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

ORDER M-804

Appeals M_9500729 and M_9500731

The Board of Education for the City of Hamilton

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

These are appeals under the Municipal Freedom of Information and Protection of Privacy Act (the Act) of decisions of the Board of Education for the City of Hamilton (the Board).

BACKGROUND:

The appellant is a teacher with the Board. She has brought a complaint against the Board to the Ontario Labour Relations Board (the OLRB) concerning alleged discriminatory hiring practices of the Board. In order to obtain evidence to present to the OLRB, the appellant submitted six access requests under the Act to the Board relating to the qualifications of teachers who have been hired by the Board. These six requests were submitted subsequent to a number of other access requests made to the Board and arise, in part, from information received in the previous requests.

The Board responded to each of the six requests separately and issued a decision with respect to each one. The appellant filed one letter of appeal which referred to all six decisions. The Commissioner's office opened six appeal files to deal with each request separately.

During the mediation stage of these appeals, two appeals were resolved and the files were closed (Appeal Numbers M-9500732 and M-9500734). Further, the appellant agreed that two of her appeals (Appeal Numbers M-9500731 and M-9500733) dealt with the same subject matter and she, therefore, agreed to have these two files consolidated into one appeal (Appeal Number M-9500731).

As a result of mediation, therefore, there remain three appeal files. All three files have proceeded to the inquiry stage of the appeals process. Two of the appeals (Appeal Numbers M-9500729 and M-9500731) concern similar types of records. Accordingly, this order will dispose of the issues arising in both of these appeals. I will address the issues in Appeal Number M-9500730 in Order M-805.

NATURE OF THE APPEALS:

Appeal Number M-9500729

In her letter of request in this appeal, the appellant referred to a list of 47 permanent staff (the teachers) appointments which she obtained from the Board's Personnel and Organizational Committee minutes. She then requested copies of these individuals' credentials at the time of their first appointment. In particular, the appellant indicated that, for each teacher, the Board was to provide the following: (a) date of first appointment, (b) Ontario Teacher's Certificate, (c) Ontario Teacher's Qualification Record Card, (d) Ontario Secondary School Teachers' Federation (OSSTF) certification or Ontario Public School Teachers' Federation (OPSTF) certification, and (e) letter of permission, standing, eligibility or approval.

The appellant advised the Board that she was not seeking personal information such as the names, addresses and social insurance numbers of the teachers. She indicated further that the records could be provided in random order.

Appeal Number M-9500731

In her letter of request in this appeal, the appellant referred to attached lists of probationary staff appointments for 1992 to 1994 on which she had marked 17 positions. The lists, from which teachers' names were deleted, had been provided by the Board apparently in response to a previous access request. They contain only the locations (schools where these unnamed teachers are teaching), assignments (the subjects/grade being taught), the dates of the teachers' probationary appointments and their dates of permanent appointments. The appellant then requested copies of the credentials of the 17 unnamed teachers that she had identified. In this regard, she sought the same type of information she had requested in Appeal Number M-9500729.

The appellant similarly advised the Board in this appeal that she was not seeking the personal information of the teachers.

The Board's Response

The Board identified records responsive to both requests and, in separate decisions, denied access to them in their entirety on the basis that their disclosure would constitute an unjustified invasion of the personal privacy of the teachers identified on the lists (section 14(1) of the Act).

The appellant appealed both decisions.

During the course of the two appeals, the appellant raised the possible application of section 16 of the Act, the so-called "public interest override".

A Notice of Inquiry was sent to the appellant and the Board for each appeal. Representations were received from both parties in response to the two Notices.

THE RECORDS

The records at issue in this appeal consist of Ontario Teacher's Certificates, Ontario Teacher's Qualifications Record Cards, OSSTF or OPSTF Certification Rating Statements, Letters of Permission, Eligibility, Standing or Approval. The Board provided a sample copy of each type of record referred to above to this office, and indicated that the nature of the information contained on each type of record in the sample is representative of that found in all of the records responsive to the requests. With the agreement of the appellant, this order will proceed by way of the representative sample of the records. My decision with respect to these records will apply equally to the other records identified as being responsive to the requests.

