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

# ORDER M-847

## Appeal M_9500771

## Toronto Board of Education

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## NATURE OF THE APPEAL:

The Toronto Board of Education (the Board) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to all records relating to the requester's sexual harassment complaint made to the Board's Equal Opportunity Office and the Employee Relations Department. The Board identified 80 records and granted partial access to a large number of the records. The Board denied access to the remaining records on the basis of the exemptions provided by:

- advice and 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 requester appealed the decision to deny access.

As a result of mediation, the Board decided to release additional records to which it had previously denied access. At this time, the Board also raised the application of the exemption in section 11(f) to Record 75.

This office sent a Notice of Inquiry to the appellant, the Board and one of the respondents in the sexual harassment complaint. In the Notice of Inquiry, the Board was asked to include in its representations, the reasons why it had raised the discretionary exemption at this late date and the reasons why the exemption should apply. Representations were received from the Board and the respondent.

In its representations, the Board indicates that it has now decided to disclose Record 18 in its entirety, the withheld parts of Records 54 and 57, and one line at the bottom of Record 9 to the appellant. I have reviewed these records and I note that they contain some personal information. However, it is clear from the face of the records that this personal information has either been provided by the appellant herself or it is information that the appellant is already aware of. In these circumstances, withholding the information from the appellant would create an absurd result and in my view, disclosure of the records identified by the Board to the appellant would not result in an invasion of personal privacy.

The Board did not make representations on the application of section 10(1) to the records. Because this is a mandatory exemption, I have reviewed the records for its possible application and find that it has no application in the circumstances of this appeal.

The records that remain at issue are described in Appendix "A" to this order.

Subsequent to the receipt of representations, the Board wrote to the Registrar of Appeals for this office, stating that this office did not have the jurisdiction to deal with this appeal. The Board bases its assertion on a finding in Order P-1242, under section 65(6) of the provincial Act, which

corresponds to section 52 of the Act. I will address both the issue of the late raising of a discretionary exemption and the jurisdiction of this office as preliminary matters below.

## PRELIMINARY ISSUES:

### 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 Order P-1242 wherein Assistant Commissioner Tom Mitchinson, in the circumstances of that case, upheld the institution's decision to withhold access to records based on paragraph 3 of section 65(6) of the provincial Act (which corresponds to section 52(3)(3) of the Act). This section of the Act reads:

> 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:
>
> > Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

The Board asserts that as a result of the above decision, the Commissioner no longer has the jurisdiction to address the issues arising from this appeal. The Board has not submitted any additional argument.

In this case, the request is dated May 24, 1995. On October 10, 1995, the appellant wrote to the Board and confirmed that the request was not received by the Board until October 4, 1995. On November 2, 1995, the Board wrote to the appellant and advised that it was extending the time for responding to the request by an additional 30 days to December 3, 1995 and also advised the appellant of her right to appeal the time extension. The appellant did not appeal the decision to extend the time. On December 8, 1995, the Board issued its decision on access. Based on the evidence before me and because of the time lapse between the actual date of the request and the date it was received, I accept that the request was made no later than October 4, 1995. Bill 7 did not come into force until November 10, 1995, when it received royal assent.

In Order M-796, 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. The 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 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-Andre Cote, 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 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.

**LATE RAISING OF DISCRETIONARY EXEMPTIONS**

Upon receipt of the appeal, this office provided the Board with a Confirmation of Appeal. This notice indicated that the Board had 35 days from the date of the notice, that is until January 29, 1996, to raise additional discretionary exemptions not claimed in its decision letter. No additional exemptions were raised during this period.

Subsequently, in its April 24, 1996 letter to the appellant, the Board raised the application of the discretionary exemption provided by section 11(f).

It has been determined in previous orders that the Commissioner has the power to control the process by which the inquiry is undertaken (Orders P-345 and P-537). This includes the authority to set time limits for the receipt of representations and to limit the time during which an institution can raise new discretionary exemptions not claimed in the original decision letter.

The Board was asked in the Notice of Inquiry to provide its reasons for claiming the discretionary exemption after the expiration of the 35-day period and the reasons why the discretionary exemptions apply. The Board states that the discretionary exemption was not raised earlier as re-review of the large number of records for release or potential additional exemptions required a great deal of time. The Board also states that since the record was already a year old at the time of the request, the possible application of the discretionary exemption provided by section 11(f) did not become apparent until later and after the deadline for raising new discretionary exemptions had passed.

