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

ORDER M-539

Appeal M-9400608

Metropolitan Toronto Police Services Board

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NATURE OF THE APPEAL:

This is an appeal under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The appellant, a Board of Education, submitted a request to the Metropolitan Toronto Police Services Board (the Police) for copies of records created in connection with an investigation by the Police into allegations against a teacher (the teacher) employed by the appellant. No charges were laid as a result of the Police investigation. The teacher has since been fired by the appellant and the firing has been referred to a Board of Reference under the Education Act.

The Police granted full access to several records and partial access to others. Access to the remaining records was denied in full.

The Police relied on the following exemptions to deny access to the information which was not disclosed:

- solicitor-client privilege - section 12
- invasion of privacy - sections 14(1) and 38(b).

The records at issue in this case consist of:

- tape recordings of interviews with children who were in the teacher's class, and a teacher's assistant, conducted during the investigation;
- a General Occurrence Report;
- a letter to the parents of one of the children interviewed;
- a letter from the parents of one of the children interviewed;
- a list of names and addresses of the children interviewed and their parents;
- a handwritten list of the questions to be asked when the children were interviewed;
- handwritten interview notes;
- a handwritten synopsis of information obtained during the interviews;
- a Canadian Police Information Centre (C.P.I.C.) print-out.

A Notice of Inquiry was sent to the appellant, the Police, the teacher, a teacher's assistant mentioned in some of the records, and the parents of the children who were interviewed (with the exception of those parents who had consented to disclosure at the request stage). All of these children are under the age of sixteen.

In response to the Notice of Inquiry, representations were received from the appellant, the Police, and the parents of three children who were interviewed.

In its representations, the appellant raised the possible application of the public interest override and requested the opportunity to submit supplementary oral representations. Because of the circumstances surrounding this appeal, and the need to offer the other parties an express opportunity to comment on the applicability of section 16, I decided to grant this request. Accordingly, the parties who received the Notice of Inquiry were sent an invitation to submit supplementary representations, either in person, by telephone, or in writing. In response to this invitation, one of the parents made representations in person, and another

parent made representations by telephone (and ultimately consented to disclosure of information pertaining to his child). The appellant and the Police made representations by telephone.

DISCUSSION:

INVASION OF PRIVACY

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including any identifying number assigned to the individual and the individual's name where 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 appellant submits that the information in the records is not personal information, relying on the enumerated categories of information in the definition of that term found in section 2(1) of the Act. However, the preamble to the definition in section 2(1) states that "`personal information' means recorded information about an identifiable individual, ...", including the enumerated categories. In my view, this preamble is intended to be encompassing, and the enumerated categories are examples of things that would constitute personal information.

I have reviewed the records in detail. In my view, they contain information of a sensitive nature about many of the individuals referred to, and this is certainly within the type of information which is considered "personal" under the Act. The information in the records pertains to one or more of the following identifiable individuals: the teacher, the children interviewed, and several parents of children interviewed. I find that virtually all of the information in each of the records at issue is personal information.

One of the exemptions relating to personal privacy raised by the Police is section 38(b). That section can be claimed to prevent unjustified invasions of personal privacy with respect to records containing a requester's personal information. In this case, the appellant (who is the requester) is a public body. By definition, information about the appellant cannot be its personal information since it is not an individual. Accordingly, section 38(b) is not applicable in this appeal.

The other exemption relating to personal privacy raised by the Police is section 14(1). Once it has been determined that a record contains personal information, section 14(1) of the Act prohibits the disclosure of this information except in certain circumstances.

Section 14(1) states, in part, as follows:

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

> (a) upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;
>
> ...
>
> (f) if the disclosure does not constitute an unjustified invasion of personal privacy.

The exception to this exemption provided by section 14(1)(a) applies where the person to whom the information relates consents in writing to the disclosure. As noted previously, several of the parents consented to disclosure at the request stage. However, while parts of the information at issue pertain to the children of the individuals who consented, all of it can also be said to pertain to individuals who did **not** consent (i.e. the teacher and some of the other children), and for that reason, I find that no further disclosure can be ordered on this basis. For the same reason, no further disclosure can be ordered on the basis of the consent provided during the inquiry stage.

The only other exception to this exemption which could apply in the circumstances of this appeal is section 14(1)(f), which applies 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 disclosure of personal information would result in an unjustified invasion of personal privacy. Where one of the presumptions ofan unjustified invasion of personal privacy in section 14(3) applies to the personal information found in a record, the only way such a presumption can be overcome is if the personal information falls under section 14(4) or where a finding is made that section 16 of the Act applies to the personal information (Order M-170).

The Police submit that section 14(3)(b) applies to all of the information at issue, since it was all compiled during a police investigation into possible criminal behaviour. Section 14(3)(b) of the Act states, in part, as follows:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> > was compiled and is identifiable as part of an investigation into a possible violation of law, ...

In my view, it is clear that the undisclosed information in the records was compiled as part of an investigation into a possible violation of law (specifically, the Criminal Code), and the presumed unjustified invasion of personal privacy set out in section 14(3)(b) applies to all of it.

Section 14(4) does not apply to this information. Accordingly, I find that all of it is exempt from disclosure pursuant to section 14(1). I will consider the possible application of section 16 under the heading "Public Interest in Disclosure", below.

