



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER M-273**

**Appeal M-9300210**

**York Region Board of Education**



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# INTERIM ORDER

## BACKGROUND:

As the result of an anonymous leak, a reporter came into possession of an addendum to a contract between the York Region Board of Education (the Board) and a former Director of Education. Despite having possession of this document, the reporter made a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to information contained in the addendum to the contract. The Board responded:

The only existing record in the Board's custody and control is within Clause 4 of the Addendum to [the Director's] employment contract which [the newspaper the requester works for] has published.

The requester was unsatisfied with the response received, and contacted the Board to confirm that he wanted to receive a response in accordance with the Act. The Board subsequently responded to the request by identifying that access to the addendum to the agreement between the former Director of Education and the Board was denied on the basis of sections 6(1)(b), 10(1)(c), 11(c) and (d), and 14(1) of the Act. The requester appealed the Board's decision.

Mediation was not successful and notice that an inquiry was being conducted to review the Board's decision was sent to the Board, the appellant, an identified third party and the former Director of Education (the affected person). Representations were received from the Board.

As this appeal concerns matters which were reported by the press, the Appeals Officer identified that section 16 of the Act might be relevant to this appeal.

## ISSUES:

The issues arising in this appeal are:

- A. Whether the mandatory exemption provided by section 10(1)(c) of the Act applies.
- B. Whether the discretionary exemptions provided by sections 11(c) and/or (d) of the Act apply.
- C. Whether the information contained in the requested record qualifies as "personal information" as defined in section 2(1) of the Act.
- D. If the answer to Issue C is yes, whether the mandatory exemption provided by section 14 of the Act applies.
- E. If the answer to Issues A, B, or D is yes, whether there is a compelling public interest in the disclosure of the records which clearly outweighs the purpose of the exemptions.

F: Whether the discretionary exemption provided by section 6(1)(b) of the Act applies.

## **SUBMISSIONS/CONCLUSIONS:**

**ISSUE A: Whether the mandatory exemption provided by section 10(1)(c) of the Act applies.**

Section 10(1)(c) of the Act states:

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,

result in undue loss or gain to any person, group, committee or financial institution or agency;

In order for a record to fall within the exemption found in section 10(1)(c), the Board, the third party and/or the affected person 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 one of the harms specified in (a), (b) or (c) of section 10(1) will occur.

[Order M-10]

In order to satisfy part two of the test, the information must have been supplied to the institution in confidence, either implicitly or explicitly.

The record is an agreement entered into between the Board, the third party and the affected person. In general, in order to meet the test of "**supplied**", the information contained in the record at issue must be one and the same as that originally provided to the Board for the purpose of creating the record (Orders 87, 179, 203 and 204).

The Board has not specifically addressed the issue of how the information contained in the record was

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"supplied" by the affected person or the third party. Neither the third party nor the affected person has provided any submissions concerning the possible application of section 10. In my view, the information contained in the record consists of negotiated terms of an agreement, and I am not satisfied that the information contained in the record was supplied by the affected person or the third party, nor am I satisfied that disclosure of the record would permit accurate inferences to be drawn about information which may actually have been supplied to the Board.

Accordingly, I find that part two of the test has not been met. As failure to satisfy any one of the three parts of the test renders the section 10 exemption claim invalid, I find that the mandatory exemption set out in section 10(1)(c) of the Act does not apply.

**ISSUE B: Whether the discretionary exemptions provided by sections 11(c) and/or (d) of the Act apply.**

Sections 11(c) and (d) of the Act read:

A head may refuse to disclose a record that contains,

- (c) information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
- (d) information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution;

In order to qualify for exemption under sections 11(c) and (d) of the Act, the Board must successfully demonstrate a reasonable expectation of harm to its economic interests, competitive position or its financial interests should the information contained in the record at issue be disclosed. Descriptions of possible harm, even in substantial detail, are insufficient in themselves. At the least, there must be a clear and direct linkage between the disclosure of specific information and the harm alleged (Orders P-557 and M-202).

