitions in each case. Rather, it is necessary to consider all aspects of the creation, maintenance and use of particular records, and to decide whether "custody" or "control" has been established in the circumstances of a particular fact situation. In doing so, I believe that consideration of the following factors will assist in determining whether an institution has "custody" and/or "control" of particular records:

1. Was the record created by an officer or employee of the institution?

2. What use did the creator intend to make of the record?

3. Does the institution have possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?

4. If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee?

5. Does the institution have a right to possession of the record?

6. Does the content of the record relate to the institution's mandate and functions?

7. Does the institution have the authority to regulate the record's use?

8. To what extent has the record been relied upon by the institution?

9. How closely is the record integrated with other records held by the institution?

10. Does the institution have the authority to dispose of the record?

These questions are by no means an exhaustive list of all factors which should be considered by an institution in determining whether a record is "in the custody or under the control of an institution". However, in my view, they reflect the kind of considerations which heads should apply in determining questions of custody or control in individual cases.

This approach has been followed in many subsequent orders. In each case, the issue of custody and/or control has been decided based on the particular facts of the case. Similarly, this appeal must be decided on the basis of its particular facts.

With respect to part 2 (names of individuals interviewed), the Board now acknowledges that this information is contained in the Fact-Finder's Report (Record 20), and is, therefore, in the custody and control of the Board. I will address this information in my discussion under the heading "Invasion of Privacy".

With respect to parts 3 and 4, however, the Board and the Fact-Finder have both indicated that the Fact-Finder is an independent consultant, retained to conduct an investigation and prepare a summary of findings and report for the Director of Education. In this regard, any notes or documentation she has in her possession are held by her in her own capacity and are outside the custody and control of the Board.

Specifically, the Fact-Finder states that she is a self-employed person and that she maintains a private office. Her office is not connected to the Board in any way and she does not have a continuing relationship with the Board. She indicates further that she was retained for the specific purpose of investigating the complaint and providing the Board with a report.

The Fact-Finder confirms that she has retained all of her notes and documentation in her own office, and that these records have not been integrated with the Board's records in any way. Moreover, she indicates that there is nothing in the Board's Sexual Harassment Policy that requires her to take, maintain or provide notes to the Board. She states that if the Board requested a copy of her notes, she would refuse to provide them.

With respect to part 11 of the request, the Board indicates that the consulting firm is similarly an independent consultant retained by the Board to conduct a study on one of its operations and to make recommendations regarding it. The terms of the retainer did not include the delivery of any documentation in the consultant's files, other than its report containing recommendations.

Having reviewed the representations of both the Board and the Fact-Finder, I find that the records relating to parts 3, 4 and the portion of part 11 which refers to the consultants are neither in the custody nor under the control of the Board. Accordingly, they are not accessible under the Act in the circumstances of this appeal.

The Board has not provided any representations regarding the portion of part 11 which refers to notes held by Board employees regarding their interviews with the consultants. I will address this portion of the request below under the heading "Reasonableness of Search".

PERSONAL INFORMATION

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including any identifying number assigned to the individual and the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

I have reviewed the information contained in the records at issue and I find that Records 8, 10 and 20 all contain the personal information of the complainant and the respondents. Record 20 also contains the personal information of other identifiable individuals. Record 21 contains the personal information of the Fact-Finder only.

I note that Record 8, which is a letter to the Director of Education from the Fact-Finder, was copied to the complainant. I find that since the complainant was an intended recipient of the letter, disclosure of this record to the complainant would not constitute an unjustified invasion of any other individual's personal privacy. Accordingly, this record should be disclosed to the complainant.

INVASION OF PRIVACY

Section 36(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 38 provides a number of exceptions to this general right of access.

Under section 38(b) of the Act, where a record contains the personal information of **both the requester (in this case the complainant) and other individuals**, and the Board determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the Board has the discretion to deny the requester access to that information. For these records (Records 10 and 20), I will consider whether disclosure would be an unjustified invasion of the personal privacy of other individuals under section 38(b).