PRELIMINARY ISSUE:

APPLICATION OF THE ACT

The Board submits that the Act does not apply to the records at issue as a result of the recent amendments to the Act under Bill 7 (the Labour Relations and Employment statute Law

Amendment Act. In particular, the Board refers to the addition of section 52(3)(1) to the Act. This section states:

> Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> > Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.

Other than raising the possible application of section 52(3)(1), the Board has not submitted any additional argument.

In each case, the request was dated October 6, 1995 and the Board issued its decision letter on October 25, 1995. Bill 7 did not come into force until November 10, 1995, when it received royal assent.

In Order M-796, issued June 28, 1996, Inquiry Officer Holly Big Canoe commented on whether these amendments to the Act should be applied retrospectively. In finding that the amendments do not apply retrospectively to requests made prior to their passage, she stated:

> I do not agree with the Board's submissions. This appeal was brought under the part of the Act which focuses on a request for access to records. In my view, it is the date of the request, which will not be difficult or onerous to discern, which determines whether or not the amendments will apply, not the date of the records.
>
> The amendments eliminate certain rights and obligations which previously existed. The general rule with respect to statutes affecting substantive matters is that they do not apply to pending cases, even those under appeal (see Pierre-André Côté, The Interpretation of Legislation in Canada, Quebec, 1991 at p.160).
>
> In addition, the amendments obviously affect the Commissioner's jurisdiction. In Royal Bank of Canada v. Concrete Column Clamps (1961) Ltd., [1971] S.C.R. 1038, 1040, the court found that a statute modifying a court's jurisdiction is not generally applicable to pending cases, because "... it is well established that jurisdiction is not a procedural matter ...". This has been applied to lower courts and courts sitting on review and there have also been cases involving administrative tribunals where similar reasoning has been applied (see Picard v. Public Service Staff Relations Board, [1978] 2 F.C. 296 and Garcia v. Minister of Employment and Immigration and Immigration Appeal Board, [1979] 2 F.C. 772 (C.A.)).
>
> In my view, the above cases make it clear that any request made prior to the passage of the amendments should be dealt with, both at the request stage and on appeal, under the Act as it was at the time of the request. Once a request has been submitted, the case can be said to be "pending" in the same way as a civil action is "pending" once a statement of claim has been issued and served. The case law

> supports the view that it would be at that point that the right of the requester to information or correction would crystallize.
>
> Further, I note that the government had initially drafted the bill such that the amendments had clear retroactive effect. This wording was later changed, demonstrating a legislative intention that the amendments are not meant to operate retrospectively.

I agree with both the Inquiry Officer's findings and reasoning, and I adopt them for the purposes of this appeal. Accordingly, I find that as the requests were made prior to the enactment of the amendments, they should be dealt with under the provisions of the Act as they were at that time.

Having found that the Act applies to the records at issue, I will now consider the other issues raised in these appeals.

PERSONAL INFORMATION

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including 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 records to determine whether they contain personal information, and if so, to whom the personal information relates.

I find that all the records pertaining to the 47 named teachers contain the personal information of these individuals. With respect to the 17 unnamed teachers whom the requester selected from the lists of probationary staff, I find that all records relating to them contain their names, as well as other personal information about them. As the appellant has not asked for copies of her credentials, none of the records contain the appellant's personal information.
As I indicated above, the appellant is not interested in receiving the names or other identifying information of the teachers and is prepared to receive the records in random order.

However, in view of the nature of the records and the information which the appellant already has, I find that even if the names and social insurance numbers of the 47 teachers are deleted from the records, the teachers would be identifiable from the remaining information contained in the records. Accordingly, I find that the records contain the personal information of the 47 named teachers.

With respect to the 17 unnamed teachers, I note that the appellant already has possession of information which identifies which school the teacher is teaching at, the subject or grade taught, and the year the teacher was appointed to that position. In these circumstances, because of the relatively small number of teachers whose credentials are being sought, it is likely that they would be identifiable from the records. Accordingly, I find that, even with the names and other identifying information removed, the records pertaining to this request contain the personal information of the 17 unnamed teachers.

