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

ORDER M-1091

Appeal M-9700344

Near North District 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/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The Near North District School Board, formerly the Nipissing Board of Education, (the Board) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for the following records respecting a job competition in which the requester was an unsuccessful candidate:

1. All data and notes from the requester's interview.

2. The requester's individual and overall point totals.

3. All data and notes from the successful candidate's interview.

4. The successful candidate's individual and overall point totals.

5. Records relating to the successful candidate's formal education, upgrading and related work experience as it pertains to the job.

The Board advised the requester that no records responsive to parts one to four of the request exist and that the one record responsive to part five was exempt from disclosure under section 14(1) of the Act.

The requester, now the appellant, appealed the Board's decision and raised a concern that the individual responsible for making the decision on behalf of the Board had a conflict of interest in doing so as this individual may be biased against the appellant.

A Notice of Inquiry was provided to the appellant, the Board and to another individual whose rights may be affected by the disclosure of the record (the affected person). The Board did not refer to the possible application of sections 52(3) and (4) of the Act in its decision letter. However, because it appeared that the requested records may fall outside the scope of the Act, the parties were asked to address the possible application of these sections to records which would be responsive. In addition, the parties were requested to make submissions with respect to the issue of whether the delegated head responsible for making the decision on behalf of the Board may be in a conflict of interest situation in responding to the appellant's request.

PRELIMINARY ISSUES:

CONFLICT OF INTEREST

In Order M-457, former Assistant Commissioner Irwin Glasberg canvassed the question of conflict of interest in the context of the Act. He found that:

> The question of when a conflict of interest situation might arise under the Act has been canvassed by Management Board of Cabinet in its freedom of information

and protection of privacy publication entitled "Handbook for Municipalities and Local Boards", April 1993. On pages 2 and 3 of this document, the authors address this issue in the following fashion:

> A conflict of interest may exist where a public official knows that he or she has a private interest that is sufficiently connected to his or her public duties to influence those public duties. The focus for conflict of interest is frequently financial matters. It may also arise when the head is meeting his or her decision making responsibilities under the Act.
>
> A head may be in a conflict of interest situation where it is reasonable to assume that he or she is making decisions based on their personal interest rather than the public interest. In some situations, the conflict of interest may be more apparent than real. It is recommended that delegations of the head's powers reflect the possibility of conflict of interest and provide alternate decision-makers in those instances.

While the fact situations which define an actual or perceived conflict of interest can vary appreciably, I believe that the comments in the publication present a reasonable view on how these sorts of scenarios should be addressed.

I agree with former Assistant Commissioner Glasberg that the above-noted statement accurately reflects the approach which ought to be taken in circumstances where a conflict of interest may arise.

It is a well-established principle of natural justice that a decision-maker must not be biased as "no one shall be a judge in his own cause". In other words, an individual with a personal interest in the disclosure or non-disclosure of a record must not be the decision-maker who makes the determination with respect to disclosure. A breach of this fundamental rule of fairness will cause a statutory delegate, such as a delegated head under the Act, to lose jurisdiction. The result of this loss of jurisdiction is to render his or her decision void.

The parties to this appeal were asked to address the following questions in order to assist in determining whether a breach of the rule against bias has occurred:

1. Did the decision-maker have any kind of personal or special interest in the records?

2. Would a well-informed person reasonably perceive bias on the part of the decision-maker?

In his appeal letter and a letter forwarded to this office during the mediation of the appeal, the appellant raised concerns about the fact that the individual who made the decision with respect to his request was a member of the interview panel for the job competition which is the subject of the records requested.

The appellant also objected to this individual making the decision on behalf of the Board because of certain past incidents in which he and the individual were involved. Because of these incidents, the appellant is particularly concerned that the delegated head may not have dealt with the request fairly.

In response, the Board submits that the decision provided to the appellant would not have been any different, regardless of who had made the decision. The Board points out that its decision simply stated that records which are responsive to parts one to four of the request do not exist and that the record which relates to the fifth part of the request is exempt under the mandatory exemption in section 14(1). The Board denies any bias on the part of the individual responsible for making the decision and submits that a well-informed person would not reasonably perceive bias on this individual's part in the manner in which he made his decision on behalf of the Board.

In my view, because the decision did not require the exercise of discretion or an evaluation of the merits of the request by the delegated head, the question of a potential conflict of interest as a result of bias on the part of the individual who rendered the decision on behalf of the Board is diminished. I also find that there does not exist any personal or special interest in the part of the delegated head in the circumstances of this case. In my view, a well-informed person would not perceive bias on the part of the delegated head as he simply responded to the appellant's request by advising that most of the requested information did not exist and that the one responsive record was subject to both a presumption under section 14(3)(d) and the mandatory exemption in section 14(1).

In addition, I am satisfied that the delegated head did not unfairly exercise a discretionary power and improperly withhold information from the appellant in these circumstances. Accordingly, I find that an actual or perceived conflict of interest such as to breach the rule against bias by the delegated head has not been substantiated. Accordingly, I dismiss this portion of the appellant's appeal.

JURISDICTION

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

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.

Sections 52(3) and (4) 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.

