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

INVESTIGATION REPORT

INVESTIGATION I93-009M

A Municipal School Board

August 11, 1993

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INTRODUCTION

Background of the Complaint

This investigation was initiated as a result of a complaint concerning a municipal school board (the Board).

The complainant had been employed by the Board on a casual basis as an occasional teacher and had completed various short-term occasional teaching assignments between August, 1989 and December, 1992. In October, 1992, he applied for a long-term occasional position with the Board, and was selected as the successful candidate out of the job competition, in December, 1992. He was then terminated from this long-term occasional contract in January of 1993.

The complainant was asked by the Assistant to the Board's Staffing Superintendent to provide the Board with the names of individuals who could be contacted by the Board for reference purposes. The Assistant said that the complainant told her the names of seven individuals, but he was uncertain if they were still employed at their respective boards, or of their current whereabouts. She recorded the list of referees on a page from a notepad, and told him that they would be contacted. She then passed the list on to the Staffing Superintendent.

The Staffing Superintendent found that of two of the referees for the [named board], one was not known at the board, and one was a retiree. However, she wished to obtain a reference from the [named] board, and later, at a meeting of Staffing Superintendents, in a personal conversation, the Staffing Superintendent asked the Superintendent of the [named board] if there was someone he might know whom she could contact to obtain a reference for the complainant. He told the Staffing Superintendent that the complainant's contract had been terminated by his board, and that an arbitration decision was available. He did not provide any details to the Staffing Superintendent.

The Staffing Superintendent had not been previously aware that the complainant's prior employment with the [named board] had been terminated for unsatisfactory performance. She subsequently received a copy of the arbitration decision from the Board's lawyer. The arbitration decision stated in part:

> Thus, it is the conclusion of this board of arbitration that the Board was correct in its action of dismissal and further that there is no evidence before this board which could justify reinstatement...
>
> We are concerned that respect for the spirit of the document [the collective agreement] was not reflected by the speed with which the administration and the Board acted in the last week of April and the month of May. That part of the process is seen by us as "unjust" and warrants a remedy for the grievor which remedy can only be by way of compensation since it would be wrong to reinstate. The grievor in his appearance before us does not present as one who is able or prepared to listen and abide suggestions for improvement and based on the evidence before us it would not be in the best interests of the student to place him in a classroom.

After reading the arbitration decision, the Staffing Superintendent concluded that it was inappropriate to continue the complainant's long-term occasional assignment or to keep his name on the Board's occasional teacher list.

The complainant received a letter dated January 11, 1993, from the Board's Staffing Superintendent. The letter stated:

> I have recently become aware of an arbitration decision confirming the actions of the (named school board) in terminating your contract for unsatisfactory teaching performance.
>
> The Chair of the Arbitration Board concluded "it would not be in the best interests of the students to place him in a classroom". The [Board] concurs with this judgement; accordingly I am not prepared to employ you as an occasional teacher. Had this information been made available to the Board earlier, you would have not been accepted on our long-term occasional teacher list, and of course, would not have been an acceptable applicant for a long-term occasional assignment.
>
> Accordingly, your long-term occasional assignment at [named school] is hereby terminated, effective today, and your name is hereby removed from our list of occasional teachers.

The complainant believed that his privacy had been breached when the Board collected information about him from the arbitration decision, and used it to terminate his contract and remove his name from its list of occasional teachers. In his view, the information had been obtained surreptitiously, and had been used without his authorization. He was also concerned that medical information in the arbitration decision had been used by the Board in making its decisions. He stated that he had worked for the Board since 1989 as an occasional teacher, with excellent performance reports.

The Staffing Superintendent stated that she had not taken any medical information from the arbitration decision into account in making the termination decision. Although she had considered the complainant's satisfactory performance reviews, her decision had been influenced most by the statement in the arbitration decision that, "it was not in the best interests of the students to place him in the classroom".

Issues Arising from the Investigation

(A) Did the arbitration decision contain the complainant's "personal information" as defined in section 2(1) of the Act?

(B) Did section 27 of the Act apply to the record of the arbitration decision?

(C) Was the personal information collected in accordance with section 28(2) of the Act?

(D) Was the personal information collected in accordance with section 29(1) of the Act?

(E) Did the Board provide proper notice for the collection of the personal information in accordance with section 29(2) of the Act?

(F) Was the personal information used in accordance with section 31 of the Act?

In its response to our draft report, the Board raised an additional issue by requesting that the compliance investigation process be stayed pending the conclusion of grievance/arbitration proceedings concerning the Board's decisions to terminate the complainant's long-term occasional teaching assignment and remove his name from its list of occasional teachers.