The Board states that its expectation of financial or economic harm is based on the fact that there is a confidentiality clause in the agreement. The Board submits that it is bound by the agreement not to disclose the record, and that disclosure of the agreement may therefore result in harm to the Board.

The provisions of the Act are statutory provisions regulating the disclosure of information in the custody or under the control of municipal institutions. In my view, the belief by an institution that it may be sued if the records are released is not sufficient grounds for exemption under sections 11(c) or (d). Section 49(2) of the Act provides that "No action or other proceeding lies against a head ... for damages resulting from the

disclosure or non-disclosure in good faith of a record or any part of a record under this Act ...".

I do not accept that the disclosure of the information contained in the record, in response to a request under the Act, would lead to the harm identified by the Board. Accordingly, I find that the record does not qualify for exemption under sections 11(c) and 11(d) of the Act.

**ISSUE C: Whether the information contained in the requested record qualifies as "personal information" as defined in section 2(1) of the Act.**

Section 2(1) of the Act defines "personal information", in part, as follows:

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

...

- (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,

...

- (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;

I have examined the record in issue in this appeal and, in my view, the record contains personal information relating to the affected person.

**ISSUE D: If the answer to Issue C is yes, whether the mandatory exemption provided by section 14 of the Act applies.**

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 section 14(1)(f). This provision reads as follows:

A head shall refuse to disclose personal information to any person other than the individual

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to whom the information relates except,

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

In order for section 14(1)(f) to apply, I must find that the release of the personal information at issue would **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 personal privacy. Section 14(4) identifies certain information, the disclosure of which would **not** constitute an unjustified invasion of personal privacy. Sections 14(4)(a) and (b) read:

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

- (a) discloses the classification, salary range and benefits, or employment responsibilities of an individual who is or was an officer or employee of an institution; or
- (b) discloses financial or other details of a contract for personal services between an individual and an institution.

I have reviewed the information contained in the record. In my view, none of the information found in these documents could be characterized as relating to the former employee's classification, salary range or employment responsibilities.

With respect to the term "benefits", however, clause 3 of the record identifies that certain entitlements received by the affected person as a result of his employment will continue to be received. It is my view that these entitlements are derived from the original contract of employment entered into between the Board and the affected person, and the provisions set out in clause 3 of the record constitute "benefits" for the purpose of section 14(4)(a). Consequently, I find that the personal information contained in clause 3 of the record falls within the ambit of section 14(4)(a) of the Act.

In Order M-173, in which a retirement agreement was considered, it was identified that a record containing personal information would be regarded differently depending upon whether the agreement was a contract of employment or an agreement with an independent contractor. In that order, it was determined that the former staff members were hired pursuant to contracts of employment rather than as independent contractors. In the circumstances of this appeal, however, it is my view that clause 4 of the record reflects an agreement entered into between the Board and the affected person as an independent contractor. It is therefore my view that section 14(4)(b) applies to the personal information contained in clause 4 of the record.

The representations I have been provided with respecting the remaining portions of the record weigh in favour of finding that the section 14(1)(f) exception does not apply. Accordingly, having found that this information qualifies as personal information and in the absence of any representations weighing in favour of finding that disclosure of the personal information would **not** constitute an unjustified invasion of personal privacy, I find that the exception contained in section 14(1)(f) does not apply, and the remaining portions of the record are properly exempt from disclosure under section 14 of the Act.

**ISSUE E: If the answer to Issues A, B, or D is yes, whether there is a compelling public interest in the disclosure of the records which clearly outweighs the purpose of the exemptions.**

I have found under Issue D that the disclosure of some personal information found in the records is properly exempt under section 14 of the Act. Section 16 of the Act 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. [emphasis added]

In order for section 16 of the Act to apply, two requirements must be met: there must be a compelling public interest in the disclosure of the record; and this compelling public interest must clearly outweigh the purpose of the exemption (Order M-6). In the context of the present appeal, I have found that clauses 3 and 4 of the record do not qualify for exemption under section 14. I am mindful of the fact that, as stated by the Board, the record in issue is one which the newspaper the appellant works for has published. In my view, section 16 of the Act does not apply in the circumstances of this appeal.

