



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

INVESTIGATION REPORT

INVESTIGATION I93-023P

ONTARIO LABOUR RELATIONS BOARD



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INTRODUCTION

Background of the Complaint

This investigation was initiated as a result of a complaint concerning the Ontario Labour Relations Board (the Board).

The complaint was filed by an employer (the Employer) on behalf of its employees.

The Employer was engaged in a dispute with a union (the Union) before the Board. The Union was seeking to unionize the Employer's employees, and, to this end, had commenced certification proceedings before the Board. During the course of these proceedings, the Employer was required to submit four lists of its employees to the Board. In a letter to the Board, the Union asked the Board for a copy of these lists. In a written decision, the Board complied with the Union's request, ordering the labour relations officer involved in the case to disclose the lists to the Union.

The Employer has submitted that the Board's disclosure of the lists, which contained the employees' personal information, was contrary to the Freedom of Information and Protection of Privacy Act (the Act).

Issues Arising from the Investigation

The following issues were identified as arising from the investigation:

- (A) Was the information in question "personal information", as defined in section 2(1) of the Act?
- (B) Was the disclosure of the personal information by the Board in accordance with section 42 of the Act?

RESULTS OF THE INVESTIGATION

Issue A: Was the information in question "personal information", as defined in section 2(1) of the Act?

Section 2(1) of the Act states, in part:

"personal information" means recorded information about an identifiable individual, including,

- (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 four lists contained each employee's name, his/her occupational classification, and an indication of whether or not the employee worked 24 hours per week or more. The lists contained additional information including whether or not the employee was at work on the application date; the municipality in which each employee worked; an indication of whether the employee was not at work on the application date by reason of lay-off; the date of lay-off; the expected date of recall; an indication of whether the employee was in the bargaining unit on the application date; the last day the employee worked; the reason for the employee's absence on the application date; and the expected date of return to work.

In our view, the information in these lists met the requirements in paragraph (h) of the definition of personal information in section 2(1) of the Act.

Conclusion: The information in question was "personal information" as defined in section 2(1) of the Act.

Issue B: Was the disclosure of the personal information by the Board in accordance with section 42 of the Act?

Under the Act, personal information in the custody or control of an institution can not be disclosed except in the specific circumstances outlined in sections 42(a) to 42(n).

Both the Employer and the Board made submissions regarding the application of sections 42(a), 42(c) and 42(e) of the Act to the disclosure of the lists. Therefore, we have examined each of these sections separately.

Section 42 of the Act states, in part:

An institution shall not disclose personal information in its custody or under its control except,

- (a) in accordance with Part II;
- ...
- (c) for the purpose for which it was obtained or compiled or for a consistent purpose;
- ...
- (e) for the purpose of complying with an Act of the Legislature or an Act of Parliament or a treaty, agreement or arrangement thereunder;
- ...

Section 42(a)

Section 42(a) states that an institution shall not disclose personal information except in accordance with Part II of the Act. Section 21 of Part II of the Act provides a general rule of non-disclosure of personal information to any person other than the person to whom the information relates. Certain exceptions to this general rule are set out in section 21(1). These exceptions include, in part, where it would not be an unjustified invasion of personal privacy to disclose the personal information. Sections 21(2) and 21(3) then provide a series of guidelines

and/or presumptions that are to be taken into account by the head in determining whether or not a particular disclosure constitutes an unjustified invasion of personal privacy. The head is also obliged, under section 21(2) to "consider all the relevant circumstances", in addition to those expressly mentioned.

The Board submitted that the disclosure of the personal information was:

in accordance with Part II of the FIPPA [per section 42(a)] and did not constitute an "unjustified invasion of personal privacy" within the meaning of section 21(1)(f), having regard to section 21(2)(d).

The Board further stated that:

It is submitted that no statutory presumption against disclosure is appropriate under section 21(3) of FIPPA. For the reasons expressed above, it is the Board's position that the information in issue does not relate to "employment history" within paragraph (d). It is submitted that no other part of section 21(3) is even arguably relevant.

It is further submitted that the information in issue is "relevant to a fair determination of rights" within section 21(2)(d), and that disclosure is not "unjustified" in these circumstances.

The Board referred us to certain case law. It submitted that the practice of the Board is rooted in considerations of fairness and the protection and advancement of statutory rights. In summary, the Board stated that:

In short, the OLRB [the Board] is obliged by the rules of natural justice to provide an applicant union with access to the information contained in the employee lists before the Board acts on that information in making any determination which affects or determines that union's rights. The information in the lists is not only relevant but critical to a fair determination of rights in certification cases.

The Employer submitted that the disclosure was not in accordance with Part II of the Act and section 42(a) of the Act since it could be presumed to constitute an unjustified invasion of personal privacy. The Employer submitted that:

With respect to Section 42(a) and Section 21, we note that there has been no written request or consent by the individual employees involved, so that Section 21(1)(a) is inapplicable. With respect to Section 21(1)(d), there is no provision under the *Labour Relations Act* which "expressly authorizes the disclosure", so that that exception is also inapplicable. Nor can it be said that Section 21(1)(f) applies. In this regard, we submit that Section 21(3)(d) prevails, so as to give rise to the statutory presumption contained therein that the disclosure of this personal information constitutes an unjustified invasion of privacy. None of the limitations contained in Section 21(4) apply. Section 21(4)(a) does not apply since we are

not here dealing with "an individual who is or was an officer or employee of an institution...".

