



Information and Privacy
Commissioner/Ontario

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

PRIVACY COMPLAINT REPORT

PRIVACY COMPLAINT NO. MC06-67

Upper Grand 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/Télé: 416-325-9188
TTY: 416-325-7539
<http://www.ipc.on.ca>

PRIVACY COMPLAINT REPORT

PRIVACY COMPLAINT NO. **MC06-67**

INVESTIGATOR: **Mark Ratner**

INSTITUTION: **Upper Grand District School Board**

SUMMARY OF COMPLAINT:

The Office of the Information and Privacy Commissioner/Ontario (IPC) received a privacy complaint from an individual (the complainant) regarding the Upper Grand District School Board (the Board). Specifically, the individual was concerned that the Board had inappropriately collected his personal information in contravention of the provisions of the *Municipal Freedom of Information and Protection of Privacy Act* (the Act).

Background

The complainant provided the following information to the IPC. The complainant's daughter (the employee) is a former employee of the Board. During the time that she was employed by the Board, she sustained an injury and cited this injury as the reason for her absence from work. Subsequently, she was placed under surveillance by the Board.

The complainant stated that, as part of the surveillance, an investigator hired by the Board followed him to a number of locations including his residence as well as a hospital. At the hospital, the Board's investigator questioned hospital staff about the complainant's reasons for attending the hospital.

The complainant stated that his image was captured on a surveillance videotape that was recorded by the investigator. The videotape, along with an accompanying report, was provided to the Workplace Safety and Insurance Board (WSIB), and was eventually made available to the employee. The complainant was made aware of the existence of the records by the employee.

In response to the complaint, the Board confirmed that it had been engaged in surveillance of the employee and stated that the purpose of the surveillance was to determine the authenticity of the employee's medical absence and claim for disability benefits.

The Board acknowledged that, as part of the surveillance, the investigator videotaped the complainant entering and exiting the employee's residence. The Board explained that this aspect of the surveillance took place to assist in determining the location of the employee, and that surveillance of her residence continued once her location had been determined. In addition, the Board confirmed the existence of the report and the videotape, which are the subject of this privacy investigation.

The Board has stated that the records in question are excluded from the scope of the *Act*. The Board explained that the complainant's information was collected during the course of surveillance of an employee, and that the information was gathered for the purpose of determining whether the employee's claim for disability benefits was legitimate.

The Board advised that the employee was eventually terminated from her position, and that the termination had been grieved under the applicable collective bargaining agreement. The Board also noted that the matter has proceeded to arbitration.

The Board has taken the position that the records are excluded from the application of the *Act* by virtue of section 52(3), which states:

Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:

1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.
3. Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

Section 52(4) states:

This Act applies to the following records:

1. An agreement between an institution and a trade union.

2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.
3. An agreement between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees.
4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment.

In order for an institution to show that records fall within the scope of section 52(3)1, it must demonstrate that the records satisfy the three criteria set out below [see, for example, Order P-1257, which dealt with analogous provisions in the provincial *Freedom of Information and Protection of Privacy Act*, and Order MO-1464].

The institution must demonstrate that:

1. the record was collected, prepared, maintained or used by the institution, or on its behalf; and
2. this collection, preparation, maintenance or usage was in relation to proceedings or anticipated proceedings before a court, tribunal or other entity; and
3. these proceedings or anticipated proceedings related to labour relations or to the employment of a person by the institution.

In applying these three criteria to the facts of this privacy investigation, I am satisfied that the records in question fall within the scope of section 52(3)1. With respect to the first criterion, the records were collected by a private investigator employed by the Board, which satisfies the requirement that the record must have been collected by an institution, or on its behalf.

With respect to the second and third criteria, the records in question, once collected, were provided to the WSIB in anticipation of proceedings, including a potential appeal of a decision by WSIB to the Workplace Safety and Insurance Tribunal. Because WSIB proceedings qualify as proceedings “before a court, tribunal or other entity,” [see Order M-896, which dealt with the predecessor to WSIB, the Workers’ Compensation Board] and these proceedings were related to the employment of a person by the institution, I am satisfied that both the second and third criteria have been met. In addition, I have considered the exceptions in section 52(4) and none of these are present in the circumstances of this complaint.

Based on the foregoing, I agree with the Board and accept its position that the records in question fall within section 52(3), and are therefore excluded from the scope of the *Act*.

CONCLUSION:

- Section 52(3) applies to the records in question and consequently, the records are not subject to the *Act*. Therefore, the *Act* does not apply to this complaint.

POSTSCRIPT:

In this Privacy Complaint Report, I have concluded that the records in question are not subject to the provisions of the *Act*. Notwithstanding my conclusion above, I remain concerned about the surveillance of the complainant, who was not directly involved in the labour relations matter between the Board and the employee.

In the circumstances of the complaint, the complainant's information was collected by the Board despite the fact that he was not the subject of the Board's surveillance. While I appreciate the purpose and need for the Board's surveillance of the employee, it is extremely important from a privacy perspective that the surveillance and resulting collection is limited to the subject of the surveillance, whenever possible. The Board should be cognizant of what information it is collecting in order to prevent the inadvertent collection of any other individuals' information.

In sum, the Board is responsible for the activities of its staff, including any investigator they may retain and for ensuring that the surveillance is conducted in a reasonable and privacy protective manner.

Original signed by: _____

Mark Ratner
Investigator

August 9, 2007