The Board submits that the records which are responsive to the appellant's request fall within the ambit of section 52(3)3. In order to meet the three requirements of section 52(3)3 of the Municipal Freedom of Information and Protection of Privacy 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 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.

I find that the records responsive to parts one to four of the request, if they had been located, would likely contain information about labour relations and employment-related matters. However, without viewing these records I cannot conclude that they were collected, prepared, maintained or used in relation to meetings, consultations, discussions or communications. In addition, section 52(3)3 also requires that these labour relations or employment-related matters be ones in which the Board has an interest. In my view, the fact that the Board saw fit to destroy these records demonstrates that any interest which it may have had in them is unlikely to be sufficient for the purposes of section 52(3)3.

As noted above, with the exception of the record responsive to part five of the request, I do not have the records to review. Section 52(3) is record-specific and fact specific. Considering the application of sections 52(3)1 and 2, I find that in the absence of the records which are responsive to parts one to four, I have not been provided with sufficient evidence to link all of the possible responsive records with the requirements of these sections. By way of summary, I am not persuaded that all of the records which could be responsive to parts one to four of the request would fall within the purview of either sections 52(3)1 or 2.

For these reasons, I am unable to conclude that all of the requirements of section 52(3) have been met with respect to these records. Accordingly, I find that they are subject to the Act and I have jurisdiction to address the issue of the reasonableness of the Board's search for records responsive to parts one to four of the request.

Insofar as the record responsive to part five of the request is concerned, I find that it was used by the Board in relation to meetings, consultations and communications about an employment-related matter, the job competition. Previous orders of the Commissioner's office have determined that an "interest" for the purposes of section 52(3)3 must be more than mere curiosity or concern. It must be a legal interest which has the capacity to affect the legal rights or obligations of an institution (Orders P-1223, P-1242, P-1258, M-830 and M-840).

In Order M-830, Assistant Commissioner Tom Mitchinson found that the Ontario Human Rights Code (the Code) applies to impose provisions which require an employer such as the Board to observe certain standards with respect to non-discrimination in the conduct of a job competition. He went on to find that as a result of the obligations imposed by the Code, an employer acquires certain legal obligations which meet the criteria required for a legal "interest" for the purposes of section 52(3) when it conducts a job competition. In the present circumstances, I find that the Board has established that it has a legal interest in the subject matter of this record as a result of its statutory and common law rights and obligations as an employer to direct and manage its employees and to conduct job competitions to fill vacancies.

Accordingly, I find that the record responsive to part five of the request falls within the ambit of section 52(3)3 and is outside the jurisdiction of the Act. None of the exceptions listed in section 52(4) apply to this document. Because of my findings with respect to section 52(3), it is not necessary for me to address the possible application of section 14(1) to this record.

DISCUSSION:

REASONABLENESS OF SEARCH

In his letter of appeal, the appellant submits that records responsive to the first four parts of his request should continue to exist in the Board's record-keeping system. No further information was forthcoming from the appellant with respect to this issue.

The Board acknowledges that records responsive to all of the first four parts of the appellant's request did exist at one time. However, it submits that all of these documents have since been destroyed by the individuals who created them, following the completion of the job competition.

Where a requester provides sufficient details about the records which she is seeking and the Board indicates that such records do not exist, it is 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 the requested 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.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records may, in fact, exist.

I note that the job competition in question was held in January 1997 and the position was filled in March 1997. The Board indicates that the records held by one interviewer were destroyed "after a reasonable period of time after the interview", but prior to the Board's receipt of the appellant's request. It further submits that the responsive records held by the delegated head were destroyed in June or July of 1997 and that those maintained by the remaining interviewer were destroyed in August 1997. The appellant's request under the Act was made in October 1997.

The Board has provided me with a copy of its records retention schedule that governs the length of time for which it is to maintain various types of records. According to section 3.1 of its Motion #239-95-06 entitled "Records Management", the Board is required to maintain "Staff Records" for a two year period in its active files. Section 3.8 of the Records Management motion mandates that other staff records are also to be maintained for a period of two years. The job competition was held in January 1997 and all of the records were apparently destroyed prior to September 1997. As they were no longer in existence at the time of the request in October 1997, it is clear that this record retention policy was not adhered to.

Section 5 of Regulation 517/90 made under the Act requires that personal information that has been used by an institution shall be retained for the shorter of one year after use or the period set out in the

applicable by-law or resolution made by the institution. By destroying the records prior to the expiration of the period prescribed in the Regulation or the Board's own motion, the Board has breached its obligations to the appellant under the Act.

Based on my review of the submissions of the Board, I am satisfied that the records which were responsive to parts one to four of the request no longer exist and that the Board's search for them was reasonable in the circumstances. In future, I would ask that the Board more strictly adhere to the requirements of the Act and its own records retention schedule with respect to the maintenance of its job competition records.

ORDER:

1. I find that the Board's search for records which are responsive to parts one to four of the appellant's request was reasonable and I dismiss this aspect of the appeal.

2. I find that the record responsive to part five of the request falls outside the scope of the Act.

Original signed by: April 6, 1998
Donald Hale
Inquiry Officer