



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

ORDER M-978

Appeal M_9700080

Essex County Roman Catholic Separate School Board



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Télé: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

The appellant is a newspaper reporter. She submitted three requests to the Essex County Roman Catholic Separate School Board (the Board) under the Municipal Freedom of Information and Protection of Privacy Act (the Act). In particular, she requested access to a copy of the separation agreements between the Board and two named Board employees. In addition, she requested a copy of the minutes of a meeting of the Board pertaining to one of the named Board employees, including an accounting of the votes cast for and against the motion concerning the separation package given to this individual, and records of how each Trustee voted on the motion.

The Board located records responsive to the request and claimed that they fell within the parameters of section 52(3)2 of the Act and were, therefore, outside the scope of the Act. The Board also indicated that even if section 52(3) did not apply, the records were exempt from disclosure under sections 6(1)(b) (closed meeting) and 14(1) (invasion of privacy) of the Act.

The appellant appealed this decision and raised the application of section 16 of the Act, the so-called "public interest override".

This office sent a Notice of Inquiry to the Board, the appellant and the two Board employees named in the request (the affected persons). Representations were received from the Board and the appellant.

The records consist of an agreement dated February 5, 1996 between one affected person and the Board, an undated agreement between the other affected person and the Board, and the minutes of the Board of Trustees, Committee of the Whole (the Committee) dated October 22, 1996.

PRELIMINARY MATTERS:

RAISING OF ADDITIONAL DISCRETIONARY EXEMPTION

Immediately following receipt of the Confirmation of Appeal, the Board sent correspondence to this office in which it claimed that the exemption in section 11(e) of the Act (economic and other interests) also applied. The Board did not advise the appellant in writing that it had raised the additional exemption. The Notice of Inquiry did not identify this exemption as an issue in the appeal. In its representation submitted in response to the Notice of Inquiry, the Board continues to argue the application of section 11(e).

In my view, because the Board raised this exemption in a timely way, it is an issue in this appeal. For reasons which will become apparent in my discussion of the exemptions below, however, I have decided not to issue a Supplementary Notice of Inquiry to notify the appellant of this exemption.

JURISDICTION

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 of the Act read as follows:

- (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 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.

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 submits that section 52(3)2 applies in the circumstances of this appeal. In order for a record to fall within the scope of paragraph 2 of section 52(3) of the Act, 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 negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution; **and**
3. these negotiations or anticipated negotiations took place or will take place between the institution and a person, bargaining agent or party to a proceeding or anticipated proceeding.

Requirement 1

I am satisfied that the Minutes of the Committee and the two Retirement Agreements were prepared, maintained or used by the Board within the meaning of section 52(3).

Requirements 2 and 3

These records relate primarily to the arrangements made between the Board and the affected persons regarding the terms and conditions of their retirement from employment.

“in relation to”

In Order P-1223, former Commissioner Tom Mitchinson made the following comments regarding the interpretation of this phrase within the meaning of section 65(6) of the provincial Act, which is identical to section 52(3) of the Act:

I recognize that the context of the phrase “in relation to” in section 92 of the Constitution Act, 1867 and in section 65(6) of the Act is different. However, in my view, the case law does provide a clear indication that in order to be “in relation to” something, the activity or object in question must do more than merely “affect” that thing; there must be a substantial connection between the activity and the thing to which it is supposed to be “in relation”.

...

Following the approach taken in the constitutional cases, the connection must be fairly substantial. In the context of section 65(6), I am of the view that if the preparation (or collection, maintenance, or use) of a record was for the purpose of, as a result of, or substantially connected to an activity listed in sections 65(6)1, 2, or 3, it would be “in relation to” that activity.

I agree with this interpretation. I find that this preparation, maintenance and usage of these records was in relation to the negotiation of the retirement from employment by the Board of the

two affected persons. They relate, therefore, to the employment of the affected persons by the Board.

Further, I find that these negotiations were entered into between the affected persons and the Board itself. Therefore, I find that Requirements 2 and 3 have been met.

In summary, the records meet all the criteria under section 52(3)2. However, as noted above, section 52(4) provides exceptions to the section 52(3) exclusions. I will now consider whether section 52(4) applies to any of the records.

