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

ORDER M-805

Appeal M_9500730

The Board of Education for the City of Hamilton

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This is an appeal under the Municipal Freedom of Information and Protection of Privacy Act (the Act) of a decision 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 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) essentially 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. In this order, I will dispose of the issues arising in Appeal Number M-9500730. I will address the issues in Appeal Numbers M-9500729 and
M-9500731 in Order M-804.

NATURE OF THE APPEAL:

The request in Appeal Number M-9500730 was for copies of the lists of the Board's probationary staff appointments made in 1992 to 1994. In making this request, the appellant referred to a copy of these lists which was obtained through a previous access request. On the copy of the lists which she attached to the request, all of the elementary school appointments had been blacked out. In this case, she indicated that she wished to receive a complete unsevered copy of the lists.

The Board identified a 15-page record as being responsive to this request. Each page of this record is divided into five columns under the following headings: teacher (name), location (school assigned for teaching), assignment (subject/grade being taught), probationary appointment date and permanent appointment date. The Board granted access to all of the information in the record with the exception of the names of the teachers, which it withheld on the basis of the exemption in section 14(1) of the Act (invasion of privacy).

The appellant appealed the Board's decision to deny access to the names of the teachers.

During the course of the appeal, 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. Representations were received from both parties.

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 this 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 request was made prior to the enactment of the amendments, it should be dealt with under the provisions of the Act as they were at that time.

Having found that the Act applies to the record at issue, I will now consider the other issues raised in this appeal.

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 record to determine whether it contains personal information, and if so, to whom the personal information relates.

The portion of the record at issue only contains the names of teachers. Where a record contains only the name of an individual, it does not qualify as personal information within the meaning of section 2(1) of the Act (Order 27). Further, where disclosure of a name would not reveal other personal information about the individual, it does not qualify as personal information (Order P-284). However, in the circumstances of this appeal, I find that when this information (i.e. the column containing the teachers' names) is combined with the portion of the record which was disclosed to the appellant, the combined information qualifies as the personal information of the teachers referred to on the list.

I find that the record does not contain the appellant's personal information.

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 appellant claims that the disclosure of the teachers' names would not constitute an unjustified invasion of their personal privacy. While agreeing that the names constitute their personal information, the appellant argues that "this information is readily available from each individual school if one has the time and patience to go around to collect it".
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.

The Board refers generally to the factors and presumptions in sections 14(2) and (3). In particular, it considered whether disclosure of the teachers' names was desirable for the purpose of subjecting the activities of the Board to public scrutiny (section 14(2)(a)), which is a factor which weighs in favour of disclosure. The Board concluded that because of the processes already in place for public scrutiny through the public availability of the reports of its Personnel and Organizational Committee, this factor was not relevant in the circumstances of this appeal.

I have considered all of the presumptions and factors in sections 14(2) and (3), as well as all other circumstances raised by the appellant. In reviewing the record at issue in this appeal, I find that disclosure of the names of the teachers would constitute a presumed unjustified invasion of privacy pursuant to 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;

In this regard, I find that the disclosure of the teachers' names, in conjunction with the information already in the possession of the appellant, would reveal details of their employment with the Board. In my view, this constitutes the "employment history" of these individuals within the meaning of section 14(3)(d). I find that none of the records fall within the scope of section 14(4).

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). Accordingly, I find that the record is 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 record 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 record is exempt under section 14(1). I will now consider whether section 16 applies to the record.

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 record contains 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 the record is essentially a private one, in that she requires the record so that she can use it at the OLRB hearing. I am not persuaded that, in the circumstances of this appeal, there is a compelling public interest in the disclosure of the record.

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

ORDER:

I uphold the decision of the Board.

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