In making its request, the Board cited several reasons including: the prejudicial effect that our report might have on the grievance/arbitration proceeding; the principle that multiple legal proceedings ought to be discouraged; section 9 of the Ontario Evidence Act; and the "tenor" of our investigation reports.

We have carefully considered the Board's request but are not persuaded that a stay is warranted in the circumstances of this case, for the following reasons:

First, although the privacy investigation and grievance arbitration proceedings arise from similar facts, they do not address the same issues. Our investigation addresses whether the Board has complied with the privacy protection provisions of the Act, while the grievance/arbitration is concerned with whether the Board acted appropriately, in accordance with its collective agreement, in terminating the complainant's long-term occasional teaching assignment and removing his name from its list of occasional teachers.

Secondly, our investigation report and the recommendations it contains are not binding on the decision maker in the arbitration. The investigation report simply sets out our views on whether the Board had complied with the privacy protection provisions of the Act.

Section 9 of the Ontario Evidence Act provides a witness who gives an answer in one proceeding protection against that answer being used or received in evidence in a subsequent proceeding, if he has objected to answering the question because it might tend to incriminate him, or tend to establish his liability in a civil proceeding. Even assuming that the Ontario Evidence Act applies to our investigation report, we are unable to see how it supports the granting of a stay in the circumstances of this particular case.

Finally, in our view, the Board has failed to demonstrate specifically how its position in the arbitration would be prejudiced by the issuance of our final report. Therefore, after considering all of the circumstances, including the complainant's interest in an expeditious resolution of his privacy complaint, we are not satisfied that a stay is warranted.

RESULTS OF THE INVESTIGATION

Issue A: Did the arbitration decision contain the complainant's "personal information", as defined in section 2(1) of the Act?

Section 2(1) of the Act defines "personal information" as recorded information about an identifiable individual, including, but not limited to:

> ...
>
> (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,
>
> ...
>
> (e) the personal opinions or views of the individual except if they relate to another individual,
>
> ...
>
> (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

In our view, the arbitration decision contained the complainant's "personal information" as defined in paragraphs (b),(e),(g), and (h) of the definition of personal information in section 2(1) of the Act.

> **Conclusion:** The arbitration decision contained the complainant's "personal information" as defined in section 2(1) of the Act.

Issue B: Did section 27 of the Act apply to the record of the arbitration decision?

Section 27 of the Act states:

> This Part does not apply to personal information that is maintained for the purpose of creating a record that is available to the general public.

In other words, the privacy provisions of Part II of the Act do not apply to personal information that is maintained for the purpose of creating a record that is available to the general public.

The Freedom of Information and Protection of Privacy Act (the provincial Act) contains an equivalent provision, which is expressed in identical terms (section 37 of the provincial Act).

It is our view that personal information maintained by an institution may be excluded from the application of Part II of the Act and Part III of the provincial Act only if the personal information is maintained by that institution for the purpose of creating a record which is available to the general public. **Other** institutions cannot claim the benefit of the exclusion for the same personal information, unless they, too, maintain the personal information for the purpose of making it available to the general public.

The Board, in response to our draft report, noted that the above interpretation is somewhat different from the interpretation contained in earlier privacy investigations dealing with section 27. While recognizing that consistency is an important goal, we also believe that the process of interpreting and applying a statute is not a static exercise. Privacy protection is a continuously evolving field. In our view, it is important not to take a rigid approach to this legislation. Over time, as we have the chance to apply the Act in a variety of factual situations, we may refine and sometimes reconsider earlier positions in order to meet the changing needs of our information society.

Section 27 is a case in point. In our view, the narrower interpretation set out in this report is not only reasonable but also more in keeping with one of the fundamental goals of the Act -- namely, "to protect the privacy of individuals with respect to personal information about themselves held by institutions".

In the circumstances of this case, the record in question is an arbitration decision made under the School Boards and Teachers Collective Negotiations Act. We found that the Education Relations Commission (the ERC), which is an institution under the provincial Act, maintains a library of copies of arbitration decisions made under the School Boards and Teachers Collective Negotiations Act, and makes these decisions available to the public. The ERC's library is available to members of the public who visit its offices, and summaries of arbitration decisions are routinely forwarded to school boards and teaching federations. In our view, arbitration decisions are the type of public record contemplated in section 37 of the provincial Act. Therefore, in disclosing the arbitration records, the ERC may rely on section 37 to exclude them from falling under the privacy provisions of Part III of the provincial Act.

