



**Information and Privacy
Commissioner/Ontario**

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

ORDER M-277

Appeal M-9300248

East Parry Sound Board of Education



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ORDER

BACKGROUND:

The East Parry Sound Board of Education (the Board) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to the contract entered into between the Board and a named consulting firm for the 1992-1993 school year. The requester expressed a particular interest in the monetary value of the contract.

The Board located the agreement which was responsive to the request but denied access to the record "under the Freedom of Information Act". The Board did not, however, indicate which exemption it was relying upon to withhold this document from disclosure. The requester appealed the Board's decision.

After the appeal had been filed, the Board issued a new decision letter where it stated that the contract was being withheld pursuant to the exemptions contained in sections 10(1)(a) and 14(1) of the Act.

The record at issue in this appeal consists of a three page contract to which is attached a two page appendix. The signatories to the agreement are the Board, the principal of the consulting firm and the Ontario Public School Boards' Association (the Association).

The mediation of this appeal was not successful and notice that an inquiry was being conducted to review the Board's decision was sent to the Board, the appellant and to two affected persons (the consulting firm and the Association). Representations were received from all parties except the Association.

ISSUES:

The issues arising in this appeal are:

- A. Whether the information contained in the contract qualifies as "personal information" as defined in section 2(1) of the Act.
- B. If the answer to Issue A is yes, whether the mandatory exemption provided by section 14(1) of the Act applies to the information contained in the contract.
- C. Whether the mandatory exemption provided by section 10(1)(a) of the Act applies to the contract at issue.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the information contained in the contract qualifies as "personal information" as defined in section 2(1) of the Act.

As indicated previously, the record at issue in this appeal consists of a contract entered into between the Board and a consulting firm. The agreement is structured as one where the firm contracts with the Board as a sole proprietorship.

Section 2(1) of the Act defines "personal information" to mean "recorded information about an identifiable individual". The first issue which I must, therefore, address is whether information which outwardly pertains to a business entity (the sole proprietorship) can be categorized as also relating to an identifiable individual.

This question has been canvassed in a number of previous orders issued by the Commissioner's office. In Order 16, former Commissioner Sidney B. Linden approached this subject from the following perspective:

The use of the term "individual" in the Act makes it clear that the protection provided with respect to the privacy of personal information relates only to natural persons. Had the legislature intended "identifiable individual" to include a sole proprietorship, partnership, unincorporated associations or corporation, it could and would have used the appropriate language to make this clear.

Commissioner Linden had occasion to consider this issue again in Order 113. There, he qualified the proposition which he had originally advanced in Order 16 and stated that:

It is, of course, possible that in some circumstances, information with respect to a business entity could be such that it only relates to an identifiable individual, that is, a natural person, and that information might qualify as that individual's personal information.

In Order P-515, I applied the approach set out in Order 113 and found that information which outwardly pertained to a business entity more properly related to an identifiable individual. I then concluded that this information qualified as that individual's personal information.

With the relevant orders now having been summarized, I must determine whether the information contained in the present agreement can be said to relate to an identifiable individual. To answer this question, it is necessary for me to consider the actual wording of the contract.

As I have indicated, the agreement is formally structured as one between the Board and the consulting firm as a sole proprietorship. Based on my review of the document, however, I find that the contract involves the provision of services by the principal of the firm in his personal capacity. This conclusion arises predominantly from a review of clause 4.3 of the agreement which contemplates that, in the normal course of events, the relevant consulting services will be provided exclusively by the principal. That this is a contract which at its heart involves the provision of services by an individual is bolstered by clauses 4.1 (which refers to standard employee fringe benefits) and 4.2 (which deals with vacation time).

Based on these considerations, I find that the agreement in question constitutes a contract between the Board and an identifiable individual (the principal of the firm). I also find, based on the definitions for the term set out in sections 2(1)(b) and (h) of the Act, that the agreement contains the personal information of the principal of the firm.

ISSUE B: If the answer to Issue A is yes, whether the mandatory exemption provided by section 14(1) of the Act applies to the information contained in the contract.

Once it has been determined that a record contains personal information, section 14 of the Act provides a general rule of non-disclosure of the personal information to any person other than the individual to whom the personal information relates. Section 14(1) provides some exceptions to this general rule of non-disclosure, one of which is set out in section 14(1)(f) of the Act. This provision reads as follows:

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

if the disclosure does not constitute an unjustified invasion of personal privacy.

Sections 14(2), (3) and (4) of the Act provide guidance in determining whether the disclosure of personal information would constitute an unjustified invasion of the personal privacy of the individual to whom the information relates.

