



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-2172

Appeal MA-040297-2

Windsor-Essex Catholic District School Board



Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téloc: 416-325-9188
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

The Windsor-Essex Catholic District School Board (the Board) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the Act) for access to “a copy of the agreement(s) that details the salary, benefits and working conditions of people employed by the Board as Principals of Elementary Schools” within the Board’s jurisdiction.

The Board did not issue a decision letter within the statutory 30-day period and, as a result, the requester filed a “deemed refusal appeal” with our office and appeal file MA-040297-1 was opened. The Board subsequently issued a decision letter and file MA-040297-1 was closed.

After notifying the elementary school principals in question (the affected parties) and considering their submissions, the Board issued a decision denying access to the responsive records and advising the requester that the affected parties had objected to the disclosure of the information requested. The Board did not indicate in its decision letter what exemptions it was relying on to deny access to the information at issue.

The requester (now the appellant) appealed the Board’s decision and this appeal file was opened.

During the course of mediation, the Board explained that access to the records relating to the affected parties’ working conditions could not be granted as these records do not exist. The appellant accepted this explanation and confirmed it was no longer interested in this information. Accordingly, this information is no longer at issue in this appeal.

Also during the course of mediation, the appellant clarified that he was not pursuing access to the affected parties’ individual salaries, but rather to their salary range and standard benefits. In light of this clarification, the Board agreed to grant access to the affected parties’ salary range and to a list of their benefits. Accordingly, the Board issued a revised decision letter advising the appellant of its revised decision. The Board then notified the affected parties of its revised decision, giving them an opportunity to appeal the decision. The affected parties did not object and the Board, subsequently, sent a letter to the appellant in which it disclosed the salary range for elementary school principals and a list of benefits that the affected parties enjoy.

Also during mediation, the appellant advised that he still wishes to pursue access to the actual contract between the Board and the affected parties describing their salary range and standard benefits, and including entitlements such as leave of absence, sick leave and severance allowance. These issues could not be resolved at mediation and the file was transferred to me for an inquiry.

During the mediation stage, the Board also confirmed that it is relying on the section 14(1) exemption (personal privacy), read in conjunction with the presumption in section 14(3)(d) (employment or educational history), to deny access to the information at issue.

I commenced my inquiry by issuing a Notice of Inquiry setting out the facts and issues in the appeal, and seeking representations from the Board. The Board responded with representations. In light of the Board’s response I decided to also seek representations from 41 affected parties through the issuance of the same Notice of Inquiry. Legal counsel representing all of the affected parties submitted representations on their behalf.

I then sought representations from the appellant. I enclosed with my Notice of Inquiry the non-confidential portions of the representations received from the Board and the affected parties. Portions of their submissions were not shared with the appellant because of my concerns about their confidentiality. The appellant submitted representations in response. I shared the appellant's representations in their entirety with the Board and the affected parties, seeking their submissions in reply. Both the Board and the affected parties submitted reply representations.

I then asked the Board to provide evidence that the affected parties had each signed the Employment Contract. In response to this issue, the Board submitted an affidavit sworn by the Board's Superintendent of Education – Human Resources.

RECORDS:

The following three records remain at issue:

- “Employment Contract” template for the employment of a school principal by the Board (the Employment Contract)
- “Appendix ‘A’ to Contract”, setting out “Salary Schedule” (the Appendix)
- three page document setting out a “Benefit Package” with insurer’s “Outline of Benefits” booklet attached (the Benefits Documentation)

DISCUSSION

THE PERSONAL PRIVACY EXEMPTION

Personal Information

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the records contain “personal information” and, if so, to whom it relates. That term is defined in section 2(1) as follows:

“personal information” means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history

of the individual or information relating to financial transactions in which the individual has been involved,

- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except where they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name if 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;

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225].

Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

The Board's position is that all three of the records at issue contain the affected parties' personal information. The basis for the Board's view is that the names of the affected parties are easily

obtained by conducting an internet search of the Board's website and that once obtained, the names can be linked to the information in the records. The Board, therefore, submits that the information in the records constitutes recorded information about an identifiable individual within the definition of "personal information" in section 2(1) of the *Act*, since the information is personal in nature to the affected parties as it describes the terms of their employment and their employment history.

The Board then argues that disclosure of the information in the records is presumed to constitute an unjustified invasion of the affected parties' personal privacy since the information at issue relates to their employment or educational history [section 14(3)(d)] and the disclosure of the personal information would describe an individual's income [section 14(3)(f)].