Where, however, a record **only contains the personal information of other individuals**, and the release of this information would constitute an unjustified invasion of the personal privacy of these individuals, section 14(1) of the Act prohibits the Board from releasing this information. For this record (Record 21), I will consider whether disclosure would be an unjustified invasion of personal privacy under section 14(1).

Under both sections 14(1) and 38(b), sections 14(2), (3) and (4) of the Act provide guidance in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy. Where one of the presumptions found in section 14(3) applies to the personal information found in a record, the only way such a presumption against disclosure can be overcome is where the personal information falls under section 14(4) or where a finding is made that section 16 of the Act applies to the personal information.

If none of the presumptions contained in section 14(3) apply, the Board must consider the application of the factors listed in section 14(2) of the Act, as well as all other considerations that are relevant in the circumstances of the case.

The Board relies on sections 14(2)(e), (f), (g), (h) and (i) and 14(3)(d) and (g), to support its decision to withhold the information at issue .

The respondents' representations also argue against disclosure, based on sections 14(2)(e), (f), (h) and (i).

The representations of the witnesses, which also oppose disclosure, refer to sections 14(2)(f) and (h).

In her letter of appeal and in her representations, the complainant states that, to date she has only been provided with the decision of the Fact-Finder. The complainant indicates, however, that she has been given no reasons for this decision. Without this information, as well as knowledge of the identity of the individuals interviewed and the qualifications of the Fact-Finder, she is unable to determine whether the investigation was complete and fair.

The parts of section 14 referred to in the parties' representations state as follows:

> (2) 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,
>
> (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
>
> (f) the personal information is highly sensitive;
>
> (g) the personal information is unlikely to be accurate or reliable;
>
> (h) the personal information has been supplied by the individual to whom the information relates in confidence; and
>
> (i) the disclosure may unfairly damage the reputation of any person referred to in the record.
>
> (3) 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;

I will begin this discussion of the application of factors and presumptions by reviewing the presumptions under section 14(3). After that, I will consider the factors under section 14(2) which have been raised.

Before beginning, I note that the Board's representations appear to focus on Records 20 and 21. The Board has also claimed section 14 for Record 10. Record 10 is a memorandum from the Director of Education to one of the respondents. The memorandum was written to inform the primary respondent that a complaint had been made against him, and includes a summary of the

details of the complaint. Because of the nature of the information contained in this record, I will apply the Board's arguments, where applicable, to this information.

Section 14(3)(d)

This presumption applies to information which relates to employment (or educational) history.

In its representations, the Board indicates that the information contained in Record 21 (curriculum vitae) relates to the employment or educational history of the Fact-Finder and that disclosure of this record would constitute a presumed unjustified invasion of personal privacy under section 14(3)(d) of the Act. Many previous orders of the Commissioner's office have found that resumes contain the employment and/or educational history of an individual. I agree with this approach and have applied it to Record 21. Accordingly, I find that the presumed unjustified invasion of personal privacy found in section 14(3)(d) of the Act applies. Since the 14(3)(d) presumption applies, factors favouring disclosure of the records under section 14(2) cannot be used to rebut the presumption (Order M-170). Record 21, therefore, is properly exempt under section 14(1) of the Act.

The Board also argues that the investigation and allegations relate to the discharge of the duties of the respondents to the complaint. Further, because the allegations and investigation are past events, they are of a historical nature. Therefore, the Board submits that the presumption in section 14(3)(d) also applies to exempt information regarding the complaint in Records 20 (the Fact-Finder's Report) and 10 (memorandum) from disclosure. In my view, the records contain information concerning employment related incidents involving the complainant and the primary respondent. However, this information cannot accurately be characterized as the employment history of any of the individuals to whom it relates, and I find that section 14(3)(d) does not apply.