However, the Board collected the personal information in the record of the arbitration decision with a specific individual in mind (the complainant), for the purpose of furthering its reference check on the complainant. The Board's purpose was not to create a record that was available to the general public. Therefore, it is our view that the Board could not rely on section 27 to exclude the arbitration record from the privacy provisions of Part II of the Act.

Conclusion: Section 27 of the Act did not apply to the record of the arbitration decision.

Issue C: Was the personal information collected in accordance with section 28(2) of the Act?

Section 28(2) of the Act prohibits the collection of personal information unless one of three conditions exist. This section states:

> No person shall collect personal information on behalf of an institution unless the collection is expressly authorized by statute, used for the purposes of law enforcement or **necessary to the proper administration of a lawfully authorized activity** [emphasis added].

The Board's authority to appoint qualified teachers for schools that it operates is set out in section 170(12) of the Education Act. Collecting personal information during job competitions and subsequent reference checks affords the Board the opportunity to assess the qualifications of the candidates and verify the candidates' experience and qualifications. In our view, collecting personal information for job competitions and subsequent reference checks is necessary in order for the Board to properly administer its lawfully authorized activity of hiring qualified teachers to fill available positions. Therefore, we conclude that the Board's collection was necessary to the proper administration of a lawfully authorized activity, and was in accordance with section 28(2) of the Act.

Conclusion: The Board collected the complainant's personal information in accordance with section 28(2) of the Act.

Issue D: Was the personal information collected in accordance with section 29(1) of the Act?

Section 29(1) of the Act prohibits an institution from collecting personal information other than directly from the individual unless certain conditions are met. This section states in part:

> (1) An institution shall collect personal information only directly from the individual to whom the information relates unless,
>
> (a) the individual authorizes another manner of collection;
>
> (b) the personal information may be disclosed to the institution concerned under section 32 or under section 42 of the Freedom of Information and Protection of Privacy Act, 1987;

Although the complainant had given the Board verbal authorization to collect information about him from his referees, he had not authorized the Board to collect his personal information from the arbitration record. Since the complainant had not authorized another manner of collection, paragraph (a) did not apply.

Paragraph (b) provides that personal information may be collected from a source other than the individual if the information may be disclosed to the institution under section 42 of the provincial Act. In order for the Board to be able to collect the personal information from the ERC, the ERC would have had to be able to disclose the personal information to the Board under section 42 of the provincial Act.

We have noted in the discussion of Issue B above, that in our view, section 37 of the provincial Act excludes records of arbitration decisions maintained by the ERC from the application of Part III of the provincial Act, including the restrictions on disclosure set out in section 42. Therefore, the ERC's disclosure of the personal information in the record of the arbitration decision could not contravene the restrictions on disclosure set out in section 42. The ERC is permitted to disclose the information to the Board since the ERC is maintaining the personal information for the purpose of creating a record available to the general public.

In our view, as the ERC's disclosure of the arbitration decisions did not contravene section 42, the disclosure can be said, for the purposes of section 29(1)(b) of the Act, to be a disclosure that may be made under section 42 of the provincial Act. Therefore, the collection of the personal information by the Board was made in accordance with section 29(1) of the Act.

Conclusion: The collection was made in accordance with section 29(1) of the Act.

Issue E: Did the Board provide proper notice for the collection of the personal information in accordance with section 29(2) of the Act?

Section 29(2) of the Act provides that if personal information is collected on behalf of an institution, the head shall inform the individual to whom the information relates of,

(a) the legal authority for the collection;

(b) the principal purpose or purposes for which the personal information is intended to be used; and

(c) the title, business address and business telephone number of an officer or employee of the institution who can answer the individual's questions about the collection.

In response to the question of whether the Board had provided notice for the collection of the personal information for the job competition and subsequent reference checks, the Board stated that notice had been provided on the job posting, and drew our attention to the wording at the bottom of the posting, which stated:

> Confidentiality: personal information provided by applicants will be used for the purpose of this competition only and will be protected in accordance with the Municipal Freedom of Information and Protection of Privacy Act.

We found that the above statement does not contain all the elements set out in section 29(2). There is no reference to the Board's legal authority to collect the personal information, or to the title, business address, and business telephone number of an individual who could answer an individual's questions about the collection. The purpose of the collection is stated in a limited manner (i.e. for the purpose of this competition only). Therefore, in our view, the Board did not provide proper notice in accordance with section 29(2) of the Act for the collection of personal information for the job competition and subsequent reference checks.