The Board also offers submissions on why it believes the exception in section 14(4)(b) to the exemption in section 14(1) does not apply, stating that the affected parties are "employees" not "independent contractors", and so they are not subject to a "contract for personal services" as is required for the exception in section 14(4)(b) to apply. With regard to section 14(4)(a), aside from simply stating that the exception in that section does not apply, the Board does not make any representations on its application despite having been invited to do so.

The affected parties echo the Board's position on the "personal information" issue, stating that the information remaining at issue constitutes their personal information.

In response, the appellant suggests that the records at issue do not contain personal information. With specific reference to the Employment Contract the appellant states this is a contract setting out "general working conditions and benefits" that are applied to all affected parties.

As set out above, previous decisions of this office have drawn a distinction between information relating to an individual in a *personal capacity* and information relating to an individual in a *professional or official government capacity*. As a general rule, information associated with a person in a professional or official government capacity will not be considered to be "about the individual" within the meaning of the section 2(1) definition of "personal information" [Orders P-257, P-427, P-1412, P-1621].

The parties were invited to address this distinction in their representations but elected not to do so.

In Order PO-2435, Assistant Commissioner Brian Beamish discussed the distinction between information relating to an individual in a *personal capacity* and information relating to an individual in a *professional or official government capacity*, following the reasoning of former Assistant Commissioner Mitchinson in Order PO-2225.

Order PO-2435 involved a request submitted to the Ministry of Health and Long-Term Care (the Ministry) under the provincial *Act* for access to all records relating to the province's e-Physician Project, including the Smart Systems for Health Agency. The Ministry sought to exempt the

names of individual consultants together with their per diem rates and contract ceiling that relate to them, under the provincial *Act* equivalent of section 14(1) of the *Act*. In addressing the distinction between personal and professional information and the application of the personal privacy exemption in section 21(1) of the provincial *Act*, Assistant Commissioner Beamish stated:

In determining whether information relating to a named individual is “personal information”, the appropriate approach is to look at the *capacity* in which the individual is acting and the *context* in which their name appears. This was enunciated in Order PO-2225 where Assistant Commissioner Tom Mitchinson considered the definition of “personal information” and the distinction between information about an individual acting in a business capacity as opposed to a personal capacity. The Assistant Commissioner posed two questions that help to illuminate this distinction:

Based on the principles expressed in these [previously referenced] orders, the first question to ask in a case such as this is: “*in what context do the names of the individuals appear?*” Is it a context that is inherently personal, or is it one such as a business, professional or official government context that is removed from the personal sphere?

....

The analysis does not end here. I must go on to ask: “*is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual?*” Even if the information appears in a business context, would its disclosure reveal something that is inherently personal in nature?

In applying Assistant Commissioner Mitchinson’s analysis to the current appeal, the context in which the names, per diems and ceiling amounts appear is not inherently personal, but is one that relates exclusively to the professional responsibilities and activities of these individuals. As evidenced by the contents of the records themselves, each of these individuals is participating as consultants in a professional business capacity. For example, on the face of Record 2, each individual is listed as a consultant. Further, as is clear from the wording of the [associated business cases] that form part of Record 3, the selected individuals are being chosen for their professional, rather than personal, qualifications and experience.

Similar to the business context present in Order PO-2225, the professional context in which the individuals’ names appear here removes them from the personal

sphere. In addition, there is nothing about the names, per diem or ceiling amounts that, if disclosed, would reveal something of a personal nature about the various consultants. [...]

I find however, in the current case, I do not need to rely on this analysis. Even if I accept the Ministry's position that the names of the individual consultants, together with their per diems and contract ceilings is personal information and that the disclosure of this information is presumed to constitute an unjustified invasion of the physician's personal privacy under section 21(3)(f) of the *Act*, this information is still not exempt under section 21(1).

Section 21(1) states that "A head shall refuse to disclose personal information to any person other than the individual to whom the information relates..." unless one of the exceptions at section 21(1)(a)-(f) applies. Section 21(1)(f) provides that the exemption will not apply "if the disclosure does not constitute an unjustified invasion of personal privacy.

Section 21(4)(b) of the *Act* identifies a particular type of information, the disclosure of which does not constitute an unjustified invasion of personal privacy. Section 21(4)(b) of the *Act* reads as follows:

Despite subsection (3), a disclosure does not constitute an unjustified invasion of personal privacy if it,

- (b) discloses financial or other details of a contract for personal services between an individual and an institution; or

I have carefully reviewed the submissions and Record 2 (items #39, #43, #46 and #49) and Record 3B. The records, including the Business Cases that form Record 3B make clear that individual physicians were retained on contracts for personal services. For example, the purpose set out in the Business Case for "CMS ASP RFP Evaluators" reads as follows:

The approval of the Assistant Deputy Minister is sought to acquire up to 13 IT consultants to provide consulting services to the ePhysician Project. The IT consultants will act as Physician Evaluators for the Clinical Management System Application Service Provider Request for Proposals (CMS ASP RFP).