Section 14(3)(g)

The Board submits that Record 20 (Fact-Finder's Report) contains the Fact-Finder's personal evaluations regarding the primary respondent and thus qualifies for exemption under section 14(3)(g). In a broad sense, it could be argued that some of the comments contained in the record are "evaluations" of the respondent. However, in my view, it is not possible to characterize these comments as "personal evaluations" or "personnel evaluations". The record was created during an investigation to determine whether sexual harassment under the Board's Sexual Harassment Policy had taken place. The conclusions reached as a result of the investigation are based on whether this policy has been complied with, and have no "personal" or "personnel" component, as required by section 14(3)(g) (Order M-82). Accordingly, in my view, section 14(3)(g) does not apply to the information contained in Record 20.

Sections 14(2)(e), (g) and (i)

The Board argues that since the complaint was determined to be "unfounded", the information in the records is unlikely to be accurate or reliable (section 14(2)(g)). Further, because the complaint was found to be "unsubstantiated", the fact of the investigation and the nature of the allegations may unfairly damage the reputations of the respondents, and of the primary

respondent in particular (section 14(2)(i)), and may cause them to be exposed unfairly to harm (section 14(2)(e)).

The Board also indicates that some of the comments made by the Fact-Finder about the primary respondent were irrelevant to the Policy and the issues investigated by the Fact-Finder were intended only for the consideration of the Director of Education. The Board submits that dissemination of this information would be exceedingly unfair to the primary respondent.

The representations of the two respondents reiterate and support the Board's position in this regard.

In my view, a determination that actions or incidents which led to a complaint do not meet the requirements to establish harassment has no automatic bearing on the accuracy or reliability of the information provided. The Board has not established, in the circumstances of this appeal, that any of the information contained in the records is either inaccurate or unreliable. Further, I do not agree that the Fact-Finder's comments about the primary respondent were irrelevant to the Policy. In my view, they were directly related to the Fact-Finder's conclusions regarding her investigation of the complaint.

Finally, I do not accept the Board's argument that the mere fact that the respondents have been identified in the context of a complaint under the Board's Policy would unfairly damage their reputations or expose them unfairly to harm. I do accept that the investigation and some of the comments about the primary respondent may have some negative impact on his reputation. However, in my view, the Board's and respondent's argument, that a determination by the Fact-Finder that the complaint did not constitute sexual harassment within the meaning of the Board's Policy, is not sufficient to render this impact "unfair" as required by section 14(2)(e).

In my view, sections 14(2)(e), (g) and (i) do not apply in this case.

Sections 14(2)(f) and (h)

These two sections relate to information which is highly sensitive (section 14(2)(f)), and information provided in confidence (section 14(2)(h)). The Board's representations indicate that it is primarily concerned with maintaining the integrity and confidentiality of its process in addressing the problem of sexual harassment. It provides some background regarding its Sexual Harassment Policy and stresses that confidentiality is integral to the effectiveness of the Policy. The Board cites from the guidelines which have been established in the Policy regarding its investigative procedures as follows:

> Given the sensitive nature of any complaint, every attempt will be made throughout the investigative proceedings on the part of all parties concerned to respect the confidential nature of the information. All written communications will be marked "Private and Confidential".

I note that the Policy also refers to the applicability of the Act to any information collected under the Policy.

The Board argues further that because the complainant voluntarily invoked the Policy, she accepted the fundamental term of confidentiality, upon which the other participants have relied. As a result, the Board submits that the complainant is estopped from seeking disclosure of any information in the records. The Board refers to several legal textbooks on this issue in support of its arguments.

With respect to this argument, it is important to point out that there is nothing in the Act which prohibits an individual from requesting information in the custody or control of an institution. Rather, this request must be viewed and responded to in accordance with the access provisions of the Act. The fact that the complainant agreed to a process in which confidentiality was assured does not bar her from seeking, under the Act, information obtained during that confidential process.