Section 14(4)(b) of the Act identifies a situation where the disclosure of personal would **not** constitute an unjustified invasion of personal privacy. This provision states that:

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

discloses financial or other details of a contract for personal services

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between an individual and an institution.

In their representations, both the Board and the consultant agree that the agreement represents a contract for personal services of the consultant. I have carefully reviewed the document and concur that the consultant was engaged as an independent contractor. On this basis, I find that section 14(4)(b) applies to the personal information contained in the agreement.

I must now determine, based on the wording of the section, how much of the personal information found in the contract may be released. In his representations, counsel for the appellant comments on the applicability of section 14(4)(b) in the following way:

If this record is found to be a contract for services, then I would submit that it comes within the deemed non-invasion of privacy contained in s. 14(4)(b). This subsection contains no limit on the type of information that can be contained in such a record, and authorizes no exemption from disclosure.

Neither the Board nor the consultant have directly addressed the scope of section 14(4)(b) in their representations.

Where a record is found to be a contract for personal services, section 14(4)(b) specifies that the disclosure of the **financial or other details** of the contract does not constitute an unjustified invasion of personal privacy. Thus, I conclude that the personal information which may be released where this provision applies is not limited to the financial terms of the agreement but includes all other relevant particulars of the contract. This would include, for example, the scope of the assignment and the nature of the working relationship between the parties.

Having concluded that the release of the personal information at issue would not constitute an unjustified invasion of the personal privacy of the principal under section 14(1)(f) of the Act, I must now consider the Board's claim that section 10(1)(a) of the Act applies to this and the other information found in the agreement.

ISSUE C: Whether the mandatory exemption provided by section 10(1)(a) of the Act applies to the contract at issue.

The Board claims that section 10(1)(a) of the Act applies to the agreement. This provision states that:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,

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prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

For a record to qualify for exemption under this provision, the Board and/or the affected person resisting disclosure must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; **and**
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; **and**
3. the prospect of disclosure of the record must give rise to a reasonable expectation that the harms referred to in section 10(1)(a) will occur.

[Orders 36, M-29 and M-37]

If any part of the test is not satisfied, the exemption under section 10(1) will not apply to the record (Order M-10).

I will first consider part two of the test, which requires that the Board and/or the affected person establish that the information contained in the record was **supplied** to the Board and secondly that such information was supplied **in confidence** either implicitly or explicitly.

A number of previous orders have addressed the question of whether information contained in an agreement entered into between an institution and an affected person was supplied by the affected person. In general, the conclusion reached in these orders is that, for such information to have been supplied to an institution, the information must be the same as that originally provided by the affected person. Since the information contained in an agreement is typically the product of a negotiation process between the institution and a third party, that information will not qualify as originally having been "supplied" for the purposes of section 10(1) of the Act (Orders P-251 and M-173).

Based on the evidence before me, I find that the terms and conditions contained in the contract itself, were not originally provided by the consultant but were rather negotiated between the parties with the assistance of the Association. For this reason, I am satisfied that the reasoning applied in the line of orders previously referred to also applies to the contract in the present case. I find, therefore, that the information contained in this agreement was not "supplied" to the Board for the purposes of section 10(1) of the Act.

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In addition, there is no evidence before me that the appendix to the contract, which contains the terms of reference and job description for the position, was provided by the consultant to the Board. The more likely scenario is that these documents were created by the Board to outline the specific services that it wished to obtain. On this basis, I also find that the information contained in the appendix was not supplied to the Board for the purposes of section 10(1) of the Act.

Other orders issued by the Commissioner's office have held that information contained in a record would reveal information "supplied" by an affected person, within the meaning of section 10(1) of the Act, if its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the institution (Orders P-451 and P-472). I have carefully reviewed the agreement and it is my conclusion that the release of the contents of this document would not permit such inferences to be drawn.

For the reasons outlined, I find that the second part of the test for the application of section 10(1) of the Act has not been met.

As stated previously, the failure to satisfy any component of the three part test means that the section 10(1) exemption will not apply. As I have found that the information contained in the contract and the appendix was not supplied to the Board within the meaning of section 10(1), it is not necessary for me to consider the first or third parts of the test.

ORDER:

1. I order the Board to disclose the record to the appellant within 35 days of the date of this order and **not** earlier than the thirtieth (30th) day following the date of this order.
2. In order to verify compliance with the provisions of this order, I order the Board to provide me with a copy of the record disclosed to the appellant pursuant to Provision 1, **only** upon request.

Original signed by: _____

Irwin Glasberg
Assistant Commissioner

_____ March 2, 1994