In Order P-658, Inquiry Officer Anita Fineberg concluded that in cases where a discretionary exemption is claimed late in the appeals process, a decision-maker has the authority to decline to consider the discretionary exemption. I agree with Inquiry Officer Fineberg's reasoning and adopt it for the purposes of this appeal.

In the circumstances of this appeal, I am not persuaded that a departure from the 35-day time frame is justified. I note that the Board exercised its right under section 20 of the Act to extend the time for making a decision on access by an additional 30 days on the basis that the request necessitates a search through a large number of records. Accordingly, I decline to consider the application of section 11(f) to Record 75.

## DISCUSSION:

### PERSONAL INFORMATION

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual. Based on my review of the records, I find that Record 75 contains information that relates solely to the appellant. I also find that the other information that relates solely to the appellant has been previously disclosed to the appellant.

In general, the information in the remaining records consists of names, telephone numbers and opinions of identifiable individuals other than the appellant. In my view, this information constitutes the personal information of the respondent and other identifiable individuals (collectively the affected persons). However, because the records relate to an investigation into a complaint made by the appellant, I find that this information necessarily relates to both the appellant and the affected persons.

### INVASION OF PRIVACY

The Board has withheld access to Record 73 under sections 7(1) and 38(a) of the Act. However, I have previously found that Record 73 contains the personal information of both the appellant and other identifiable individuals and I will, therefore, include it with the other records for which the Board has claimed sections 14(1) and 38(b) of the Act.

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 appellant and other identifiable 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 appellant access to that information.

In this situation, the appellant is not required to prove that the disclosure of the personal information would not constitute an unjustified invasion of another individual. Since the appellant 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 the disclosure of the information would constitute an unjustified invasion of another individual's 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 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), as well as all other considerations which are relevant in the circumstances of the appeal.

The Board has not claimed that any of the presumptions in section 14(3) apply to the personal information in the records. I agree.

The Board states that its Sexual Harassment Complaint Policy process is based on voluntary participation by employees, supported by the Board's assurances that the information collected during the investigation would be held in confidence. A copy of the Board's policy has been provided to this office. The Board submits that the withheld portions of Records 9, 21, 22, 23, 34, 47 and 56 contain names, telephone numbers and related personal information which is highly sensitive (section 14(2)(f)) and which was supplied in confidence (section 14(2)(h)). The Board submits that sections 14(2)(f) and (h) apply equally to Records 16 and 24 withheld in full. The Board points out that a substantial amount of information has already been provided to the appellant and that this should be considered in determining disclosure of the remaining information.
I have carefully reviewed the personal information in the records together with the representations of the Board and the affected person.

Record 73 contains references, by name, to the individuals or respondents against whom the appellant filed the complaint. The appellant is therefore, fully aware of the identity of these individuals and withholding this information under the Act would result in an absurdity. In my view, disclosure of this information would not result in an unjustified invasion of personal privacy. I will review this record again to determine the possible application of sections 7(1) and 38(a) of the Act.

With respect to the personal information in the remaining records, I find that some of the personal information in the records may be characterized as highly sensitive. I find that this is a significant consideration favouring the non-disclosure of this information. I accept that all of the

information was supplied implicitly in confidence to the Board by the affected person and other identifiable individuals. Section 14(2)(h) is therefore a relevant consideration in the circumstances of this appeal, weighing against disclosure of the records.

I note that the appellant has received a substantial amount of information relating to the complaint, the investigation process and the findings. In my view, the fact that extensive disclosure has already been made to the appellant is also a relevant consideration when balancing her access rights against the privacy rights of the affected person and other identifiable individuals.

I have not been provided with any factors which would weigh in favour of disclosure. I have considered the factors listed in section 14(2) together with all the relevant circumstances of this case and I find that on balance, the factors favouring the protection of the privacy of the affected persons outweigh the rights of access of the appellant. I find, therefore, that disclosure of the information would result in an unjustified invasion of the personal privacy of the affected persons and the records, accordingly, qualify for exemption under section 38(b) of the Act.

**ADVICE OR RECOMMENDATION / DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION**

Under section 38(a) of the Act, the Board has the discretion to deny access to an individual's own personal information in instances where certain exemptions, including section 7(1), would otherwise apply to that information. Section 7(1) 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.

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 records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process. Information in records which would reveal the advice or recommendations is also exempt from disclosure under section 7(1) of the Act.

In Order 94, former Commissioner Sidney B. Linden commented on the scope of the exemption. He stated that "[t]his exemption purports to protect the free flow of advice and recommendations within the deliberative process of government decision-making or policy-making".