Before I go on to determine whether disclosure of this personal information would constitute an unjustified invasion of personal privacy, I would like to comment on the appellant's approach in defining the records at issue in Appeal Number M-9500731. As I indicated above, the information which the appellant seeks in this appeal pertains to specific teachers who have been placed on a list which is in the appellant's possession. She states that she is not interested in receiving the names of the teachers in any of the records requested. However, I note that in Appeal Number M-9500730, the appellant has specifically requested the names of the teachers identified on this very list. In my view, despite the stated intentions of the appellant in Appeal Number M-9500731, she has gone to some lengths to determine the identity of the teachers she is interested in, as well as other personal information pertaining to them.

INVASION OF PRIVACY

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. The only exception to the mandatory exemption which may apply in the circumstances of this appeal is section 14(1)(f), which permits disclosure if it "... does not constitute an unjustified invasion of personal privacy".

Because section 14(1)(f) is an exception to the mandatory exemption which prohibits the disclosure of personal information, in order for me to find that section 14(1)(f) applies, I must find that disclosure of the personal information would **not** constitute an unjustified invasion of personal privacy.

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 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 if 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 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 circumstances that are relevant in the circumstances of the case.

The Board submits that the personal information falls within the presumption set out in section 14(3)(d) of the Act which states:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> > relates to employment or educational history;

The appellant maintains that the disclosure of other information in the records without the names of the teachers would not constitute an unjustified invasion of their personal privacy. The appellant also argues that the requested information is required for her hearing before the OLRB, and has, therefore, raised the possible application of section 14(2)(d), which is a factor which weighs in favour of disclosure.

With respect to the 47 named teachers, the disclosure of their dates of first appointment, information contained in their credentials and their letters of permission, standing, eligibility or approval, in conjunction with the information already in the possession of the appellant, would reveal details of their qualifications and employment with the Board. In my view, this constitutes the "educational or employment history" of these individuals such that section 14(3)(d) has been satisfied.

As for the 17 unnamed teachers, I similarly find that section 14(3)(d) applies to exempt disclosure of the records.

Even if I were to find that the appellant's arguments raised a relevant factor or consideration favouring disclosure under section 14(2), the Divisional Court's decision in the case of John Doe v. Ontario (Information and Privacy Commissioner) (1993) 13 O.R. 767 held that the factors and considerations in section 14(2) cannot be used to rebut the presumptions in section 14(3).

I find that none of the records fall within the scope of section 14(4). Accordingly, I find that the records are properly exempt under section 14(1) of the Act.

PUBLIC INTEREST IN DISCLOSURE

As I indicated above, the appellant argues that there is a public interest in the disclosure of the records at issue in accordance with section 16 of the Act. This section provides:

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

There are two requirements contained in section 16 which must be satisfied in order to invoke the application of the so-called "public interest override": there must be a **compelling** public interest in disclosure; and this compelling public interest must **clearly** outweigh the **purpose** of the exemption.

I have found that the records are exempt under section 14(1). I will now consider whether section 16 applies to these records.

In support of the application of section 16, the appellant states that members of the public have a right to know whether teachers in public schools have the necessary qualifications as required by the Education Act and Regulation 297 (Ontario Teacher's Qualifications). She refers to professionals, such as doctors and pharmacists who display their diplomas in their offices or professors whose qualifications are listed in a university calendar and contends that, on this basis, the information sought on the teachers hired by the Board ought to be available to the public. According to her, "there is [a] compelling public interest in seeing that the hiring practices of the school board lead to the hiring of the very best applicants, and I have at present a complaint with the [OLRB] concerning hiring practices."

The Board submits that there is no compelling public interest that outweighs the purpose of the exemption in view of the fact that the records contain the personal information of employees as opposed to information pertaining to elected officials or to the Board's appointees.

I have carefully considered the submissions of both parties. I find that the appellant's interest in these records is essentially a private one, that is, the records are required for her use at the OLRB hearing. I am not persuaded that, in the circumstances of these appeals, there is a compelling public interest in the disclosure of the records.

Accordingly, I find that section 16 of the Act does not apply.

ORDER:

I uphold the decisions of the Board.

Original signed by: July 9, 1996
Laurel Cropley
Inquiry Officer