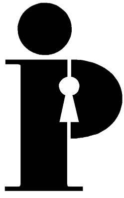

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-1269

Appeal MA-990117-1

Keewatin-Patricia District School Board

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NATURE OF THE APPEAL:

The appellant made a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) to the Keewatin-Patricia District School Board (the Board). The request was for access to copies of the severance packages awarded to two former Directors of Education by the Board.

The Board denied access to the records stating that the request was frivolous and vexatious and was made in bad faith. The Board further indicated that should the frivolous and vexatious/bad faith decision not be upheld, access to the records at issue was also being denied pursuant to the following exemptions contained in the Act:

- closed meeting - section 6(1)(b);
- economic and other interests - sections 11(c)and (d);
- solicitor-client privilege - section 12; and
- invasion of privacy - section 14(1).

The appellant appealed the Board's decision, indicating that the request was not frivolous or vexatious and was not submitted in bad faith. He also submitted that the exemptions claimed did not apply.

A Notice of Inquiry was provided to the Board, the appellant and to the two former Directors of Education (the affected persons). Representations were received from all of the parties. The submissions of the Board and the appellant with respect to the frivolous and vexatious issue were exchanged between those two parties. They each made additional submissions on this issue, having had the opportunity to review the arguments of the other. The appellant also argues that there exists a public interest in the disclosure of the records, as contemplated by section 16 of the Act.

RECORDS:

The records at issue consist of the severance agreements for the two former Directors of Education.

PRELIMINARY ISSUE:

FRIVOLOUS AND VEXATIOUS

The provisions which I must consider to determine whether the appellant's request is frivolous or vexatious are in sections 4(1)(b) and 20.1(1) of the Act and section 5.1 of Regulation 823 made under the Act.

Section 4(1)(b) of the Act specifies that every person has a right of access to a record or part of a record in the custody or under the control of an institution unless the head of an institution is of the opinion on reasonable grounds that the request for access is frivolous or vexatious. The onus of establishing that an access request falls within these categories rests with the institution (Order M-850).

Sections 20.1(1)(a) and (b) of the Act state that a head who refuses to provide access to a record because the request is frivolous or vexatious must state this position in his or her decision letter and provide reasons to support the opinion.

Sections 5.1(a) and (b) of Regulation 823 provide some guidelines for determining whether a request is frivolous or vexatious. They prescribe that a head shall conclude that a request for a record or personal information is frivolous or vexatious if:

(a) the head is of the opinion on reasonable grounds that the request is part of a pattern of conduct that amounts to an abuse of the right of access or would interfere with the operations of the institution; or

(b) the head is of the opinion on reasonable grounds that the request is made in bad faith or for a purpose other than to obtain access.

I will now consider whether the facts of this case fit within the above provisions.

Background to the request

The request was originally received in October 1998 on behalf of two individuals, the appellant, who was the local President of the Ontario Public School Teachers Federation (OPSTF), and another person, who was at the time the local President of the Ontario Secondary Schools Teachers Federation (OSSTF). At the time the request was made, the Board was involved in collective bargaining negotiations with its teachers unions, represented at the bargaining table by the appellant and the OSSTF President. The Board denied access to the requested information and the requesters appealed that decision to the Commissioner's office. Prior to a decision being rendered by this office, I was advised by the appellant that the appeal was being withdrawn as a result of an agreement reached with the Board during their negotiations. Accordingly, no decision was rendered with respect to the Board's decision to deny access to the records at that time.

Shortly thereafter, the Board received another request for the identical information from the appellant personally, as opposed to in his capacity as OPSTF President. Again, the Board denied access to the requested information and the appellant appealed that decision to this office.

The Board's Position

The Board submits that the request is part of a pattern of conduct that amounts to an abuse of the right of access and may interfere with the operations of the institution, as contemplated by section 5.1(a) of Regulation 823. It argues that the appellant has made two requests for the same information within a period of several months, without any reasonable grounds. It states that the purpose of the request is not legitimate and was made solely to harass the Board. Finally, the Board suggests that the appellant manipulated the settlement with the Board under which he and the OSSTF President agreed to withdraw their access request "knowing full well that he would proceed to request the same information by different means, in his personal capacity." It concludes this portion of its submissions by arguing that the appellant has no legitimate interest in the records and that he has misrepresented his intentions and mislead the Board.

Further the Board relies on the decision in Order M-850 as the basis for its contention that the request was made in bad faith. It submits that by not abiding by the agreement to withdraw the

original request and by resubmitting it in his personal capacity, the appellant has acted in bad faith.

The Appellant's Position

The appellant submits that his original request was withdrawn following the successful resolution of several key items in the collective bargaining between the Board and its elementary school teachers, who were represented by the Elementary Teachers Federation of Ontario (ETFO), the successor organization to the OPSTF and the Federation of Women's Teachers of Ontario (FWTO). He argues that at the time the appeal was withdrawn, he was not an elected official of ETFO or the local elementary teacher's association.