The Board states that its Sexual Harassment Policy requires that at the conclusion of the investigation, the fact-finders will submit their report, which will form the basis for determining whether further steps are necessary. The Board submits that "Record 73 fulfills the requirement of a report from the fact-finders to the Associate Director, in the form of a memorandum from the Superintendent of Employee Relations (who was overseeing and coordinating the complaint process), the content of which suggests a certain course of action (**or advice**) to follow ..."

I do not accept the Board's submissions with respect to Record 73. I have reviewed the record and in my view, it is only the last paragraph which contains advice and recommendations for the purpose of the section 7(1) exemption and section 38(a) applies. I have highlighted this paragraph on the copy of the record which will be provided to the Board's Freedom of Information and Privacy Co-ordinator with a copy of this order. The remaining portions of the record contains the final conclusions of the fact-finders and do not qualify for exemption under section 7(1).

Only one paragraph in Record 75, a memorandum from the Superintendent of Employee Relations to the Associate Director, has been withheld by the Board. In this regard, the Board submits that the information "comprise[s] a **recommendation** to revisit the sexual harassment complaint investigative procedure and review different possibilities with respect to" conducting such investigations.

In my view, the withheld part of Record 75 does not contain the advice or recommendations within the deliberative process of government decision-making or policy-making which was intended to be protected under section 7(1) of the Act. Rather, the record contains several options for possible ways of handling the complaint process; no preferred option is identified. Previous orders have found that if a record does not provide advice or recommendations about which alternative should be selected, the exemption in section 7(1) could not apply to it (Order P-978). Accordingly, I find that the withheld part of Record 75 does not qualify for exemption under section 7(1) of the Act and section 38(a) does not apply.

Accordingly, the remaining portions of Records 73 and 75 should be disclosed to the appellant.

In summary, I have found that section 38(b) of the Act applies to those records for which the Board has claimed the exemption provided by section 14(1) and section 38(a) applies only to the last paragraph of Record 73.

## ORDER:

1. I uphold the Board's decision to deny access to Record 9, with the exception of the one line ordered to be disclosed under Provision 3, together with Records 16, 21, 22, 23, 24, 34, 47 and 56.

2. I uphold the Board's decision to deny access to the highlighted portion of Record 73, a copy of which is provided to the Board's Freedom of Information and Privacy Co_ordinator with a copy of this order.

3. I order the Board to disclose the one line at the bottom of Record 9, Record 18 in its entirety, the withheld portions of Records 54, 57, 75 and the non-highlighted portions of Record 73 to the appellant by sending her a copy by **November 15, 1996**, but not earlier than **November 11, 1996**.

4. In order to verify compliance with the provisions of this order, I reserve the right to require the Board to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 3.

Original signed by: October 11, 1996
Mumtaz Jiwan
Inquiry Officer

# APPENDIX "A"

## INDEX OF RECORDS AT ISSUE

| RECORD NUMBER(S) | DESCRIPTION OF RECORDS | EXEMPTIONS CLAIMED FOR RECORDS OR PARTS OF RECORDS NOT DISCLOSED |
|---|---|---|
| 9 | Notes of a meeting dated May 30; partial disclosure | 2(1); 7(1); 14(2)(e), (f), (h), (i); 32 ; 38 |
| 16 | Handwritten memo dated June 2, 1994 | 2(1)(e), (f); 10(1)(d); 14(2)(e), (f), (h), (i) |
| 21 | Note (undated) with handwritten notes in margins; partial disclosure | 2(1); 32; 38 |
| 22 | Telephone message (2 pages), undated, with additional handwritten notes; partial disclosure | 2(1); 10(1)(d); 32; 38 |
| 23 | Telephone message dated June 13, 1994; partial disclosure | 2(1); 32; 38 |
| 24 | Memo dated June 14, 1994 | 2(1); 7(1); 10(1)(d); 14(2)(f); 32; 38 |
| 34 | Handwritten notes dated August 22, 23 and 24, re phone conversations; partial disclosure | 2(1); 14(2)(e), (f), (h), (i); 32;38 |
| 47 | Telephone message, dated October 6, with handwritten notes; partial disclosure | 2(1)(e); 10(1)(d); 14(2)(f); (h); 32; 38 |
| 56 | Telephone message dated November 23, with handwritten note on front; partial disclosure | 2(1)(d); 32; 38 |
| 73 | Memo dated April 5, 1995 | 7(1) |
| 75 | Memo dated April 25, 1995 with attachments; partial disclosure | 7(1); 11(f) |