We have carefully considered the submissions made by both parties. In previous compliance investigations, we have held the view that the section 42(a) exception to the section 42 prohibition against disclosure of personal information only applies in the context of a request by an individual, under Part II of the Act, for personal information relating to another individual.

In this case, the Union requested, in a letter which accompanied its application for certification, that the employee lists be forwarded by the Board to the Union immediately upon receipt by the Board. No mention was made that the Union's request was pursuant to the Act. Since the circumstances of the disclosure did not involve an access request under Part II of the Act, it is our view that section 42(a) did not apply.

However, even assuming that the request by the Union was an access request under Part II of the Act, the Board would have had to comply with the provisions of Part II, in order for the disclosure to have been in accordance with section 42(a) of the Act.

Section 28(1)(b) of Part II of the Act states:

28.-(1) Before a head grants a request for access to a record,

(b) that is personal information that the head has reason to believe might constitute an unjustified invasion of personal privacy for the purposes of clause 21(1)(f),

the head shall give written notice in accordance with subsection (2) to the person to whom the information relates.

Under this section, before a head grants a request for access to a record, if the head has reason to believe that 21(1)(f) **might** apply i.e. the disclosure of the information might constitute an unjustified invasion of personal privacy, written notice must be given in accordance with section 28(2) of the Act.

In this case, it is our view that the head had had reason to believe that the disclosure of the employees' personal information might constitute an unjustified invasion of personal privacy, if simply through its considerations of the submissions made by the Employer to the Board. Therefore, in order to comply with section 28, notice would have had to have been given to the employees. In our view, since no notice was given, the disclosure cannot be said to have been in accordance with section 28 of Part II of the Act and, therefore, cannot have been in accordance with section 42(a) of the Act.

Section 42(e)

With respect to the application of section 42(e), the Board stated:

The Board also relies on section 42(e) of FIPPA. ...As explained, the Board collects the information in question so that it may do that which is required of it under section 8 of the Labour Relations Act in respect of certification applications. It is submitted that the disclosure of the employee lists is necessary in order to comply with the requirement in section 104(13) of the Labour Relations Act that the Board give "full opportunity to the parties to any proceeding to present their evidence and to make their submissions." For such an "opportunity" to have substance, an interested party must be fully informed as to the case to be met. ... Indeed, it is submitted that a refusal to supply employee lists could not be rationally supported under section 104(13) of the Labour Relations Act.

The Employer submitted the following:

We further submit that Section 42(e) does not allow for the disclosure of this personal information, since the Labour Relations Act does not require the Ontario Labour Relations Board to disclose this information to the applicant union and therefore such disclosure is not necessary "for the purpose of **complying** with an Act".

In our view, the Board is relying on an implicit, rather than an express, provision of the Labour Relations Act to authorize disclosure of the employee lists to the Union. There is, in fact, no express provision of the Labour Relations Act which requires the Board to disclose such information. In our view, it cannot be said that in supplying the employee lists to the Union, the Board was "complying with an Act of the Legislature" since there is no provision in the Ontario Labour Relations Act which required it to do so. Therefore, in our view, the disclosure was not in accordance with section 42(e) of the Act.

Section 42(c)

Section 42(c) of the Act states that an institution shall not disclose personal information except for the purpose for which it was obtained or compiled or for a consistent purpose. With respect to the application of section 42(c) of the Act, the Board submitted as follows:

The Board also relies on section 42(c) of FIPPA. As explained above, the information contained in employee lists is collected to allow the Board to fulfil its statutory duty in the context of a "lis" between an applicant union and respondent employer. The Board is required, as a matter of law, to determine the number and identity of employees properly in the "appropriate bargaining unit" and the parties are entitled, as a matter of law, to disclosure of (and to make representations with respect to) relevant evidential material which affects the disposition of an essential issue in this case. Accordingly, the information is collected precisely so that it may be disclosed, as a first step in the Board making the required determination under section 8 of the [Ontario Labour Relations Act].

The Employer submitted the following:

Nor can it be said that Section 42(c) applies, since it cannot be said that the employee lists were compiled for the purpose of providing a copy thereof to the [Union]. Rather, the purpose of obtaining the employee lists was to allow the OLRB [the Board] to satisfy itself as to the number of employees in the bargaining unit or units in question so that it can in turn determine whether the Union enjoys the support of the requisite percentage of employees in each unit. It is submitted that this can be done without releasing this information to the [Union].

In our view, it seems clear that the Board obtained the employee lists for the purpose of reviewing an application for union certification pursuant to section 8 of the Ontario Labour Relations Act. If, in the course of conducting such a review, the Board decides it is appropriate for each of the parties to have access to the lists, then, in our view, the Board's disclosure of the lists to the parties is for the purpose for which they were obtained, i.e. conducting a review of the application for union certification.

Therefore, in our view, since the personal information was disclosed for the purpose for which it was obtained by the Board, the disclosure was in accordance with section 42(c) of the Act.

Conclusion: The disclosure of the personal information by the Board was in accordance with section 42(c) of the Act.

SUMMARY OF CONCLUSIONS

- The information in question was "personal information" as defined in section 2(1) of the Act.
- The disclosure of the personal information by the Board was in accordance with section 42(c) of the Act.

Original signed by: _____
Susan Anthistle
Compliance Review Officer

October 28, 1993

Date