

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-3736

Appeal PA15-191-2

Ontario Labour Relations Board

May 26, 2017

Summary: The appellant filed a request under the *Act* to the Ontario Labour Relations Board for trade union membership cards. The board issued a decision letter claiming that it is precluded from disclosing membership cards relating to an application for certification under section 119(1) of the *Labour Relations Act*. The appellant appealed the board's decision to this office. This order upholds the board's decision and finds that the confidentiality provision in section 67(2)7 applies. The appeal is dismissed.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 67(2)7.

OVERVIEW:

[1] The appellant, a company in the construction industry, filed a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ontario Labour Relations Board (the board) for information relating to an application for certification and grievance filed with the board.

[2] The board issued a decision advising the appellant that section 119(1) of the *Labour Relations Act* precludes it from providing an employer with the identity of employees who might have signed membership cards relating to an application for certification. The board also provided the appellant with copies of records relating to the grievance matter with its decision.

[3] The appellant appealed the board's access decision to this office and a mediator was assigned to the appeal. The mediator had discussions with the parties but

settlement was not an option. The appeal file was transferred to adjudication where an adjudicator conducts an inquiry into the issues of the appeal.

[4] During the inquiry, the parties provided representations to this office. The board states in its representations that the appellant was provided with copies of records responsive to his request except for copies of the trade union membership cards. The appellant, in his representations, does not dispute the board's claim but maintains that he is entitled to "see the voting numbers". Accordingly, this order will only address the appellant's request for the membership cards filed in the certification of the trade union.

[5] The board submits that a card-based application for certification was filed by a trade union. Typically, when an appeal file is opened the institution provides copies of the records at issue to this office. In this case, the board takes the position that it can not provide copies of the membership cards because the cards are not in its custody or control as required under section 10(1). The board advises that the membership cards were returned to the union and that it does not keep copies.¹

[6] However, in its representations the board referred me to two board decisions² which reproduced redacted membership cards. The membership card information reproduced in the board decisions contain a statement that the employee makes an application to become a member of a trade union which is to be dated and signed by the employee. In the circumstances, I decided that the membership cards sought by the appellant may contain "personal information" as defined in the definition of that term in paragraph (h) of section 2(1). Therefore, I included the possible application of the exemption in section 14(1) (personal privacy) as an issue to this appeal.

[7] In this order, I find that the confidentiality provision in section 67(2)7 applies and dismiss the appeal.

ISSUES:

- A. Does section 119(1) of the *Labour Relations Act* preclude the board from disclosing the membership cards under section 67(2)7 of the *Act*?
- B. Are the membership cards "in the custody" or "under the control" of the institution under section 10(1)?
- C. If so, would disclosure of the membership cards constitute an unjustified invasion of personal privacy under section 14(1)?

¹ The board provided with its representations, a notice entitled "Return of Membership Evidence" its Registrar sent to the trade union.

² *IBEW v Synapse Electric Limited* 2013 CanLII 82268 at para. 16 and *LIUNA, Local v. Moffat Excavating and Utilities Ltd. et al* 2015 CanLII 53032 at para.6.

DISCUSSION:

A. Does section 119(1) of *the Labour Relations Act* preclude the board from disclosing the membership cards under section 67(2)7 of the *Act*?

[8] The board takes the position that section 119(1) of the *Labour Relations Act* precludes it from disclosing membership evidence. In its representations, the board explains that section 67(2)7 of the *Act* refers to an outdated section in the *Labour Relations Act* and that the correct reference is section 119(1) not section 113(1).³

[9] In its decision letter, dated November 18, 2015, the board states:

... membership evidence is subject to the confidentiality clause in section 119(1) of the *Labour Relations Act* which specifically prevails over [the *Act*], pursuant to section 67(2)7...

[10] At the time the board issued its decision, section 67(2)7 of the] \ *Act* read, in part:

67. (1) This *Act* prevails over a confidentiality provision in any other *Act* unless subsection (2) or the other *Act* specifically provides otherwise. R.S.O. 1990, c.F.31, s.67(1).

(2) The following confidentiality provisions prevail over this *Act*:

7. Subsection 113(1) [**119(1)**] of the *Labour Relations Act*.

[Emphasis mine]

[11] Section 119(1) of the *Labour Relations Act* states:

Secrecy

119. (1) The records of a trade union relating to membership or any records that may disclose whether a person is or is not a member of a trade union or does or does not desire to be represented by a trade union produced in a proceeding before the Board is for the exclusive use of the Board and its officers and shall not, except with the consent of the Board, be disclosed, and no person shall, except with the consent of the Board, be compelled to disclose whether a person is or is not a member of a trade union or does or does not desire to be represented by a trade union.

[12] The appellant takes the position that the records should be disclosed to him to remedy a fraud committed against him and his business. Based on the materials

³ Bill 127, the *Stronger, Healthier Ontario Act (Budget Measures), 2017* received Royal Assent on May 17, 2017 and repeals paragraph 7 of subsection 67(2) containing the reference to section 113(1) of the *Labour Relations Act* and substitutes it with "7. Subsection 119(1) of the *Labour Relations Act, 1995*".

submitted with the board's representations, it appears that the appellant filed a reconsideration with the board and argued that the certificate in the union's Certification Application was obtained through deception. In his representations, the appellant questions whether section 67(2)7 applies taking into account that:

[s]uch conduct approaching Serious Criminal or Egregious Fraud are but examples of well accepted consideration of public Policy that are substantially incontestable and may override Section 119(1)

Decision and Analysis

[13] In my view, the confidentiality provision in section 67(2)7 applies in the circumstances of this appeal. The appellant filed a request under the *Act* to seek access to copies of the signed membership cards from his employees. The cards identify the employees by their full name and contain a declaration as to whether or not they wish to be represented by the union in question. As a result, sections 67(2)7 of the *Act* and section 119(1) *Labour Relations Act* clearly operate to prevent the board from disclosing the requested membership cards to the appellant in response to a request under the *Act*.

[14] I also considered the appellant's concerns and note that the board considered the appellant's allegations in determining his reconsideration request but made no order to vary or change the issuance of the certificate to the union. In any event, section 64(1) and (2) of the *Act* provide that this decision does not impose any limitation on information otherwise available by law to a party to litigation or affect the power of a court or tribunal to compel the production of the record. Accordingly, although the confidentiality provision in section 67(2)7 bars the appellant's access to the membership cards through a freedom of information request, other avenues may be available.

[15] As a result of my decision, it is not necessary that I also consider whether the records are in the board's custody or control. It is also not necessary for me to determine whether disclosure of the records to the appellant would constitute an unjustified invasion of personal privacy under section 14(1).

ORDER:

The board's decision is upheld and the appeal is dismissed.

Original signed by: _____
Jennifer James
Adjudicator

_____ May 26, 2017