



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

INVESTIGATION REPORT

INVESTIGATION I95-024M

A SCHOOL BOARD

January 31, 1996



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INTRODUCTION

Background of the Complaint

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

The complainant had filed a complaint of discrimination with the Ontario Human Rights Commission (the OHRC) against the Board. The complainant was concerned that in response to five access requests (including three from the media) made under the Municipal Freedom of Information and Protection of Privacy Act (the Act), the Board had disclosed that he had filed the OHRC complaint, together with the legal fees incurred by the Board in dealing with his complaint.

The complainant's spouse was campaigning at that time for re-election as a Board trustee in the municipal elections. The complainant believed that the information disclosed by the Board had been to two individuals who had wanted to tarnish his spouse's re-election campaign. The complainant stated that these individuals had subsequently sent an open letter to all parents of children enrolled in the Board's schools, recommending the election of certain persons as trustees but critical of both his spouse and himself. Attached to this letter was a list of the legal fees paid by the Board in defending itself against litigation undertaken by trustees and/or their family members. This list included the cost to date incurred by the Board in dealing with the complainant's OHRC complaint.

In addition, the complainant believed that the Board had also given details of his OHRC complaint to the media since a newspaper article published a brief summary of his complaint. The complainant was also concerned that the Board had disclosed his personal information at public Board meetings and in the minutes of those meetings.

The complainant believed that the Board's disclosures were in breach of 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? If yes,
- (B) Did section 27 of the Act apply to the personal information?
- (C) Did the Board disclose the complainant's personal information in reply to the access requests, in compliance with section 32 of the Act?
- (D) Did the Board disclose the complainant's personal information in public Board meetings and in the minutes, in compliance with section 32 of the Act?

- (E) Did the Board disclose details of the complainant's OHRC complaint to the media, in compliance with section 32 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 that "personal information" is 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,
...
- (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 information in question included the complainant's name; the fact that he had filed an OHRC complaint against the Board and that his complaint had resulted in certain legal fees being incurred by the Board; certain details of his OHRC complaint and the fact that he was married to a Board trustee. It is our view that this information met the requirements of paragraphs (a) and (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: Did section 27 of the Act apply to the personal information?

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.

It is our view that personal information maintained by an institution may be excluded from the application of Part II of the 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 that purpose.

The Board stated that it believed that section 27 was applicable for a number of reasons: that the information was "public" since the complainant had identified himself in previous press reports; that under section 207(4) of the Education Act (the EA), the public had a right of access to all current accounts of all school boards; and that there had been an OHRC Board of Inquiry hearing the complainant's OHRC complaint which was open to the public.

The Board referred us to two newspaper articles about the complainant that appeared on September 26, 1992 and May 29, 1993. We examined the two articles and found that they contained the complainant's name and other personal information about him including the fact that he had filed an OHRC complaint alleging racial discrimination, but the articles did not give the amount of money that had been spent by the Board in dealing with his complaint nor did the complainant state that he was married to a school trustee.

It is our view that while the complainant may have disclosed to the press that he had filed an OHRC complaint, this did not render "public" the information that was later disclosed by the Board within the meaning of section 27. It is our view that the Board was not maintaining this personal information specifically to make it available to the public and, therefore, section 27 of the Act was not applicable.

The Board also stated that since it relies on public funds, it would have been inappropriate to refuse access to information outlining how it uses these funds. The Board referred us to Section 207(4) of the EA which states:

Any person may, at all reasonable hours, at the head office of the board inspect the minute book, the audited annual financial report and the current accounts of a board, and, upon the written request of any person and upon the payment to the board at the rate of 25 cents for every 100 words or at such lower rate as the board may fix, the secretary shall furnish copies of them or extracts therefrom certified under the secretary's hand.

It is our view that the above section does not require that audited annual financial reports and current accounts be made available in a form that would include personal information. The Board did not need to make the complainant's identity known in order to provide requesters with information on how it uses public funds. It is our view that section 207(4) of the Education Act does not support the Board's position that section 27 of the Act is applicable to the complainant's personal information.