Further, many previous orders of the Commissioner's office have addressed arguments concerning the confidentiality of the harassment investigation process and have concluded, generally, that complete confidentiality of information provided during these investigations cannot be guaranteed.

In particular, Inquiry Officer John Higgins recently considered sections 21(2)(f) and (h) of the provincial Freedom of Information and Protection of Privacy Act, which are equivalent to sections 14(2)(f) and (h) of the Act in the context of a harassment complaint (Order P-1014). In doing so, he examined previous approaches taken by the Commissioner's office in addressing these issues. Because of the degree of concern raised by the Board regarding this issue, I will set out his discussion in full, and indicate at this time that I agree fully with his conclusions. He states as follows:

> In Order M-82 (issued under the municipal Act), Inquiry Officer Holly Big Canoe dealt with a request by the complainant in a harassment investigation. She described the general considerations which apply when a party to a complaint of harassment or discrimination requests access to the investigation file. Her comments were particularly directed at the application of sections 14(2)(f) and (h) of the municipal Act (the equivalent of sections 21(2)(f) and (h) of the Act). In that regard, she made the following comments:
>
> > In my opinion, information that pertains to normal, everyday working relationships and workplace conduct is not highly sensitive. However, when an allegation of harassment is made and investigated, it is reasonable for the parties involved to restrict discussion of workplace relationships and conduct and to find such information distressing in nature, as the affected persons have indicated here. Nevertheless, in my view, it is not possible for such an investigation to proceed if the complaint is not made known to the respondents and the direct response to the allegations made in the complaint is not made known to the complainant. Accordingly, I find that section 14(2)(f) is a relevant consideration in the circumstances of this appeal, but only in respect of the information provided by individuals other than the appellant, and

> not in respect of the information provided by the affected persons in direct response to the appellant's complaint.
> ...
> The City and the affected persons submit that all of the information was supplied under verbal assurances of confidentiality by the City. ... In my view, it is neither practical nor possible to guarantee complete confidentiality to each party during an internal investigation of an allegation of harassment in the workplace. If the parties to the complaint are to have any confidence in the process, respondents in such a complaint must be advised of what they are accused of and by whom to enable them to address the validity of the allegations. Equally, complainants must be given enough information to enable them to ensure that their allegations were adequately investigated. Otherwise, others may be discouraged from advising their employer of possible incidents of harassment and requesting an investigation, which runs counter to a policy the purpose of which is to promote a fair and safe workplace. Accordingly, in my view, section 14(2)(h) is a relevant consideration, but only in respect of the information provided by individuals other than the appellant, and not in respect of information provided by the affected persons in direct response to the appellant's complaint.

This order [M-82] was the subject of an application for judicial review. This application was recently resolved by the Ontario Court (General Division) Divisional Court (Corporation of the City of Hamilton v. Tom Wright, Information and Privacy Commissioner et al. (February 9, 1995), Hamilton Doc. D246/93). The Divisional Court dismissed the application for judicial review of Order M-82. Commenting on the approach the Inquiry Officer took to section 14(2)(h), the Court stated:

> On the appeal from the refusal of the City to disclose certain information, the Inquiry Officer was bound by this section of the Act to consider and weigh in the balance between the desire to know and the desire to protect privacy, the fact that the information given by the two employees was given in confidence. If the Inquiry Officer failed to do this then her decision must be set aside.
>
> In our view the Inquiry Officer did give due consideration to the fact the personal information was given in confidence. ...
>
> Her decision was in effect that in spite of the fact that information was given in confidence, that it must be disclosed to the complainant, **that otherwise the complainant might be left wondering whether his complaint had been properly investigated** and others might be discouraged from making known incidents of harassment. ...

> We are satisfied the Inquiry Officer meant that in the circumstances of this case section 14(2)(h) is not determinative of whether the information must be disclosed, not that the subsection is irrelevant. (emphasis added)

I adopt the Divisional Court's views for the purposes of this appeal. In this case, several of the witnesses have indicated that they were given assurances of confidentiality. On this basis, and following the Divisional Court's reasoning, I am of the view that the factor in section 21(2)(h) applies to all personal information provided by the witnesses and the complainant which pertains to individuals other than the appellant.

