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

# ORDER M-879

## Appeal M_9600291

## Metropolitan Separate School Board
## [Toronto]

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## NATURE OF THE APPEAL:

The appellant made a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) to the Metropolitan Separate School Board (the Board). The request was for access to 16 items from the appellant's personnel, medical and official files.

After clarifying the appellant's request, the Board provided access to records responsive to items 1, 2, 5, 8-10, 12-14 and 16 of the request. The Board also provided access to several records which were not identified in the request. The Board denied access to items 3, 4, 6, 7, 9 and 15 of the request, stating that records responsive to these parts of the request did not exist. The Board also denied access to item 11 of the request under the following exemptions:

- invasion of privacy - sections 14 and 38(b)

The appellant appealed the Board's decision to deny access to item 11 of the request. The appellant also indicated that records responsive to items 3, 4, 6, 7, 9 and 15 of the request should exist, and that additional records responsive to items 8 and 16 of the request should exist.

A Notice of Inquiry was sent to the Board, the appellant and another individual whose interests could be affected by the outcome of the appeal (the affected person). As the Appeals Officer was of the view that section 52(3) of the Act might be relevant in the circumstances of this appeal, the application of this section was included as an issue in the Notice of Inquiry. Representations were received from all parties.

## PRELIMINARY ISSUE:

### APPLICATION OF THE ACT

The interpretation of sections 52(3) and (4) is a preliminary issue which relates to the Commissioner's jurisdiction to continue an inquiry. These sections read:

> (3) 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.

(4) 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 form 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.

Section 52(3) is record-specific and fact-specific. If this section applies to a specific record, in the circumstances of a particular appeal, and none of the exceptions listed in section 52(4) are present, then the record is excluded from the scope of the Act and not subject to the Commissioner's jurisdiction.

The Board claims that sections 52(3)1 and 52(3)3 are applicable in the circumstances of this appeal.

In order for a record to fall within the scope of section 52(3)1, the Board must establish that:

1. the record was collected, prepared, maintained or used by the Board 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 relate to labour relations or to the employment of a person by the Board.

(Order M-815)

Record 11 is a letter the affected person wrote to the Board which relates to a charge of assault laid against the affected person after an incident involving the appellant, and a memo written by

another employee of the Board regarding the issues raised in the affected person's letter. The Crown proceeded with the charge under the Criminal Code and the matter was heard in the Ontario Court of Justice (Provincial Division) on April 28 and 29, 1994. Despite the fact that the proceedings stemmed from an incident between two Board employees which took place on Board property during regular school hours, I find that these proceedings are not sufficiently related to labour relations or to the employment of a person by the Board to meet the requirements of the third part of the section 52(3)1 test. Accordingly, I find that section 52(3)1 does not apply to Record 11.

In order for a record to fall within the scope of section 52(3)3, the Board must establish that:

1. the record was collected, prepared, maintained or used by the Board or on its behalf; **and**

2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; **and**

3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the Board has an interest.

(Order P-1242)

Again, despite the fact that the incident took place between two employees at the workplace during the workday, I find that the meetings, consultations, discussions or communications which took place were not sufficiently connected to labour relations or employment-related matters to bring them within the meaning of section 52(3)3. Accordingly, I find that section 52(3)3 does not apply to Record 11.

In summary, as section 52(3) does not apply in the circumstances of this appeal, I find I have jurisdiction to proceed with the inquiry and review the Board's decision to deny access to Record 11.

## DISCUSSION:

### INVASION OF PRIVACY

Personal information is defined in section 2(1) of the Act, in part, as "recorded information about an identifiable individual". Having reviewed the record, I find that it contains the personal information of the appellant and the affected person. The second page of the record, however, contains only the personal information of the appellant.

Although the third page of the record, which consists of the letter from the affected person, was written on Board letterhead and the signature line includes the affected person's position title, in my view, this alone does not disqualify the information contained therein from being considered as her personal information. The record relates to a matter which affects the affected person in her personal capacity. Although I believe the use of Board letterhead in this respect was

probably inappropriate, I am satisfied that the information contained therein relates to the affected person in her personal capacity, and it qualifies as her personal information.

Section 36(1) of the Act allows individuals access to their own personal information held by a government institution. However, section 38 sets out exceptions to this right.

Where a record contains the personal information of both the appellant and other individuals, section 38(b) of the Act allows the institution to withhold information from the record if it determines that disclosing that information would constitute an unjustified invasion of another individual's personal privacy. On appeal, I must be satisfied that disclosure **would** constitute an unjustified invasion of another individual's personal privacy. The appellant is not required to prove the contrary.

Sections 14(2), (3) and (4) provide guidance in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy. Disclosing the types of personal information listed in section 14(3) is presumed to be an unjustified invasion of personal privacy. If one of the presumptions applies, the Board can disclose the personal information only if it falls under section 14(4) or if section 16 applies to it. If none of the presumptions in section 14(3) apply, the Board must consider the factors listed in section 14(2), as well as all other relevant circumstances.

The Board contends that sections 14(2)(f) and (h) apply in the circumstances of this appeal. These sections read:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (f) the personal information is highly sensitive;
>
> (h) the personal information has been supplied by the individual to whom the information relates in confidence.

The affected person also objects strongly to the disclosure of the record, but does not refer to a particular section of the Act. However, she does refer to negative comments made about the character of the appellant in the Reasons for Judgement issued by the Provincial Court Judge in the criminal trial as giving her cause for concern about disclosure of the records to the appellant in this appeal.

The record relates to the affected person's criminal trial. Although not marked confidential, I find that the affected person had a reasonably held expectation of confidentiality at the time the letter was written, and section 14(2)(h) is a relevant consideration, which weighs in favour of privacy protection.

Having considered the records and representations before me, and balanced the appellant's right to access her personal information against the affected person's right to the protection of her privacy, I find that disclosure of pages 1 and 3 of the record would constitute an unjustified

invasion of the personal privacy of the affected person, and these pages of the record are exempt under section 38(b) of the Act. As page 2 of the record contains only the personal information of the appellant, no unjustified invasion of another individual's personal privacy could result, and this page should be disclosed to the appellant.

**REASONABLENESS OF SEARCH**

Where a requester provides sufficient details about the records which he is seeking and the Board indicates that further records do not exist, it my responsibility to ensure that the Board has made a reasonable search to identify any records which are responsive to the request. The Act does not require the Board to prove with absolute certainty that further records do not exist. However, in my view, in order to properly discharge its obligations under the Act, the Board must provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate records responsive to the request.

The Board has provided me with details of its efforts to clarify the appellant's request and to locate records responsive to it. Despite numerous complications, including the retirement of several of the employees who may have been able to assist in determining the existence of documents or in suggesting alternate areas of search, the Board was successful in locating a number of the records requested by the appellant. Having reviewed the details provided by the Board, I am satisfied that, in the circumstances of this appeal, it has made a reasonable effort to locate records responsive to the request.

## ORDER:

1. I uphold the Board's decision not to disclose pages 1 and 3 of the record.

2. I order the Board to provide the appellant with a copy of page 2 of the record by sending her a copy by **January 22, 1996** but not before **January 17, 1996**.

3. In order to verify compliance with the provisions of this order, I reserve the right to require the Board to provide me with a copy of the record which is disclosed to the appellant pursuant to Provision 2.

Original signed by: December 18, 1996
Holly Big Canoe
Inquiry Officer