In my view, (items #39, #43, #46 and #49) and Record 3B disclose financial or other details which clearly derive from contracts for personal services between the physician consultants and the Ministry, which falls squarely within the parameters of section 21(4)(b). Therefore, the disclosure of these records would not

constitute an unjustified invasion of the affected person's privacy, and the exception to the exemption at section 21(1)(f) applies. I therefore find that the records do not qualify for exemption under section 21 of the Act.

As was the case with Order PO-2435, I do not need to rely on the above analysis of the “personal information” issue owing to my conclusions below regarding the application of the section 14(1) exemption to the records. Nevertheless, I agree with Assistant Commissioner Beamish’s approach and analysis in Order PO-2435.

In this case, the affected parties act solely in their capacity as elementary school principals and, to the extent that there is information in the records that can be linked to them, this information appears in the context of their professional relationship with the Board. In my view, the information in the records, including the affected parties employment terms and benefit entitlements, is not inherently personal but is information that relates exclusively to the professional activities and responsibilities of these individuals. Accordingly, I would find that there is no information in the records at issue that, if disclosed, would reveal something of a personal nature about the affected parties.

Section 14

Section 14(1) states that, “A head shall refuse to disclose personal information to any person other than the individual to whom the information relates...” unless one of the exceptions at sections 14(1)(a) to (f) applies. Section 14(1)(f) provides that the exemption will not apply “if the disclosure does not constitute an unjustified invasion of personal privacy. If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 14(1). As stated above, the Board relies on the presumptions in section 14(3)(d) and 14(3)(f).

With regard to the application of section 14(3)(d), the Board states that the information contained in the body of the Employment Contract relates to the affected parties’ “employment history”, and goes beyond what would be found in a “job description”. The Board submits that in *Dagg v Canada (Minister of Finance)*, 1997 S.C.J. No. 63, the Supreme Court of Canada narrowly defined the type of job-related information that could be disclosed without violating personal privacy to information disclosed in a job description. That case involved the interpretation certain provisions of the federal *Access to Information Act and Privacy Act*.

With respect to the application of section 14(3)(f), the Board submits that having already disclosed to the appellant the salary range information contained in the Appendix, it would not be difficult to determine the actual salaries of the affected parties if one knows their years of service as a principal.

While I acknowledge the Board’s submissions regarding the application of sections 14(3)(d) and (f), section 14(4) sets out the circumstances in which a disclosure would *not* constitute an

unjustified invasion of privacy, despite the application of one of one or both of these section 14(3) presumptions. At the time of the request, section 14(4) read:

Despite subsection (3), a disclosure does not constitute an unjustified invasion of personal privacy if it,

- (a) discloses the classification, salary range and benefits, or employment responsibilities of an individual who is or was an officer or employee of an institution; or
- (b) discloses financial or other details of a contract for personal services between an individual and an institution.

As indicated above, the parties were invited to make representations on the application of section 14(4)(a) and (b). The Board submitted representations regarding the application of section 14(4)(b), but chose not to address section 14(4)(a). The affected parties chose to not submit representations on the application of either part of section 14(4), despite having been invited to do so.

In my view, the circumstances of this case fall squarely within the section 14(4)(a) exception. First, the Board has acknowledged in its representations that the affected parties are employees of the Board and on the evidence before me I find this to be the case. Second, on my careful review of the records, I find that the information at issue discloses the salary range, benefits and employment responsibilities of the affected parties. In particular, the Employment Contract sets out all of the terms of the affected parties' employment relationship with the Board, including reference to the defined duties of the position, rights on termination, entitlement to compensation, reimbursement of expenses and vacation entitlements. The Appendix sets out the salary range for elementary school principals in relation to experience. And, finally, the Benefits Documentation sets out the details of the Board's benefits plan in which the affected parties participate.

Therefore, even if I were to find that either of the presumptions in sections 14(3)(d) or (f) applies to the information at issue, having already concluded that section 14(4)(a) applies to this information, I must find that disclosure of it would not constitute an unjustified invasion of personal privacy under section 14(1).

Accordingly, I find that section 14(1) does not apply in the circumstances of this case and I will order the disclosure of the records in their entirety to the appellant.

ORDER:

1. I order the Board to disclose all three responsive records to the appellant no later than **April 19, 2007** but not before **April 13, 2007**.

2. I remain seized of this matter pending compliance with provision 1 of this order.

Original signed by: _____
Bernard Morrow
Adjudicator

_____ March 15, 2007