In my view, the comments of the Divisional Court about the application of section 21(2)(h) also provide guidance about the way section 21(2)(f) (highly sensitive) should be applied in this case. That is, rather than finding that section 21(2)(f) is not relevant to information provided in direct response to the complaint, it is my view that information provided in direct response to the complaint is among the most sensitive information contained in the records. Disclosure of this information would likely cause considerable personal distress to the affected persons. Some of the other personal information in the records, pertaining to the beliefs and behaviours of various co-workers of the complainant and appellant, is also highly sensitive.

Similarly, in the current appeal, I find that the information provided under the Policy and to the Fact-Finder in particular was provided in confidence. Thus, section 14(2)(h) applies to this information.

Further, I am satisfied that disclosure of the fact that a complaint had been made and information in the Fact-Finder's Report would cause considerable personal distress to individuals other than the complainant (namely, the two respondents) and section 14(2)(f), therefore, applies.

The complainant has not raised any factors which favour disclosure. However, the preamble to section 14(2) indicates that, in deciding whether disclosure would be an unjustified invasion of personal privacy, "all the relevant circumstances" should be considered. In my view, the complainant has raised one circumstance which is not specifically listed in section 14(2), but which has been addressed in a previous order of the Commissioner's office.

Adequate Degree of Disclosure

In Order P-1014, Inquiry Officer Higgins identified this consideration as "adequate degree of disclosure". This consideration, which favours disclosure, relates to the fairness of administrative processes, and the need for a degree of disclosure to the parties which is consistent with the principles of natural justice.

I appreciate the Board's position that implementation of the Board's Policy has serious consequences for both the complainant and the respondents, as well as any witnesses who participated in the investigation. However, the information which the Fact-Finder considered in reaching her decision regarding the complaint was entirely withheld from the complainant.

In upholding the Inquiry Officer's finding in Order M-82, the Divisional Court stated that, without adequate disclosure, "the complainant might be left wondering whether his complaint had been properly investigated". In my view, adequate disclosure is a fundamental requirement in a proceeding such as an investigation under the Board's Policy. Both the complainant and the respondent in such a proceeding are entitled to a degree of disclosure which permits them to understand the finding that was made and the reasons for the decision.

I note that the Fact-Finder provided the complainant and the respondents with a summary of her findings. This was done before submitting her final report to the Director of Education, and the parties were given an opportunity to respond. The complainant submitted a lengthy response. Although the summary sets out the complainant's allegations and the conclusions of the Fact-Finder, the substance of her investigation and the facts upon which she based her conclusions were not included.

In the circumstances of this appeal, I find that the factor requiring adequate disclosure applies to the personal information in the records which is directly related to the subject matter of the investigation and the Fact-Finder's findings.

In considering the above, and in keeping with the directions of the Divisional Court in Corporation of the City of Hamilton v. Tom Wright, cited above, I have weighed the interests of the complainant in disclosure of this information against the factors favouring privacy protection. In turning my discussion to these competing interests, I will summarize briefly my findings regarding the applicable factors and considerations.

As I indicated above, Record 10 is a memorandum from the Director of Education to one of the respondents which advises him that a complaint has been made. The memorandum also sets out the substance of the complaint in summary form. I found that the factors favouring privacy protection in sections 14(2)(f) and (h) apply to this record. However, because this information relates to the substance of the complaint, I also found that the unlisted consideration pertaining to "Adequate Degree of Disclosure" also applies.
In the circumstances of this appeal, I find that the consideration favouring disclosure is more compelling, and I find that disclosure of Record 10 would not be an unjustified invasion of personal privacy. Accordingly, this record is not exempt under section 38(b).

