



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER M-957

Appeal M_9600408

Sault Ste. Marie Police Services Board

NATURE OF THE APPEAL:

The Sault Ste. Marie Police Services Board (the Police) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The request was for access to records containing the requester's personal information relating to an investigation undertaken by the Police into the activities of a named individual (affected person A), a former teacher with the Sault Ste. Marie Roman Catholic Separate School Board (the Board). In addition, the appellant sought access to records which contain any comments made by another named employee of the Board (affected person B) about the requester and affected person A.

The Police located 181 pages of responsive records and granted access to eight pages of records in their entirety. The Police denied access to the remaining 173 pages, in whole or in part, claiming the application of the following exemptions contained in the Act:

- right to a fair trial - section 8(1)(f)
- law enforcement - section 8(2)(c)
- invasion of privacy - sections 14(1) and 38(b)
- discretion to refuse requester's own information - section 38(a)

In addition, the Police took the position that a number of the records fall within the parameters of sections 52(3)1 and 3 of the Act and are, therefore, outside the scope of the Act. The requester, now the appellant, appealed the Police's decision to deny access to all of the records.

A Notice of Inquiry was provided to the appellant, the Police, the Board, affected persons A and B, as well as two other individuals whose interests could be affected by the disclosure of the information contained in the records (affected persons C and D). As the original Notice of Inquiry did not adequately describe the issues in the appeal, a Supplementary Notice was provided to each of the parties setting out the appropriate tests and commentaries with respect to the application of sections 8 and 52(3). A further Supplementary Notice of Inquiry was provided to the parties requesting their submissions on the issue of whether the records identified by the Police contain information which is responsive to the request.

Representations were received from the Police, affected persons A and B and the appellant. With her submissions, the appellant advised that she was no longer seeking access to a number of the records, as they had previously been disclosed to her. In addition, the appellant confirmed that she was not seeking access to information about other police investigations or notes taken by officers in the course of their conversations with victims.

Accordingly, the documents which remain at issue consist of Records 1-3, 4-5, 6 (which is the same as Record 94), 7, 8, 10, 11, 12, 13, 14, 15, 16, 18, 19, 20, 21, 22, 23, 24, 41-42, 43-45, 54-66, 67-92, 93, 95-97, 104-106, 114, 121-122, 128, 160, 179 and 180-181 (in whole or in part). These records include only those excerpts from police officers' notebooks which make reference to the appellant, as well as witness statements, correspondence and other records relating to the

police investigation of affected person A. The records also include documents provided to the Police by the Board with respect to the Board's response to the allegations by the appellant against affected person A.

DISCUSSION:

JURISDICTION

The Police claim that Records 6, 93, 94, 95-97, 104-106, 114, 121-122, 128 and 160 fall within the parameters of sections 52(3)1 and 3 of the Act and are, therefore, outside the scope of the Act. These provisions read as follows:

- (3) 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:
1. 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.
 - ...
 3. Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest. [emphasis added]
- (4) This Act applies to the following records:
1. An agreement between an institution and a trade union.
 2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.
 3. An agreement between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees.
 4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment.

The interpretation of sections 52(3) and (4) is a preliminary issue which goes to the Commissioner's jurisdiction to continue an inquiry.

Section 52(3) is record-specific and fact-specific. If this section applies to a specific record, in the circumstances of a particular appeal, and none of the exceptions in section 52(4) are present,

then the record is excluded from the scope of the Act and not subject to the Commissioner's jurisdiction.

Section 52(3)1

In order for a record to fall within the scope of paragraph 1 of section 52(3) of the Act, the institution (in this case the Police), must establish that:

1. the record was collected, prepared, maintained or used by an institution or on its behalf; **and**
2. this collection, preparation, maintenance or usage was in relation to proceedings or anticipated proceedings before a court, tribunal or other entity; **and**
3. these proceedings or anticipated proceedings relate to labour relations or to the employment of a person by the institution.

[Order P-1223]

The Police submit that Record 95-97 was collected, prepared, maintained or used by the Board, **which is also an institution under the Act**. It also argues that this collection, preparation, maintenance or usage was in relation to anticipated civil proceedings between the Board and the appellant and that the anticipated proceedings relate to labour relations or to the employment of the appellant by the Board.