Minutes of the Committee

All three criteria have been met regarding this record, and I find that it does not fall within the exceptions listed in section 52(4). This record is, accordingly, outside the scope of the Act as it clearly falls within the parameters of section 52(3)2.

Retirement Agreements

In Order M-797, former Assistant Commissioner Tom Mitchinson made the following comments regarding early retirement agreements (the records at issue in that appeal):

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.

In my view, the two records at issue in this appeal, considered together, constitute the agreement between the Board and the Superintendent with respect to his early retirement. This agreement resulted from negotiations about a matter which clearly relates to the Superintendent's employment with the Board. I find that the records fall within the scope of the exception to the section 52(3) exclusion found in paragraph 3 of section 52(4), and are therefore subject to the Act. Accordingly, I have jurisdiction to consider the issue of denial of access by the Board, and I will now determine whether these records qualify for exemption under section 14(1) as claimed by the Board.

In my view, this reasoning is similarly applicable in the current appeal. Accordingly, I find that the two retirement agreements fall within the scope of the exception to the section 52(3) exclusion, and I have jurisdiction to consider the issue of denial of access by the Board.

DISCUSSION:

CLOSED MEETING

The Board submits that the two Retirement Agreements qualify for exemption under section 6(1)(b). This section states:

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 qualify for exemption under this section, the Board must establish that:

1. a meeting of the Board or one of its committees took place; **and**
2. that a statute authorizes the holding of this meeting in the absence of the public; **and**
3. that disclosure of the record at issue would reveal the actual substance of the deliberations of this meeting.

It is clear that a meeting of the Committee took place on October 22, 1996. The Board indicates, and I am satisfied, that a similar meeting concerning the other affected person took place on February 5, 1996. On this basis, the first part of the section 6(1)(b) test has been satisfied.

The Minutes of the Committee also make it clear that this meeting was held in the absence of the public. The Board states, and I accept, that the meeting held on February 5, 1996 was similarly held in the absence of the public. The Board submits that section 55(5) of the Municipal Act and section 207(2) of the Education Act are the authority to hold the meeting in the absence of the public. Section 207(2) of the Education Act states, in part, that:

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 ... of the board ...

...

- (d) decisions in respect of negotiations with employees of the board.

Based on the evidence before me, I am satisfied that the matters discussed during the meetings of February 5, 1996 and October 22, 1996 by the Committee relating to the retirement of the affected persons fall within the ambit of section 207(2)(b) of the Education Act. Accordingly, I find that the second part of the section 6(1)(b) test has been met.

In Orders M_184 and M_196, former Assistant Commissioner Irwin Glasberg defined the term “substance” as the “theme or subject of a thing” and the word “deliberations” to mean “discussions conducted with a view towards making a decision”.

Having reviewed the Board’s representations and the records, I find that the “theme or subject” of the Committee’s in camera meeting was the consideration of the retirement of the two affected persons named in the appellant’s request. I also find that the Committee discussed these issues with a view towards deciding how the matter should be resolved. On this basis, I have concluded that the disclosure of the information which is at issue in this appeal would reveal the actual substance of the discussions conducted by the Committee and, hence, its deliberations. The third part of the section 6(1)(b) test has, therefore, also been met. Accordingly, section 6(1)(b) applies.

COMPELLING PUBLIC INTEREST

Section 16 of the Act states that:

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.

The appellant submits that the early retirement of the two most senior administrators is clearly of public interest. In addition, the appellant indicates that a number of Board Trustees have taken the position that this information should be released. The appellant has provided a number of news sources to support her contention.

The Board submits that there is no public interest in disclosure of these records. I do not agree. In my view, the retirement of two highly placed employees of the Board, at public expense, is indeed of considerable public interest.

However, section 6 is not subject to the public interest override provided by section 16 of the Act and a record which is exempt from disclosure under section 6 is not subject to the override provided by section 16 of the Act.

Because of the findings I have made in this order, it is not necessary for me to consider the application of sections 14(1) or 11(e).

ORDER:

I uphold the decision of the Board to withhold the records from disclosure.

Original signed by: _____
Laurel Cropley
Inquiry Officer

July 28, 1997