Similarly, I was satisfied that some of the information in Record 20 (Fact-Finder's Report) was provided to the Fact-Finder in confidence, and disclosure of this information could also be expected to cause considerable personal distress to several individuals who are mentioned. On this basis, I found that the factors in section 14(2)(f) and (h) apply. However, I was also of the view that this information relates to the conclusions reached by the Fact-Finder with respect to the disposition of the complaint, and therefore, the unlisted consideration pertaining to "Adequate Degree of Disclosure", applies to this information.

Many past orders have upheld the denial of access to information which could identify witnesses in harassment investigations. In balancing the interests of the complainant and that of the witnesses, I find that disclosure of the identity of witnesses would constitute an unjustified invasion of their personal privacy. Accordingly, I find that disclosure of information in Record 20 which would serve to identify any witnesses is exempt under section 38(b).

I have weighed the interests of the complainant in disclosure of the remaining portions of Record 20 (Fact-Finder's Report) against the factors favouring privacy protection. In the circumstances of this appeal, I find that the consideration favouring disclosure is more compelling, and I find that disclosure of the portions of Record 20 which do not identify the witnesses would not be an unjustified invasion of personal privacy, and accordingly, are not exempt under section 38(b).

The complainant has not claimed section 16 for Record 21 and the portion of Record 20 which I have found to be exempt under section 14, and I find that it does not apply.

Since no other discretionary exemptions have been claimed for the information in Records 8 and 10 which I have found **not** to be exempt, and no mandatory exemption applies, these two records should be disclosed to the complainant.

ADVICE OR RECOMMENDATIONS

The Board submits that Record 20 (Fact-Finder's Report) qualifies for exemption under section 7(1) of the Act. I have already found that portions of Record 20 are properly exempt under section 38(b). I will, therefore, restrict my discussion of this section to the remaining portions of this record.

Section 7(1) of the Act provides that:

> 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.

It has been established in a number of previous orders that advice and recommendations for the purpose of section 7(1) must contain more than mere information. To qualify as "advice" or "recommendations", the information contained in the record must relate to a suggested course of action which will ultimately be accepted or rejected by its recipient during the deliberative process (Orders 118 and P-628).

In my view, Record 20 does not set out a recommended course of action to be accepted or rejected by its recipient. It is, rather, the compilation of the results of the investigation into the complaint conducted by the Fact-Finder and her conclusions based on an assessment of the information received by her. Accordingly, it does not contain "advice" or "recommendations"

within the meaning of section 7(1) of the Act and therefore does not qualify for exemption under that section.

Because of my findings regarding section 7(1), it is not necessary for me to consider the possible application of section 38(a).

REASONABLENESS OF SEARCH

As I noted above, the Board has indicated that records responsive to parts 7, 9 and 10 of the request do not exist. Part 7 of the request pertains to fees, including legal fees incurred by the Board with respect to the complaint. Parts 9 and 10 refer to records in the complainant's personnel file or to records which name the complainant in any file maintained by the primary respondent, regarding this matter.

The Board argues, initially, that there is no provision in the Act giving a requester a right to appeal regarding the reasonableness of an institution's search for documents. In this regard, the Board states that the Act places no obligation on an institution to conduct a reasonable search for records. As a result, the Board argues, the Commissioner's office may only review a decision that requested records do not exist, not whether or not the Board conducted a reasonable search for records.

The Board made related arguments in Appeal Numbers M-9200452 and M-9500280. Inquiry Officer John Higgins addressed these arguments in great detail in Order M-315 and again in Order M-615. The substance of his analysis is certainly known to the Board and is readily available on reading Order M-315. I will, therefore, not discuss his analysis here. However, in rejecting the Board's arguments on this issue, he concluded:

> As I have discussed previously, the reasonableness of the search is the standard by which the possible existence of additional records is usually addressed in the inquiry process. If it appears that additional records may exist, then in my view the wording of section 43 is sufficiently broad to permit the Commissioner's office to order an institution to conduct additional searches.