The appellant indicates that immediately following the withdrawal of the original request, at the next bargaining meeting in late October 1998, the Board informed the bargaining committee that it was of the view that an agreement was not possible and that it intended to file for conciliation of their outstanding issues. The appellant then took the position that anything that had been previously agreed to was now "off the table" and he resubmitted his request in his personal capacity.

The appellant points out that the community has expressed a keen interest in the information contained in the records, referring to several newspaper articles which comment on the terms of the retirement agreements. He submits that he is not intending to harass the Board, to gain some advantage at the bargaining table or to gain personally as a result of making this request. He also relies on the fact that the issue of access to the requested information was not, in fact, resolved in the fall of 1998 as the appeal was withdrawn prior to a decision on access being rendered by this office.

With respect to the Board's allegations of "bad faith" on the part of the appellant, he submits that the issue of his right to make an access request was not "settled" because "all bets were off" when the Board broke off negotiations and sought conciliation. If the Board had concerns about a request being made in his personal, as opposed to his elected capacity, it could have addressed them at the time the agreement to withdraw the appeal was entered into.

Is the Appellant's Request Frivolous and Vexatious?

In Interim Order PO-1168, Adjudicator Laurel Cropley made the following comments with respect to the correct approach to be taken when determining whether section 5(1)(a) of Regulation 823 applies. She held that:

> To determine whether the Board's submissions meet the criteria outlined in section 5.1(a), I must first determine whether the appellant's filing of this request forms part of a "pattern of conduct." If I find that it does, then I must determine (1) whether this pattern amounts to an abuse of the right of access, or (2) whether this pattern would interfere with the operations of the Board.

> In Order M-850, the Assistant Commissioner defined the term "pattern of conduct." He stated that, for such a pattern to exist, one must find "recurring incidents of related or similar **requests** on the part of the requester (or with which the requester is connected in some material way)." He also pointed out that, in determining whether a pattern of conduct has been established, the time over which the behaviour occurs is a relevant consideration. I agree with this approach and adopt it for the purposes of this appeal. [Assistant Commissioner Mitchinson's emphasis]

As noted above, the appellant made one earlier request in his capacity as President of the local OPSTF unit which ultimately was withdrawn at the inquiry stage of the appeal process. By filing another request for the identical information, in his personal capacity, I cannot agree with the position taken by the Board that the appellant has established a "pattern of conduct" within the meaning of section 5.1(a) of the Regulation. The Board has not made any submissions with respect to the other component of section 5.1(a), that the request would interfere with the operations of the Board. Accordingly, I find that the Board cannot rely on either component of section 5.1(a) of the Regulation to decline to process the appellant's access request.

Under section 5.1(b), a request will be defined as "frivolous" or "vexatious" where the head of an institution is of the opinion on reasonable grounds that the request is made in bad faith or that it was made for a purpose other than to obtain access. There are no further requirements to be met. In particular, no "pattern of conduct" is required.

In Order M-850, Assistant Commissioner Mitchinson commented on the meaning of the term "bad faith." He indicated that "bad faith" is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral underhandedness. He went on to conclude that it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with secret design or ill will.

I adopt this approach for the purposes of the present appeal.

In Order M-864, former Assistant Commissioner Glasberg found that, in the situation where the appellant used information to assist his wife with her legal proceeding against the institution, the access request was filed for legitimate reasons. Having found that the objects of the appellant's requests were genuine and that they were not designed to harass the Board, he concluded:

> I find that the appellant filed his access requests for a legitimate, as opposed to a dishonest, purpose and that he was not operating with an obvious secret design or ill will.

In Interim Order MO-1168-I, Adjudicator Cropley, commenting on the nature of the evidence required to make a finding of "bad faith" under section 5.1(b) held that:

> The Act provides a legislated scheme for the public to seek access to government held information. In doing so, the Act establishes the procedures by which a party may submit a request for access and the manner in which a party may seek review of a decision of the

> head. It is the responsibility of the head and then the Commissioner's office to apply the provisions of the Act in responding to issues relating to an access request. In my view, the fact that there is some history between the Board and the appellant, or that records may, after examination, be found to fall outside the ambit of the Act, or that the appellant may have obtained access to some confidential information outside of the access process, in and of itself is an insufficient basis for a finding that the appellant's request was made in bad faith. The question to ask is whether the appellant had some illegitimate objective in seeking access under the Act.

In the present circumstances, I do not accept that the appellant's request was made in bad faith, as contemplated by section 5.1(b). I find that I have not been provided with sufficient evidence to demonstrate that the appellant was motivated by ill will or dishonest motive in making the request. Accordingly, I find that the Board has not provided me with sufficient evidence to establish that it had reasonable ground for believing that the appellant's access request was made in bad faith. Therefore, the Board cannot rely on this part of section 5.1(b) of the Regulation to decline to process the appellant's access request.

Similarly, I am satisfied that the request was made for the purpose of obtaining access. Moreover, I find that this purpose is not contradicted by the possibility that the appellant may also intend to use the documents against the Board or to make public the records once access is granted. Therefore, I find that the Board cannot rely on this part of section 5.1(b) of the Regulation to decline to process the appellant's access request.