Conclusion: The Board did not provide proper notice for the collection of personal information in accordance with section 29(2) of the Act.

Issue F: Was the personal information used in accordance with section 31 of the Act?

Section 31 of the Act sets out the conditions under which personal information may be used by an institution. It states:

> An institution shall not use personal information in its custody or under its control except,
>
> (a) if the person to whom the information relates has identified that information in particular and consented to its use;
>
> (b) for the purpose for which it was obtained or compiled or for a consistent purpose; or
>
> (c) for a purpose for which the information may be disclosed to the institution under section 32 or under section 42 of the Freedom of Information and Protection of Privacy Act, 1987.

The Board's position was that it had used the personal information it collected for a consistent purpose, in accordance with section 31(b) of the Act, when it used the information to 1) remove the complainant's name from the Board's list of occasional teachers, and 2) terminate the complainant's long-term occasional contract. Section 33 of the Act states:

> The purpose of a use or disclosure of personal information **that has been collected directly from the individual** to whom the information relates is a consistent purpose under clauses 31 (b) and 32 (c) only if the individual might reasonably have expected such a use or disclosure [emphasis added].

In this case, the personal information at issue was not collected directly from the complainant; it was collected indirectly from the record of the arbitration decision the Board had obtained. Accordingly, the question of whether the use was for a consistent purpose could not be determined by the complainant's reasonable expectation. In our view, in cases such as this, where personal information is collected indirectly, the question of whether the use was for a consistent purpose should be determined by considering whether the Board's use of the personal information was reasonably compatible with the purpose for which it was collected.

In response to our draft report, the Board stated that it did not necessarily disagree with the view taken above. However, the Board raised the issue of whether we had applied an "identical" purpose test, rather than a consistent purpose test in the circumstances of this complaint (i.e. that we had interpreted a "consistent" purpose as being an "identical" purpose). The result of using such an interpretation would be that unless the use of the information was identical to the intended purpose stated in the notice, the use would not be reasonably compatible with the original purpose; the use would not then be for a consistent purpose, and would contravene the Act.

Use 1) In our draft report, when setting out our conclusion as to whether the personal information in the arbitration decision had been used for a purpose that was reasonably compatible with the original purpose for the collection, we stated,

> In our view, this use was not reasonably compatible with the purpose identified by the Board in its notice of collection **because** [emphasis added] it extended beyond the very narrow use contemplated in the notice.

Since the above wording has apparently resulted in some misunderstanding, we wish to clarify our position as follows:

Generally speaking, the fact that a use of personal information may extend beyond the intended use set out in a notice of collection would not, in itself, be cause for finding that it was not reasonably compatible with the intended purpose. As the Board has noted, the Act includes provisions for the use of personal information for a consistent purpose, which would not be identical to the intended purpose for the collection. Our reasons for finding that a use is or is not reasonably compatible with the intended purpose are based on the specific circumstances of each case.

In this particular case, the Board conducted a job competition for a specific position. The use described in the notice was "for the purpose of this competition only". The Board explained to us that this notice applied to the collection of reference information, which therefore included the arbitration decision. Our understanding of the Board's intent at the time the notice was provided was that there was to be one, and only one use for the collection -- for the purpose of the job competition. However, the Board used the information contained in the arbitration record to make a decision to remove the complainant's name from its list of occasional teachers (unrelated to this competition), and effectively terminate his employment with the Board.

In our view, by using the word "only" in its notice, the Board was giving assurance to all job candidates that the personal information to be collected would be used for a specific, limited purpose (the job competition). Accordingly, it is our view that the word "only" in the notice was meant to be taken literally -- and we have done so. Thus, after considering the above circumstances, it is our view that using the personal information for the purpose of removing the complainant's name from the list of occasional teachers would be not be reasonably compatible with the purpose stated in the notice. In light of the fact that we did not consider the use of the personal information to be reasonably compatible with the purpose for which it was collected, we conclude that the personal information was not used in accordance with section 31(b) of the Act when the Board used it for a purpose other than the competition (i.e. to remove the complainant's name from its list of occasional teachers, thereby terminating his employment).

Use 2) It is our view that when the Board terminated the complainant's long-term contract, which he was awarded as a result of the competition, it used the personal information for the purpose for which it was obtained (i.e. to make a decision about the successful candidate in the competition). Therefore, it is our view that the Board used the personal information in accordance with section 31(b) of the Act when it made its decision to terminate the long-term contract of the complainant.