The Board also submitted that since the complainant's personal information would have been discussed at the public OHRC Board of Inquiry hearing, this would have made his personal information "public".

In its representations on the draft report, the Board further submitted that as soon as an OHRC complaint is referred to a Board of Inquiry, a copy of the complaint is placed in the public record of the Board of Inquiry and the public can have access to it unless there is an order from the Board of Inquiry that the file be sealed. Therefore, the Board's view was that once a complaint has been referred to a Board of Inquiry, it is a public record.

However, it is our view that even though the complainant's OHRC complaint would have been placed in the Board of Inquiry's record and some of his personal information might have also been available at the public hearing of the Board of Inquiry, it would be the Board of Inquiry and not the Board, that would have been maintaining the complainant's personal information for the purpose of making it accessible to the public under section 27 of the Act.

The Board also stated in its submissions that the Municipal Conflicts of Interest Act (MCIA) supported its view that section 27 of the Act applied, specifically to the information concerning the complainant's marital status. The Board stated that the MCIA requires that trustees' conflicts of interest, including situations where their spouses have financial interests in matters debated in Board meetings, be published in the Board minutes available to the public. The Board cited sections 5(1), 5(3) and 6 of the MCIA as being relevant:

5. (1) Where a member, either on his or her own behalf or while acting for, by, with or through another, has any pecuniary interest, direct or indirect, in any matter and is present at a meeting of the council or local board at which the matter is the subject of consideration, the member:

(a) shall prior to any consideration of the matter at the meeting, disclose the interest and the general nature thereof;

(b) shall not take part in the discussion of, or vote on any question in respect of the matter; and

(c) shall not attempt in any way whether before, during or after the meeting to influence the voting on any such question.

...

(3) Where the interest of a member has not been disclosed as required by subsection (1) by reason of the member's absence from the meeting referred to therein, the member shall disclose the interest and otherwise comply with subsection (1) at the first meeting of the council or local board, as the case may be, attended by the member after the meeting referred to in subsection (1)

6. (1) Every declaration of interest and the general nature thereof made under section 5 shall, where the meeting is open to the public, be recorded in the minutes of the meeting by the clerk of the municipality or secretary of the committee or local board, as the case may be.

(2) Every declaration of interest made under section 5, but not the general

nature of that interest, shall where the meeting is not open to the public, be recorded in the minutes of the next meeting that is open to the public.

The Board stated that in compliance with the above legislation, the complainant's spouse had disclosed the marital status of the complainant at Board public meetings and that this was included in the minutes which were available to the public.

In our view, the MCIA only requires the disclosure of the general nature of a conflict of interest; it does not require the disclosure of all of the details of the conflict of interest nor does it specifically require all of the details to be disclosed in a "public meeting". In our view, the Board cannot be said to have been maintaining the complainant's personal information to make it

available to the public because it was required to do so under the M CIA. We conclude that, therefore, the M CIA does not support the Board's position that section 27 of the Act applied.

Having considered the submissions from the Board regarding section 27 of the Act, it is our view that this section was not applicable in the circumstances of this case.

Conclusion: Section 27 of the Act did not apply to the information in question.

Issue C: Did the Board disclose the complainant's personal information in reply to the access requests, in compliance with section 32 of the Act?

Section 32 of the Act prohibits the disclosure of personal information in the custody or under the control of an institution except in certain circumstances enumerated in paragraphs (a) through (l). The Board submitted that sections 32(a) and (b) applied to the disclosures in this case.

Section 32(a) of the Act

Section 32(a) states that an institution shall not disclose personal information in its custody or under its control except,

- (a) in accordance with Part I;

In our view, in order to rely on section 32(a), an institution must demonstrate that the disclosure took place in response to a request and that, in disclosing the personal information, it met all of the procedural requirements under Part I.

The Board stated, and we accept, that it had received five requests under the Act for information which included the complainant's personal information. However, the Board did not notify the complainant prior to disclosing his personal information. Section 21(1)(b) of the Act states:

A head shall give written notice in accordance with subsection (2) to the person to whom the information relates before granting 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 14(1)(f), (emphasis added)

Section 14 constitutes the "personal privacy" exemption under Part I of the Act. Section 14(1)(f) states:

A head shall refuse to disclose personal information to any person other than the individual to whom the personal information relates except,

- ...
- (f) if the disclosure does not constitute an unjustified invasion of personal privacy.