**ISSUE F: Whether the discretionary exemption provided by section 6(1)(b) of the Act applies.**

Section 6(1)(b) of the Act reads:

A head may refuse to disclose a record,

that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public.

To rely on section 6(1)(b), the Board must establish that:

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1. A meeting of a council, board, commission or other body or a committee of one of them took place; **and**
2. A statute authorizes the holding of such a meeting in the absence of the public; **and**
3. The disclosure of the record at issue would reveal the actual substance of the deliberations of this meeting.

[Orders M-64, M-98 and M-102]

The Board submits that a meeting of the Committee of the Whole Board was held on April 7, 1993 in the absence of the public. The Board also identifies that the substance of the Board's deliberations at that meeting regarding the early severance of the relationship between the affected person and the Board, and the terms on which this severance would occur, are reflected in the requested record. The Board has provided this office with clear evidence of the fact that the meeting was held in camera. Based on the evidence provided to me, I am satisfied that the Board did hold a meeting and that this session took place in camera.

The Board then relies upon sections 207(2)(b), (d) and (e) of the Education Act as the basis for its statutory authority to hold meetings in camera under certain circumstances. These provisions state:

A meeting of a Committee of a board, including a committee of the whole board, may be closed to the public when the subject-matter under consideration involves,

- (b) the disclosure of intimate, personal or financial information in respect of a member of the board or committee, an employee or prospective employee of the board or a pupil or his or her parent or guardian;
- (d) decisions in respect of negotiations with employees of the board; or
- (e) litigation affecting the board.

Based on the evidence provided to me, I find that the Board had the requisite authority under section 207(2) of the Education Act to hold an in camera meeting in order to discuss the matters reflected in the record, as the record involved decisions in respect of negotiations with an employee of the Board.



After reviewing the record and the representations of the Board, I am also satisfied that the disclosure of the record would permit the drawing of accurate inferences about the substance of the Board's deliberations. On this basis, I find that the Board has established that the third part of the section 6(1)(b) test applies in this case.

Since all three components of the test have been satisfied, I find that the record qualifies for exemption under section 6(1)(b) of the Act.

I must now determine whether the mandatory exception contained in section 6(2)(b) of the Act applies to the facts of this case. This section reads as follows:

Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record if,  
  
in the case of a record under clause (1)(b), the subject-matter of the deliberations has been considered in a meeting open to the public;

In its representations, the Board states that the subject matter of the deliberations of the April 7, 1993 meeting have never been considered in a meeting open to the public. Since I have not been provided with any evidence to indicate that the subject-matter of the deliberations was considered in a meeting open to the public, I find that section 6(2)(b) does not apply in the present case.

Section 6(1)(b) is a discretionary exemption. On this basis, the Board has provided specific representations regarding its exercise of discretion in favour of claiming the exemption. The Board identifies that the considerations which went into its exercise of discretion to apply the exemption in section 6 include, among other things, the affected person's absence of consent to release the information and the confidentiality provisions in the record.

I have carefully scrutinized the Board's exercise of discretion to apply section 6(1)(b) in the circumstances of this appeal. This appeal is unique in that the Board has acknowledged that the record in issue is one which the newspaper the appellant works for has published. The representations received from the Board do not identify whether the fact that the record was published has been considered in determining whether or not to rely on the section 6(1)(b) exemption. In my view, the fact that the record has been published is a fundamental factor for the Board to consider in exercising its discretion. As this factor has not been considered, I am not satisfied that the Board has properly exercised its discretion in the circumstances of this appeal.

## **ORDER:**

1. I order the Board to provide me with further representations concerning the exercise of its discretion to rely on the exemption set out in section 6(1)(b) of the Act. The Board's

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representations should contain reference to the fact that the record at issue has been published in a local newspaper.

2. The representations referred to in Provision 1 of this Interim Order shall be submitted to Norma Thorney, Registrar of Appeals, Information and Privacy Commissioner/ Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1, within 20 days of the date of this order.

Original signed by: \_\_\_\_\_

Holly Big Canoe  
Inquiry Officer

\_\_\_\_\_ February 23, 1994