Conclusions: **Use 1)** The personal information was not used in accordance with section 31(b) of the Act when the Board used it to remove the complainant's name from its list of occasional teachers.

Use 2) The personal information was used in accordance with section 31(b) of the Act when the Board used it to terminate the complainant's long-term contract.

OTHER MATTERS

We wish to draw attention to the following matters:

The complainant was concerned that his medical information might have been used by the Board in making its decision concerning his employment. Although we are aware that the arbitration decision contained medical information about the complainant, we could find no evidence to support the complainant's view that the information had actually been used in making the decision to terminate. We concluded that on the balance of probabilities, the complainant's medical information had not been used by the Board, and therefore, we did not include this item as an issue to address in this report.

The Board asked the complainant to provide the names of referees that the Board could contact for reference purposes. However, the Board collected the complainant's personal information from a different source (the arbitration decision), without his knowledge. The complainant's view of this was that his personal information had been collected surreptitiously. However, it is our understanding that it is not the Board's practice to search public records for information about job candidates without their knowledge. In this case, it was only after the Board became aware of the arbitration decision, that it decided to obtain a copy of it. In future, if a similar situation arises, we suggest that in the spirit of the Act, the Board advise the individual that it has become aware of an arbitration decision (or other public record) about him or her, and

intends to collect it and use the information contained therein. However, the Board should be aware that proper notice must also be given in accordance with section 29(2) of the Act.

The Board referred to the notice previously discussed in Issue E of this report when asked if notice was provided for the job competition and subsequent reference checks. The Board's notice stated that "personal information provided by applicants will be used for the purposes of this competition only". In our view, the wording of this notice is very narrow. It does not appear to contemplate that information collected might be used for a purpose other than the job competition involved, nor does it appear to contemplate that information that may be collected indirectly, during the course of reference checks. In determining whether the Act had been contravened, we relied on the wording of the Board's notice to determine the Board's intent with regard to the use of the personal information collected for the job competition. Similarly, individuals whose personal information is being collected would also rely on the wording of the Board's notice to advise them of how their personal information will be used by the Board. Therefore, we wish to stress the importance of the wording contained in a notice of collection regarding the intended use(s) of the personal information collected.

For the purposes of this investigation, we have taken the view that the candidate, in giving the Board the names of his referees, was authorizing the indirect collection of his personal information regarding his reference checks. However, the Board had no record to show that the indirect collection of reference information had actually been authorized by the complainant, other than on a page of notebook paper, where information about the referees was written. This page did not contain the complainant's name, signature, date, or any other information to support the Board's position that the indirect collection had been authorized by the complainant. In our view, the Board's current method of obtaining authorization should be strengthened to provide greater support regarding authorizations for the indirect collection of reference information.

The Board had also spoken with an individual who was not one of the referees named by the complainant to ask if anyone at that person's board could provide a reference for the complainant. Since we have taken the view that the complainant had authorized the Board to contact the individuals in question when he gave the Board their names, we also take the view that the complainant's authorization was limited to those individuals, and did not extend to individuals whose names he had not provided. The Board should be aware that collecting the complainant's personal information from an individual other than the named referees, contravenes section 29(1) of the Act.

SUMMARY OF CONCLUSIONS

- The arbitration decision contained the complainant's personal information, as defined in section 2(1) of the Act.

- Section 27 of the Act did not apply to the record of the arbitration decision.

- The Board collected the complainant's personal information in accordance with section 28(2) of the Act.

- The collection was made in accordance with section 29(1) of the Act.

- The Board did not provide proper notice for the collection of personal information for the job competition and subsequent reference checks in accordance with section 29(2) of the Act.

- The personal information was not used in accordance with section 31(b) of the Act when the Board used it to remove the complainant's name from its list of occasional teachers.

- The personal information was used in accordance with section 31(b) of the Act when the Board used it to terminate the complainant's long-term contract.

RECOMMENDATIONS

We recommend that the Board incorporate the following points into its procedures:

1. that proper notice for the collection of personal information be provided by the Board when it conducts job competitions and reference checks associated with the competition.

2. that proper notice be provided by the Board to individuals if it collects personal information about them from public records.
3. that written authorization be obtained by the Board from job candidates to contact individual referees and that the Board restrict itself to collecting reference information only from those referees it has been authorized to contact.

Within six months of receiving this report, the Board should provide the Office of the Information and Privacy Commissioner/Ontario with proof of compliance with the above recommendations.

Original signed by:
Ann Cavoukian, Ph.D.
Assistant Commissioner

August 11, 1993
Date