In conclusion, I find that the criteria in sections 5.1(a) and (b) of Regulation 823 have not been satisfied and, therefore, a reasonable basis for concluding that the request was "frivolous or vexatious" has not been established.

DISCUSSION:

CLOSED MEETING

The Board submits that the records at issue are exempt from disclosure under section 6(1)(b) of the Act, which states:

> A head may refuse to disclose a record,
>
> > that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public.

In order to rely on section 6(1)(b), the Board must establish that:

1. A meeting of the Board took place, **and**

2. A statute authorizes the holding of such a meeting in the absence of the public; **and**
3. The disclosure of the record at issue would reveal the actual substance of the deliberations of this meeting.

[Orders M-64, M-98, M-102, M-219 and MO-1248]

Each part of the section 6(1)(b) test must be established.

The Board states that an in camera meeting was held on December 13, 1997 to consider the substance of the severance agreements which constitute the records at issue. This meeting was held in the absence of the public pursuant to section 207(2) of the Education Act. This section states:

> A meeting of a committee of a board, including a committee of the whole board, may be closed to the public when the subject matter under consideration involves,
>
> (b) the disclosure of intimate, personal or financial information in respect of a member of the board, or committee, an employee or prospective employee of the board or a pupil or his or her parent or guardian;
>
> (d) decisions in respect of negotiations with employees of the board; or
>
> (e) litigation affecting the board.

Based on the information provided by the Board, I am satisfied that the Board met in the absence of the public on December 13, 1997. In addition, I find that the December 13, 1997 meeting was conducted in accordance with section 207(2) of the Education Act, which authorizes the holding of a meeting in the absence of the public. The personal and financial terms included in the severance agreements which comprise the records were approved by the Board at the meeting. I am satisfied that the subject matter of this meeting under consideration involved personal and financial information in respect of Board employees, decisions respecting negotiations with employees of the Board as well as potential litigation affecting the Board. Therefore, I find that the Board was authorized to hold the meeting in the absence of the public pursuant to section 207(2) of the Education Act.

Accordingly, I find that the first two parts of the test have been met.

The only remaining issue is whether disclosure of these records would reveal the substance of the deliberations of these meetings.

The appellant submits that section 6(1)(b) does not apply in the circumstances of this appeal because the subject matter of the deliberations of the Board on December 13, 1997 were revealed at another public

Board meeting. The appellant does not, however, provide any information as to when this public meeting may have been held or how the information may have been disclosed.

The Board states that the agreements at issue in this appeal were a direct consequence of the deliberations of the in camera meeting of the Board. If the agreements were to be disclosed, the actual substance of the Board's deliberations, including their debate of the dollar values in each agreement, would be revealed. The records themselves were only drafted following the Board's discussion of their terms.

In Order M-184, former Assistant Commissioner Irwin Glasberg made the following comments on the term "deliberations":

> In my view, deliberations, in the context of section 6(1)(b), refer to discussions which were conducted with a view towards making a decision. Having carefully reviewed the contents of the Minutes of Settlement, I am satisfied that the disclosure of this document would reveal the actual substance of the discussions conducted by the Board, hence its deliberations, or would permit the drawing of accurate inferences about the substance of those discussions. On this basis, I find that the institution has established that the third part of the section 6(1)(b) test applies in this case.

The former Assistant Commissioner expanded on his analysis of the interpretation of section 6(1)(b) in Order M-196 as follows:

> The Concise Oxford Dictionary, 8th edition, defines "substance" as the "theme or subject" of a thing. Having reviewed the contents of the agreement and the representations provided to me, it is my view that the "theme or subject" of the in-camera meeting was whether the terms of the retirement agreement were appropriate and whether they should be endorsed.

I adopt former Assistant Commissioner Glasberg's reasoning for the purpose of this appeal. Similar to the former Assistant Commissioner's findings in Order M-196, I am satisfied that the "theme or subject" of the in camera meetings in the current appeal was whether the terms of the severance agreements were appropriate and whether they should be endorsed. Clearly, the Board's discussions were held with a view to making a decision in respect of this matter. Further, I find that in the circumstances of this appeal, the disclosure of the records at issue would reveal the actual substance of deliberations of the in camera meeting, as they include the terms of the severance agreements which were discussed at that meeting. I find, therefore, that the third and final part of the section 6(1)(b) test has been met

As I have found that the records qualify for exemption under section 6(1)(b), it is not necessary for me to discuss the applicability of sections 11(c) and (d), 12 and 14(1) to them.

COMPELLING PUBLIC INTEREST

As I indicated above, the appellant has raised the possible application of the so-called public interest override in section 16 of the Act. This section states:

> 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.

Section 6 is not subject to the public interest override provided by section 16 of the Act and a record which is exempt from disclosure under section 6 is not subject to the override provided by section 16 of the Act. Accordingly, section 16 cannot apply to override the application of the section 6 exemption.

ORDER:

I uphold the Board's decision.

Original signed by: January 21, 2000
Donald Hale
Adjudicator