Sections 14(2), (3) and (4) provided guidance in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy.

The Board made three arguments to support its submission that disclosure of the complainant's personal information "would not constitute an unjustified invasion of personal privacy" under section 14(1)(f). Firstly, the Board stated that section 14(2)(a) of the Act applied. That section states:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all of the relevant circumstances, including whether,

- (a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;

Secondly, the Board relied on a factor not listed in section 14 to justify its disclosures. The Board stated that entire matter was "public" since a Board of Inquiry under the Human Rights Code (the Code) was appointed, and had conducted a public hearing into the complainant's complaint under the Code. The Board also stated that once the OHRC complaint had been referred to a Board of Inquiry, it was placed in a record that would have been available to the public.

It is our view that not all of the personal information disclosed by the Board would have been placed in the Board of Inquiry record. We also note that the public Board of Inquiry hearing in this case did not take place until well after the disclosures in question.

Finally, the Board relied on section 16 of the Act to support the disclosures. Section 16 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.

The Board's arguments ultimately may have supported a decision to disclose under Part I. However, in our view, other factors may have weighed against disclosure, particularly in light of the sensitivity of the subject matter, a human rights complaint. Thus, it is possible that one or more of the factors set out in sections 14(2)(e), (f) or (i) could have applied in the circumstances. Those sections read:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all of the relevant circumstances, including whether,

- (e) the individual to whom the personal information relates will be exposed unfairly to pecuniary or other harm;

- (f) the personal information is highly sensitive;
- (I) the disclosure may unfairly damage the reputation of any person referred to in the record.

Moreover, it is arguable that the presumption in section 14(3)(d) could have applied in the circumstances. That section states:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

- (d) relates to employment or educational history;

It is our view that the Board should have taken into account the sensitivity associated with the complainant's personal information, in addition to the factors which may have weighed in favour of disclosure, and concluded that disclosure "might constitute an unjustified invasion" of his personal privacy. Accordingly, it is our view that in the circumstances, the Board should have notified the complainant of the requests in accordance with section 21(1)(b) of the Act.

In its submissions, on our draft report, the Board argued that the factors set out in sections 14(2)(e), (f) and (i) did not apply in the circumstances of this case since the complainant himself had made public some of his personal information. The Board found it difficult to understand how its disclosure of the complainant's personal information could possibly constitute an unjustified invasion of the complainant's personal privacy.

It is not our intention to suggest that the complainant's personal information would or would not have been exempted under section 14(1) of the Act. Rather, it is our view that since the disclosure of complainant's personal information **might** have constituted an unjustified invasion of personal privacy, the complainant should have been notified and given an opportunity to make representations on the issue of disclosure, as well as an opportunity to appeal the Board's decision to our office. In our view, except in the clearest of cases, fairness requires that the person with the greatest interest in the information, the data subject, be given a chance to be heard.

We have concluded that the Board did not comply with the procedural requirement of notifying the complainant under section 21(1)(b). On this basis, we conclude that the Board's disclosure was not in accordance with Part I and, therefore, not in compliance with section 32(a).

Although we have concluded that in the circumstances of this case, the Board should have provided notice, the wording of section 21(1)(b) does not mean that notice is necessary in each and every situation. There may be circumstances where notice by an institution under this section would not be required.

Section 32(b) of the Act

Section 32(b) of the Act states that an institution shall not disclose personal information in its custody or under its control except, "if the person to whom the information relates has identified that information in particular and consented to its disclosure."

The Board stated that section 32(b) of the Act applied because the complainant himself had disclosed information to the media and to the community. Therefore, it was the Board's view that the complainant had consented to the disclosures in question.

In its representations on our draft report, the Board submitted that the complainant had told the media that he had filed an OHRC complaint. The Board also stated that the complainant's marital status as a spouse of a school trustee had been made public in part by the complainant himself. The Board referred to a paragraph from a newspaper article which it believed gave the impression that the complainant had disclosed this detail himself.