I agree with this approach and adopt it for the purposes of this appeal. Accordingly, I will now turn my discussion to whether the Board has conducted a reasonable search for records responsive to the request.

Where a requester provides sufficient details about the records which she is seeking and the Board indicates that records do not exist, it is my responsibility to ensure that the Board has made a reasonable search to identify any records which are responsive to the request. The Act does not require the Board to prove with absolute certainty that records do not exist. However, in my view, in order to properly discharge its obligations under the Act, the Board must provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate records responsive to the request.

The Co-ordinator indicates in her affidavit that she contacted the complainant following receipt of the request to clarify several parts of the request. In doing so, she confirmed with the complainant that she was seeking records which identify her by name or position and which

relate to the complaint or her work performance. Further, she clarified with the complainant, the locations of the records she was seeking and the time frame in which records were expected to have been created.

In the course of her search for responsive records, the Co-ordinator contacted the Equity Advisor for Women, Equal Opportunity Office and one file was located in that office. This file was searched for records responsive to the request. The Co-ordinator also contacted both the Executive Assistant and the Administrative Assistant to the Director of Education, who provided all files in the Director's office relating to the complaint.

The Co-ordinator indicates that the Board's Sexual Harassment Policy requires that all files be housed by the Equal Opportunity Office for a period of six months following the final resolution of a complaint. Since the request was filed only one month following the date of the Fact-Finder's Report, any records which existed at the time of the complaint, in these files, still existed at the time of the request.

With respect to part 7 of the request (fees), the Co-ordinator states that she contacted the Director's office, the Board's accounting department and the offices of the Board's lawyers to determine whether there existed any accounts pertaining to this matter. She indicates that she searched, in particular, for legal accounts and invoices from the Fact-Finder. She confirms that no records were located. The Co-ordinator notes that the Final Report was submitted to the Director on March 9, 1995 and that the access request was made on April 7, 1995. She indicates that it is probable that the Board had not yet received invoices for the services rendered.

With respect to part 9 of the request (personnel file), the Co-ordinator indicates that she contacted the Senior Personnel Assistant in Staff Relations and Establishment Recruitment who then reviewed the contents of the complainant's personnel file. The Co-ordinator confirms that no records pertaining to the complaint were located.

The Co-ordinator similarly contacted the primary respondent regarding performance documentation concerning the complainant in his files (part 10 of the request). He confirmed that he did not have such information in his possession.

Finally, as I indicated above, part 11 of the request contained reference to two separate locations in which records might exist. The Board addressed only those records which would be in the custody or control of the consultants. The Co-ordinator indicates, however, that the search conducted by the Executive and Administrative Assistants (referred to above) encompassed this portion of part 11 (as it relates to the Director and Associate Director). She confirms that no records were located in these files. She indicates further that the primary respondent was also asked to search for records responsive to this part of the request, and he confirmed that he had no records in his possession.

In reviewing the Board's representations and the Co-ordinator's affidavit, I am satisfied that the efforts made to search for records relating to the complaint were reasonable in the circumstances.

ORDER:

1. I uphold the Board's decision regarding custody and control with respect to records requested under parts 3 and 4 of the request, and the portion of part 11 of the request pertaining to the consultants.

2. I uphold the Board's decision to withhold Record 21 in its entirety and the portions of Record 20 which refer to or identify the witnesses.

3. I order the Board to disclose to the complainant Records 1 and 3 - 19 in their entirety, and those portions of Record 20 which do not refer to or identify the witnesses within thirty_five (35) days after the date of this order and not before the thirtieth (30th) day after the date of this order.

4. I find the Board's search for records to be reasonable and this part of the appeal is denied.

5. In order to verify compliance with the terms of this order, I reserve the right to require the Board to provide me with a copy of the records that are disclosed to the complainant pursuant to Provision 3.

Original signed by: December 19, 1995
Laurel Cropley
Inquiry Officer