Because of the determination I have made with respect to section 14(1), it is not necessary for me to consider whether the exemption provided by section 12 applies.

PUBLIC INTEREST IN DISCLOSURE

Section 16 of the Act states as follows:

> 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 to a record, two requirements must be met. First, there must be a compelling public interest in the disclosure of the record. Second, this interest must clearly outweigh the purpose of the exemption which otherwise applies to the record, in this case, section 14(1).

The appellant's counsel submits that the requested information is

> ... necessary in order for our client ... to fulfil its public duties under the Education Act (Ontario). That is, the legislature of Ontario has charged public schools with the duties "to give assiduous attention to the health and comfort of the pupils ..." and "to refuse to admit to the school or classroom a person whose presence in the school or classroom would in the principal's judgement be detrimental to the physical or mental well-being of the pupils ..." (sections 265(j) and 276(m), Education Act).

The appellant submits that it would put the requested information to use in the Board of Reference to be held under the authority of section 268 of the Education Act. The Board of Reference will decide whether or not to uphold the appellant's firing of the teacher.

Since the appellant has already fired the teacher, its efforts to comply with sections 265(j) and 276(m) of the Education Act (referred to above) must of necessity relate to its case before the Board of Reference. The appellant's counsel submits that, in the absence of better evidence, the taped interviews of the children would likely be admitted by the Board of Reference. She also states that, without the co-operation of the children's parents, their testimony at the Board of Reference would likely be of limited value.

The Police submit that the request is, in essence, a request for law enforcement records pertaining to a case where, after review of the matter with a Crown Attorney, a decision was made not to lay criminal charges.

The Police further submit that, given the extremely sensitive nature of allegations of child abuse and their decision that criminal charges should not be laid in this case, any public interest in disclosure is not sufficient to outweigh the purpose of the section 14 exemption in the circumstances of this appeal.

Because the appellant's argument in favour of applying section 16 relates to the intended use of the records in its presentation to the Board of Reference, the powers of the Board of Reference to obtain the records at issue are a relevant consideration in deciding whether there is a public interest in disclosure within the context of the Act. In that regard, section 272 of the Education Act states that:

> The Board of Reference shall inquire into the matter in dispute and for such purposes the chair has the powers of a commission under Part II of the Public Inquiries Act, which part applies to such inquiry as if it were an inquiry under that Act.

Part II of the Public Inquiries Act contains provisions which empower the Board of Reference to gather and hear evidence.

For instance, section 7(1) of that statute provides as follows:

> a commission may require any person by summons,
>
> (a) to give evidence on oath or affirmation at an inquiry; or
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> (b) to produce in evidence at an inquiry such documents and things as the commission may specify,
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> relevant to the subject matter of the inquiry and not inadmissible in evidence at the inquiry under section 11.

Section 11 of the Public Inquiries Act excludes evidence which "... would be inadmissible in a court of law by reason of any privilege under the law of evidence".

Section 10 of the Public Inquiries Act empowers the Board of Reference to "... admit at an inquiry evidence not given under oath or affirmation".

In my view, it is fair to characterize the appellant's "public interest" argument in terms of ensuring that the Board of Reference makes its decision based upon a full and fair presentation of all relevant evidence. I agree with the appellant that there is a public interest in ensuring that this takes place. This is particularly true given the responsibilities entrusted in teachers of young children by members of the public, and the sensitivity of issues relating to the physical or mental abuse of children.

However, the public interest in ensuring that the Board of Reference is able to consider all relevant evidence does not necessarily mean that there is a public interest in disclosure of these records under the Act. It is clear that the provisions of the Education Act and the Public Inquiries Act, quoted above, give a broad latitude to the Board of Reference to decide what types of evidence it needs to have before it. It is also to be noted that section 51(2) of the Act makes it clear that the powers of the Board of Reference to secure evidence are unaffected by the provisions of the Act. Accordingly, if the Board of Reference requires the records at issue in this appeal, or any of them, it can obtain them by issuing a summons. In this way, I believe that the legislature has empowered the Board of Reference to protect the same public interest which the appellant would like me to protect by applying section 16 in this appeal.

Only the Board of Reference can decide what evidence is admissible before it. It is possible that, even if I order disclosure of these records, some or all of them may be excluded from admission into evidence by the Board of Reference. Alternatively, the Board of Reference may be in a position to hear from the children directly. Since the Board of Reference is able to secure whatever evidence it chooses to admit, including the records at issue, I am not persuaded that there is a public interest in disclosure of these records under the Act. In the circumstances of this appeal, that interest is adequately and more appropriately dealt with by the provisions of the Education Act and the Public Inquiries Act referred to above.

Moreover, even if I were persuaded that there is a public interest in disclosure under the Act, I would not find that it outweighs the purpose of the section 14 exemption, which is, essentially, the protection of personal privacy. Again, I make this decision against the backdrop of the powers granted to the Board of Reference in the legislative provisions I have quoted. In my view, privacy rights, particularly where young children are involved, must be carefully protected. In the circumstances of this case, I do not believe that this interest is outweighed by any public interest in disclosure under the Act.

Accordingly, section 16 does not apply in the circumstances of this appeal.

ORDER:

I uphold the decision of the Police.

Original signed by: June 1, 1995
John Higgins
Inquiry Officer