I have reviewed the contents of Record 95-97 and find that it was prepared by an official with the Board in relation to anticipated civil proceedings before a court or other tribunal and that these anticipated proceedings relate to the employment of the appellant by the Board. Because the Board is also an institution under the Act, records which originated with it that are now in the possession of the Police continue to fall within the exclusionary provisions of section 52(3)1.

Section 52(3)3

In order to fall within the scope of paragraph 3 of section 52(3), the Police must establish that:

1. the record was collected, prepared, maintained or used by an institution on their behalf; **and**
2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; **and**
3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

[Order P-1242]

The Police submit that Records 6, 93, 94, 104-106, 114, 121-122, 128 and 160 consist of records which were collected, prepared, maintained or used by the Board in relation to meetings, discussions or communications about labour relations or employment-related matters in which the Board had an interest. These matters concerned various complaints and proceedings brought by the appellant in connection with the Board's investigation of affected person A's misconduct.

All of these documents were prepared or collected by the Board, an institution under the Act, in the course of its internal communication about certain employment-related matters raised by the appellant. I also find that the Board had an interest in the matter, and a legal obligation to investigate the appellant's allegations under the Education Act. In my view, each of these records fall within the scope of section 52(3)3 and are, accordingly, outside the ambit of the Act. I will not, therefore, consider these records any further in this order.

PERSONAL INFORMATION

Under section 2(1) of the Act, "personal information" is defined, in part, to mean information about an identifiable individual. As I noted above, the appellant has agreed to limit the scope of her appeal to include only those records or parts of records which contain information relating to herself. Accordingly, portions of a number of the records remaining at issue may fall outside the scope of the request. I have reviewed each of the records and have made the following findings:

1. Records 1, 2-3, 4-5, 7, 8, 10, 21, the undisclosed portions of Records 22 and 23 and Record 24 contain the personal information of the appellant and other identifiable individuals, including affected persons A and B.
2. The undisclosed portions of Records 11, 12, 13, 14, 16, 17, 18, 19, 20, 41-42, 43, 44, 45, 54-66, 67-92, 179 and 180-181 contain only the personal information of individuals other than the appellant. As the appellant has indicated that she is not interested in gaining access to this information, I find that it is no longer at issue in this appeal.

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 appellant and other individuals, as is the case with Records 1, 2-3, 4-5, 7, 8, 10, 21, the undisclosed portions of Records 22 and 23 and Record 24, and the Police determine that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the Police have 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 the personal privacy 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 disclosure of the information **would** constitute an unjustified invasion of another individual's personal privacy.

Sections 14(2), (3) and (4) of the Act provide guidance in determining whether the disclosure of personal information would result in 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 Police must consider the application of the factors listed in section 14(2) of the Act, as well as all other circumstances that are relevant to the appeal.

The Police submit that the presumption in section 14(3)(b) applies to all of the information in the records as it was compiled and is identifiable as part of its investigations into possible violations of the Criminal Code by affected person A. It submits, therefore, that the disclosure of this information would result in a presumed unjustified invasion of the personal privacy of the individuals whose personal information is found in these records.

The appellant makes reference to a number of factors listed under section 14(2) which, in her view, weigh in favour of the disclosure of the information contained in the records.

I find that since the records were compiled as part of a police investigation into a possible violation of law, the presumption in section 14(3)(b) applies to all of the personal information in each of the records. In addition, I find that section 14(4) does not apply in the circumstances of this appeal and that the appellant has not raised section 16. The presumption in favour of the non-disclosure of the records cannot, however, be overcome by a combination of factors under section 14(2), as submitted by the appellant. Accordingly, the personal information contained in Records 1, 2-3, 4-5, 7, 8, 10, 21, the undisclosed portions of Records 22 and 23 and Record 24 is exempt from disclosure under section 38(b).

Because of the manner in which I have addressed the application of sections 14(1) and 38(b) to the records, it is not necessary for me to address the possible application of sections 8(1)(f), 8(2)(c) and 38(a) to them.

ORDER:

I uphold the decision of the Police.

Original signed by: _____ July 4, 1997
Donald Hale
Inquiry Officer