As we have previously indicated under Issue A, the complainant had disclosed some personal information to the press. However, the complainant did not know or disclose the amount of legal fees that his OHRC complaint had cost the Board and he denied that he had stated that he was married to a school trustee.

Having considered both the Board's and the complainant's submissions, we are of the view that the complainant did not "identify" the personal information that was disclosed by the Board "in particular and consented to its disclosure". Therefore, the Board's disclosures of the complainant's personal information in reply to the access requests were not in compliance with section 32(b) of the Act.

We have examined the other provisions of section 32 and have determined that none were applicable.

Conclusion: The Board's disclosures of the complainant's personal information in reply to the access requests were not in compliance with section 32 of the Act.

Issue D: Did the Board disclose the complainant's personal information in public Board meetings and in minutes, in compliance with section 32 of the Act?

The complainant stated that the Board had repeatedly disclosed his personal information in open Board meetings and in the minutes for these meetings which were available to the public. Although he did not give any dates of those meetings, the Board provided us with documentation for two public Board meetings dated October 27, 1994 and April 20, 1995.

The minutes for the October 27 meeting indicated that the Board had discussed the complainant's case and had decided to disclose the legal costs concerning the complainant's OHRC complaint in response to the access requests. The minutes for the April 20 meeting showed that the Board had discussed the information it had sent in reply to the requests. This included the complainant's name, the information that he had filed an OHRC complaint against the Board, the legal fees that had been incurred by the Board to deal with his complaint, and that his spouse was a Board trustee.

The Board advised us that it had also relied on sections 32(a) and 32(b) of the Act to disclose the complainant's personal information at these meetings and in the minutes, on the same basis as discussed above under Issue C. We have considered the Board's submissions and it is our view that these sections of the Act did not apply. As we previously stated, in our view, section 32(a) of the Act is applicable only if the disclosure in question takes place in **response** to an access request. This was not the circumstances of these disclosures. Further, section 32(b) of the Act did not apply for the same reasons as given under issue C.

We have also examined the other provisions of section 32 and have determined that none were applicable.

Conclusion: The Board's disclosures of the complainant's personal information at two open Board meetings and in the minutes, were not in compliance with section 32 of the Act.

Issue E: Did the Board disclose the specific details of the complainant's OHRC complaint to the media?

The complainant was concerned that the Board had disclosed specific details of his OHRC complaint to a newspaper since some details had subsequently been given in summary in a published article. However, he was unable to provide us with any information as to how the newspaper might have obtained this information.

The Board informed us that it had received a sixth access request from the media for specific details of the complainant's OHRC complaint but that it had refused access to this information. (A copy of the refusal letter was provided to us). In addition, the Board stated that members of the media had attended the OHRC's Board of Inquiry on at least one occasion.

In its submissions on the draft report, the Board again denied having disclosed the details of the OHRC complaint and cited a newspaper article dated May 29, 1993 which indicated that:

School board and Ministry officials in Ottawa and Toronto refuse to comment while the issue is before the Commission.

We are, therefore, unable to determine how the media obtained the specific details of the complainant's OHRC complaint.

Conclusion: We are unable to conclude whether or not the Board disclosed the specific details of the complainant's OHRC complaint to the media.

SUMMARY OF CONCLUSIONS

- The information in question was the complainant's "personal information" as defined in section 2(1) of the Act.
- Section 27 of the Act did not apply to the information in question.
- The Board's disclosures of the complainant's personal information in reply to the access requests were not in compliance with section 32 of the Act.
- The Board's disclosures of the complainant's personal information at two open Board meetings and in the minutes, were not in compliance with the provisions of section 32 of the Act.
- We are unable to conclude whether or not the Board disclosed the specific details of the complainant's OHRC complaint to the media.

RECOMMENDATION

We recommend that the Board take the necessary precautions to ensure that in future, all disclosures of personal information are made in accordance with the Act, for example, by reminding relevant staff of the limited circumstances under which personal information may be disclosed.

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

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

January 31, 1996 _____
Date
